IN THE SUPREME COURT OF BELIZE, A.D. 2021

CLAIM NO. 81 OF 2021

CAROLICE RODRIGUEZ **CLAIMANTS**

RODRIGO RODRIGEZ

AND

LA IMMACULADA CREDIT UNION LIMITED **DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Decision
8th February, 2022

Appearances:
Ms. Alberta Perez, Counsel for the Claimants.

Mr. Estevan Perrera, Counsel for the Defendant.

KEYWORDS: Registered Land - Mortgage/Charge - Variation of Charge - Power of Attorney - Power to Vary Charge - Procedure - Application at Trial to Strike out Documents Purporting to be Witness Statements - Application to Deem the Documents Witness Summaries - Overriding Objective - Circumstances and Content Considered – Registered Land Act CAP. 194 - Supreme Court (Civil Procedure) Rules 2005 (CPR)

JUDGMENT

1. The Claimants are husband and wife and are both members of the La Immaculada Credit Union Limited (the Credit Union). Mr. Rodriguez is the sole owner of a parcel of land (the Property) which was used in 2005 to secure a loan of $45,000.00 with the Credit Union.

2. In 2018, the Credit Union executed and registered a variation of charge which increased the original charge held by the Credit Union by $71,000.00 plus interest on the reducing balance. The Claimants plead that this was wrongfully done without their knowledge or consent and in breach of the original charge agreement as well as the Credit Union's duty of care owed to the Claimants.

3. They seek a declaration that the variation was done in error and ought to be excluded from the initial mortgage along with any interest and associated charges. They also seek an order rectifying the Land Registry records accordingly and one compelling the Central Bank of Belize to issue a record of the Claimant's account or transactions. Finally, they pray damages, costs, and interests.

4. In its defence, the Credit Union pleads that it had the legal authority to execute the variation of charge by virtue of a registered power of attorney given by the 2nd Defendant to the Credit Union and dated 28th June 2018 (the Power of Attorney). They state, further, that both Claimants received a number of loans between 2011 and 2012 and executed promissory notes related thereto. Moreover, all the promissory notes signed by the 1st Defendant included the 2nd Defendant as guarantor.

5. In 2018, through the execution of the Power of Attorney, the 2nd Defendant agreed for the Property to be used as a guarantee to secure loans for both Claimants. The Credit Union used its power accordingly to legally execute and register the additional charge. At the time of doing so, the Claimants' total loans amounted to approximately $120,000.00.

6. They also urge that the 2nd Claimant was aware of the intention to vary the charge as he had signed the first draft in the presence of the Credit Advisor at the Defendant's office. In any event, the Credit Union needed no further instructions to file the variation and was allowed to do so whenever it was necessary.

7. There was no reply filed by the Claimants.

Preliminary Issues:

The Court intends to deal with four separate issues here.

Application to strike out documents filed by Claimants as Witness statements:

8. On the day of trial, it was revealed that documents which were filed by the Claimants and headed Witness Statements had not been signed by the witnesses whose names appeared on the face of the document but had been signed by the Attorney-at-Law representing the Claimants.

9. At the foot of these documents, it was stated *"The Claimant is presently out of the Jurisdiction of Belize and is unable to give his signature prior to the deadline for filing."* All the witnesses were present on the day of trial.

10. Counsel for the Defendant objected to the documents being tendered into evidence for failure to comply with **Rule 29.5 (f)** and **(g)** of the **CPR**. He asked that they be struck out in their entirety.

11. He submitted that there had been no application to vary the case management order which required the filing of witness statements by a particular date, for an extension of time in which to file witness statements or to adjourn the trial date so that witness statements could be filed.

12. Counsel for the Claimant asked in response that the witness statements be converted to witness summaries. Counsel for the Defendant again objected as he was of the view that as soon as the witnesses were available, they should have executed witness statements, the documents themselves were written in first person, were not summaries and were clearly titled Witness Statement.

13. He urged the Court not to allow the Claimant's application which would open Pandora's Box where it would be used to cure blatant defects in witness statements without following the proper procedure. He opined this would have been to apply for an adjournment of trial, relief from sanctions and an extension of time to file proper witness statements.

14. The Court reserved its decision but allowed the witnesses to be duly sworn or affirmed and give viva voce evidence. They each accepted the contents of the documents as their own. They were made available for cross-examination.

15. Strangely, the Claimant did not address this issue at all in her original written submissions. But she did so in her reply as if it were an issue raised only by Counsel for the Defence in his submissions in response.

The Court's Consideration:

16. These new rules were not intended to hold litigants slavishly to form. Nor were they intended to be flouted with impunity. The Court is required to look at the circumstances and to use the overriding objective in determining issues of procedure such as this. In fact, it is in issues of procedure that the Court's just use of discretion is most desired.

17. The Defendant had been given an opportunity to file written objections to the documents as part of the case management process. He made no such objection then. This means that the Claimants were led to believe that all was well. Taking the objection at trial under those circumstances is not fair to the Claimant and may even be seen as improper. Trial by ambush no longer holds the excitement, place of prestige or force it once did.

18. It must also be noted that while he expected the Court to entertain his application to strike out the documents on the day of trial, he also asked the Court to do otherwise with the Claimants' application to deem the documents witness summaries. In fairness, this Court proposes to entertain both applications.

19. The circumstances are that the documents had been filed on time and they were clearly not witness statements as their title said. They certainly did not comply. They also contained a statement which indicated why the witnesses had been unable to sign. In essence they were, to my mind, witness summaries and nothing more or less.

20. There was no need for the Claimants to seek leave to file a summary rather than a witness statement. Rule 29.6 provides that a party who is required to provide

but is not able