IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 4 OF 2018

THE BELIZE BANK LIMITED Appellant

v

(1) **GARRY YOUNG**
(2) **GLENDA ROSE YOUNG** Respondents

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

E A Marshalleck SC for the appellant.
S Grinage for the first respondent.
N Uk Myles for the second respondent.

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26 October 2018 and 12 February 2019.

SIR MANUEL SOSA P

Introduction

[1] The central question in this appeal revolves around the true effect of the interplay, if any, between subsection (2) of section 78 and section 26 of the Registered Land Act ('the Act'). (I shall in the remainder of this judgment refer to the two simply as **Subsection (2)** and **Section 26**, respectively.). Relying on its interpretation of **Subsection (2)**, The Belize Bank Limited ('the Bank'), by its Fixed Date Claim Form filed on 20 June 2017, as amended, sought an order for possession of Parcel 673, Block 23, Registration Section Santa Elena/Cayo ('the Parcel') against Garry Young ('Mr Young') and his mother, Glenda Rose Young ('Mrs Young'). The matter was heard on 10 October 2017 by Griffith J ('the Judge'), who announced her decision, dismissing the claim for lack of standing on the

part of the Bank, on 27 November 2017 and handed down her reasons for decision in writing ('the Reasons') on 18 January 2018. The position successfully adopted by Mr Young, in support of his contention that the Bank lacked standing to advance the claim in question, was that the Bank's interpretation of **Subsection (2)** was untenable 'as a result of the completion of [a] transfer in favour of … new owners who purchased [the Parcel] via auction': para 5 of the Reasons.

The facts

[2] Insofar as they are material for present purposes, the facts, though rather unusual in some respects, are not in dispute. On 12 July 2005, Mr Young was registered as proprietor of a lease of the Parcel, at the time national land and officially designated Parcel 673/1. Mr Young admits to having been granted by the Bank a loan of $165,000.00 on or about 25 July 2005, on which date he signed a promissory note in favour of the Bank. Almost six years later, Mr Young was registered as proprietor of the Parcel itself and issued with a Land Certificate dated 26 May 2011. Mr Young claims to have taken certain steps in June 2011 towards the transfer of the Parcel to Mrs Young and the issue to her of a Land Certificate; but no such Land Certificate was ever issued to her. On 19 July 2011, an Instrument of Charge signed by Mr Young in favour of the Bank and dated 12 September 2005, on which date, of course, Mr Young was proprietor of no more than a lease, was filed at the Land Registry. Mr Young having later defaulted on his loan, the Bank took steps to exercise its power of sale under the Instrument of Charge and the relevant provisions of the Act. On 6 December 2016, the Bank caused the Parcel to be sold by public auction, the successful bidder being Challete Limited ('Challete'), a company registered in Belize. The Bank thereafter made repeated demands on Mr Young for delivery of possession of the Parcel to it but such demands were not complied with. The date on which the Transfer of Land in favour of Challete was lodged at the Land Registry for registration was 15 March 2017.

The main relevant provisions of the Act

[3] **Subsection (2)**, is best read together with the subsection immediately preceding it. Taking them and **Section 26** in ascending order, these provisions, insofar as relevant for present purposes, are respectively as follows:

‘26. Subject to section 30 of this Act, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all interests and claims whatever but subject,

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 31 not to require noting on the register …’

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

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

It is as well immediately to note that the sections of the Act referred to in **Section 26**, viz sections 30 and 31, relate to cases of voluntary transfers and overriding interests, respectively, and are, therefore, of no relevance for present purposes.

The decision of the Judge

[4] Before the Judge, dealing with the claim by way of a summary trial, were two issues, viz (i) whether the Bank had the standing to file claim for recovery of possession and (ii), if so, whether possession of either Mr Young or Mrs Young had been proven. In the event, the Judge, reaching the conclusion that the Bank lacked such standing, did not go on to resolve the second issue.

[5] Having noted the position taken by Mr Young before her, which position has already been identified at para **[1]**, above, the Judge pointed out that 'no substantive submissions' had been deployed in support thereof. She proceeded thereafter, first, to set out the submissions of counsel for the Bank and, next, to analyse them. In the course of her analysis, she indicated that she had found assistance, in the form of extractable general principles, in three decisions (from Northern Ireland, Ireland and Malaysia, respectively.) The essence of the Reasons, however, is found in paras 19 and 20, where, having referred to **Section 26** and section 78(4) of the Act, the Judge said:

> '19. These sections provide in the case of section 26(1) (*sic*) that upon registration the proprietor becomes entitled to absolute ownership of the parcel and to all the rights and privileges belonging or appurtenant thereto. Section 78(4) provides that upon registration of the transfer effected in the exercise of the chargee's power of sale, the transferee becomes vested with all the right and interest of the chargor except for pre-existing interests as therein defined. As already stated, along with the right of ownership, moreso absolute ownership arising out of registration, the right of possession also becomes vested in the transferee. This is not the position upon conclusion of a sale upon exercise of the chargee's power of sale. Notwithstanding the sale, the chargor remains the registered owner until the register is altered to reflect a new owner and as such entitled to possession. In this context the express right to seek to recover possession afforded to the chargee upon conclusion of a sale is consistent with that position.
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> 20. With reference to the [Bank's] position in this matter, its right to seek an order of possession arose in December, 2016 upon conclusion of the sale by way of public auction in favour of [Challete]. The transfer was registered the latest by the 15th March 2017 as evidenced by issuance of the certificate of title in favour of the purchasers. In the Court's view, the right afforded to the chargee under section 78(2) was extinguished upon registration of the transfer in favour of [Challete]. As a consequence, at the time the instant claim was instituted in April 2017, the [Bank] was no longer entitled to maintain the action for possession unless authorised by the new registered owners to do so. There being no such authority evidenced as

given by the new registered proprietors, it is the Court's position that the [Bank] lacked necessary legal standing to seek the order of possession against the chargor. As a result of this finding, the second issue regarding who was in actual possession of the [Parcel] no longer arises for consideration.'

The submissions on appeal

1. On behalf of the Bank

[6] Mr Marshalleck SC, who also appeared for the Bank below, complained to this Court that the decision of the Judge was based on a wrong interpretation of **Subsection (2)**, read in the light of the Act as a whole. Whilst recognising that the backdating in the Land Registry of the transfer in favour of Challete to 15 March 2017, ie the previously mentioned date of lodgment of the relevant Transfer of Land form, was in keeping not only with established practice but also with the provisions of the Act, he submitted that the present case was one of conflict between mere impression and actual fact. The impression, he contended, was that such form was registered on 15 March, ie prior to the filing of the Bank's claim: but the fact was that registration of the form had taken place after the filing of that claim. The long and the short of the matter, then, is that the propriety of the practice in question has not been under challenge by the Bank at any stage in the present litigation. But, valiantly argued Mr Marshalleck, if the intention of the legislature had been to delimit the time within which an application for possession could be made by (if I may use a neutral expression) the person in whose favour a charge has been created, the Act could have expressly provided for a time limit. In the absence of such an express provision, so went the submission, 'so long as the chargor continues in possession, the chargee has a right to recover'. When pressed from the bench to explain how the charge could have survived the registration of the transfer in favour of Challete and how there could have continued to be a chargee when there was no longer a charge, Mr Marshalleck cited subsection (4) of section 78 of the Act, which, to the extent it is relied upon by him, provides as follows:

'Upon registration of such transfer, the interest of the charger (*sic*) as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of any other encumbrance to which the charge has priority …'

Noting that there is no provision in that subsection for the interest in question to be freed and discharged from liability on account of 'the charge' therein referred to, Mr Marshalleck nevertheless acknowledged that such charge is spent and therefore properly removed from the land register kept at the Land Registry; but he contended that a residual power to recover possession remained vested in the seller of the land in question (to once again use a neutral expression). He suggested that such a power would not be inimical to the rights of the new registered proprietor.

2. On behalf of Mr Young

[7] Ms Grinage, who also appeared for Mr Young in the court below, did not favour the Court with the benefit of submissions in writing. At the outset of her brief oral argument, she directed attention to both **Subsection (2)** and section 78(4). Whilst **Subsection (2)** provides for the time at which a chargee becomes entitled to possession, she said, section 78(4) provides for the time at which title vests in the new registered proprietor. In her submission, the entitlement of a chargee to recover possession necessarily ceases upon the vesting of title in the new proprietor, at which point it is such new proprietor who becomes entitled to recover possession. In reply to questions from the bench as to the applicability and effect, if any, of **Section 26**, she said that such section applied to the new proprietor and left no scope for the continuance of a charge no longer noted on the land register, such as the charge in the instant case.

3. On behalf of Mrs Young

[8] Mrs Uk Myles, who appeared for Mrs Young only in this court, both adopted and added to the simple submissions of Ms Grinage. It was her contention that, despite the use of the expression 'any other encumbrance' therein, the net cast by section 78(4) does catch the security referred to therein as 'the charge', ie the charge which conferred the power of sale whose exercise is the subject of section 78. She further submitted that a person in the position of the Bank in the instant case is required to recover possession during the interval which begins upon acceptance of the highest bid at auction and ends upon registration of the transfer in favour of the highest bidder.

Discussion

[9] I derive neither pleasure nor satisfaction from having to describe this appeal as hopeless. As already explained above, it is an appeal in which no issue arises as to the correctness of the practice in the Land Registry of backdating registration of a land transfer to the date of lodgment of the Transfer of Land at such registry for registration. (The practice naturally involves also backdating the Land Certificate issued in favour of the transferee.) In keeping with such practice, the Transfer of Land and the Land Certificate both take effect on the registration date they bear, ie the date of lodgment of the former. As a matter of law, then, in the instant case, the land transfer by the Bank in favour of Challete took effect on 15 March 2017, that is to say, more than three months before the filing by the Bank of its claim for recovery of possession. Mr Marshalleck's preference for the term 'impression' to describe the effect of the backdating cannot have been expressed before this Court with the hope of thereby advancing the cause of the Bank. It is plainly inconsistent to espouse such a term whilst at the same time accepting the correctness of the relevant practice.

[10] With respect, Mr Marshalleck's submissions in support of the interpretation of **Subsection (2)** proposed by him to the Court do not begin to persuade me to accept it. Rather than interpreting **Subsection (2)** in the light of the Act as a whole, as he rightly contends that it should be, in fact he seeks to isolate it from what, to my mind, are crucial provisions in the interpretative process at hand, viz the terms of **Section 26**. It is the case for the Bank that Mr Young was at all material times up to the registration of the Transfer of Land in favour of Challete the 'legal owner' of the Parcel: para 2, affidavit of Tyron Burns, Senior Recovery Officer of the Bank. The Bank does not, and cannot, dispute that, as evidenced by the copy Land Certificate exhibited to the affidavit of Mr Young, the latter was registered as proprietor with, in the language of such certificate, 'TITLE ABSOLUTE' of the Parcel. By virtue of the provisions of **Section 26**, such registration vested Mr Young with, to borrow the statutory expression, 'the absolute ownership' of the Parcel. Assuming for present purposes, without necessarily accepting (as the Judge obviously also assumed) that, consistently with the case for the Bank, the Parcel thereupon became subject to the latter's subsisting charge on Mr Young's former lease, it would be the height

of counter-intuitiveness, nay, audacity, to suggest that such charge could have survived the registration of the subsequent transfer of the Parcel to Challete. After all, the Land Certificate issued in favour of Challete, a copy of which is exhibited to the affidavit of Roman Cuello, Recovery Officer of the Bank, states, as it should, that Challete is now registered as proprietor (as Mr Young previously was) with 'TITLE ABSOLUTE'. As already noted at para **[6]**, above, Mr Marshalleck does not suggest that there has been such a survival, his submission being the nuanced one that, whilst the charge is 'spent', the entitlement to recovery of possession subsists, albeit only vestigially, even after registration of the transfer.

[11] I am, on the one hand, unable to accept the response of Ms Grinage and Mrs Uk Myles to this submission. Subsection (4) of section 78, which both of them cited, does not, in my opinion, avail them. That subsection does, indeed, start by saying, '[u]pon registration of such transfer, the interest of the charger (*sic*) as described therein shall pass to and vest in the transferee". But it cannot be treated as if it ended there. Read in its entirety, subsection (4) limits itself to the passing and vesting of a chargor's interest free only from liability in respect of any other encumbrance to which 'the charge', ie the charge being realised by the relevant chargee, has priority. Its silence as to whether such interest also passes and vests free from liability in respect of 'the charge' itself comes across, at first blush, as ear-splitting. Neither Ms Grinage nor Mrs Uk Myles replied persuasively to my request in oral argument for assistance in understanding such silence in this subsection and, indeed, in the Act as a whole.

[12] On the other hand, following mature further reflection, I have concluded that the reason for this seemingly deafening silence is all too obvious. It is, in my view, that for the Act expressly to have stated that 'the charge' is spent or extinguished upon its realisation, a process completed upon registration of the pertinent transfer of land, would have been to belabour the axiomatic. That, in the instant case, the charge had ceased to exist by, at the latest, the time of registration of the transfer in favour of Chalette is beyond doubt: the Land Certificate, required by section 34(1) of the Act to reflect the land register as regards, *inter alia*, subsisting encumbrances, contains no reference to any encumbrance whatever, let alone the charge. (See the above-mentioned copy of the Land Certificate

exhibited to the affidavit of Mr Cuello, at the section headed ‘PART C – Incumbrances Section (Leases, charges etc)’). And, whilst it is true that that Land Certificate constitutes no more than *prima facie* evidence, there is no additional evidence to suggest that the land register contains an entry not shown on such certificate: for the pertinent provisions, see section 34(2) of the Act. This, then, rather than any reasoning based on subsection (4), is what leads me to accept the proposition, urged upon the Court by Ms Grinage and Mrs Uk Myles, that the transfer in favour of Challete effectively closed the door, so to speak, on the Bank.

[13] Mr Marshalleck’s two further subsidiary points may now be dealt with. The first, that, given the absence of an express provision in the Act delimiting the duration of the entitlement to possession, such entitlement should be regarded as extending even beyond the registration of the purchaser at auction as the new proprietor is not attractive to me. I am at a loss to understand why there should be attributed to those responsible for the drafting of the Act an intention to have a former chargee share such a core right with the person to whom it/he/she (the former chargee) has already transferred for valuable consideration title absolute to a parcel pursuant to its/his/her power of sale. Chargees in general, and established banks in particular, are to be expected to organise their affairs and draft their agreements for sale with the provisions of the Act and the lawful long-standing practice of the Land Registry firmly in mind. It is not to be expected that a lender of money, least of all an experienced lending institution, will allow himself/herself/itself to be caught napping by the time limitations inherent in that registry’s known *modus operandi*, which, as I see it, is what happened here. Mr Marshalleck made much of the desirability of a lender being able to sell charged property with vacant possession. And no one can dispute such desirability, whether from the standpoint of a chargee or from that of a chargor. That said, however, the cold reality is that, in the instant case, the sale (not to mention the transfer) was effected without vacant possession – wherein lies the genesis of the present litigation. Supremely awkwardly, the carriage (ie the registration of transfer) was put before the horse (ie recovery of possession), so to speak. It does not lie in the mouth of the Bank to make an issue of the position of a chargee contracting to sell with vacant possession.

[14] Before leaving this first subsidiary point, I would add that, for purposes of the present case, the important absence from the Act is that of statutory language spelling out that a former chargee (for that is what the Bank had become by 15 March 2017) is entitled to possession notwithstanding the registration as new proprietor of the person who purchased at an auction which was held pursuant to the relevant power of sale. After all, the normal position is that entitlement to possession is the right of a proprietor, not of a former chargee.

[15] The second subsidiary point, viz that a residuary entitlement to possession would not be inimical to the rights of the new proprietor, is similarly lacking in appeal. The right to possession of a proprietor is a paramount and fundamental feature of his/her proprietorship. To have to share such a defining right with a former chargee from whom one has purchased is immediately to be subjected to loss of exclusivity and thus placed in a position of disadvantage. I can think of no good reason for such a sharing. As the Judge pertinently pointed out in the Reasons (para 20), a proprietor is free to authorise another person (such as, if I may say so for maximum clarity, a former chargee) to recover possession on its/his/her behalf.

[16] But, as the allusion to questioning from the bench at para **[6]**, above, has already foreshadowed, there is, to my mind, a further most cogent reason, why Mr Marshalleck's interpretation must categorically be rejected. This reason, interwoven to some extent with that just given above, is that the entitlement to possession under discussion is in terms conferred by **Subsection 2** on 'the chargee', whose existence in each individual case presupposes the existence of a corresponding charge. For the reason already given above, the lifetime of such a charge cannot extend beyond the registration of a Transfer of Land in favour of a relevant purchaser at auction. Neither, it follows, can that of a chargee. The riposte that the Bank, in this case, remains very much in existence following such registration cannot be treated other than as facetiousness. Inevitably, counsel's concession that the charge cannot survive registration of the transfer made under the power of sale returns, at the end of the day, treacherously to haunt him. As to the contention, noted at para **[6]** above, that 'so long as the chargor continues in possession, the chargee has a right to recover', it is plainly, so far as it goes, unassailable. How far,

however, does it go? Obviously, only so far as it shall be allowed to go by its inherent limitation, viz that a person who becomes a chargee by virtue of the creation of a charge ceases to be a chargee (even though continuing to be a person) upon the extinguishment of such charge. For **Subsection 2** grants the entitlement in question to a chargee, not to a former chargee. It is important to note in this connection that, at the end of the subsection immediately preceding, ie subsection (3), the draftsperson uses the expression 'the person exercising the power', rather than the words 'the chargee', in identifying the person against whom the remedy in damages therein provided for shall lie. The significance of the selection of this particular expression is heightened, in my view, by the fact that, not only do the words 'the chargee' appear over and over in section 78, they are to be found in the opening clause of subsection (3) itself. It seems manifest to me that the draftsperson thus reveals a wish clearly to distinguish in section 78 between a chargee and a former chargee.

Disposal

[17] For the reasons given above, I, for my part, would dismiss the appeal of the Bank and confirm the orders of the Judge. I would also order that Mr Young and Mrs Young have their costs of this appeal to be taxed, if not agreed, such order to be provisional in the first instance but become final unless application for a different order be filed with the Registrar by the Bank in 10 days from the delivery of this judgment, and the determination of any such application to be on the basis of submissions in writing to be filed and delivered by all parties in 10 days from the date of the filing of application.

Addendum: Absence of authorities

[18] The Judge adverted in the Reasons (para 9) to what, as I understand her, was Mr Marshalleck's admitted inability to find authorities to support his submissions on the true interpretation of **Subsection 2.** But, having done so, she cited three decisions, to which general reference (without citation) has already been made at para **[5]**, above, as having been of assistance to her. Whilst I myself have been unable to derive any help from these cases for the purposes of preparation of this judgment, I believe I should fully identify them at this point if only out of consideration for the reader who, having no access to the Reasons, would otherwise be left guessing as to which decisions I am speaking about.

They are *In re O'Neill, A Bankrupt* [1967] NI 129, *The Governor and Company of the Bank of Ireland v Michael Feeney* [1930] IR 457 and *Damodaran s/o P V Raman v Choe Kuan Him* [1980] AC 496.

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SIR MANUEL SOSA P

DUCILLE JA

[19] I agree totally with the judgment of the Learned President and in the circumstances have nothing to add.

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DUCILLE JA

CAMPBELL JA

[20] I have read the judgment of the learned President with which I am in agreement and have nothing that I wish to add.

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CAMPBELL JA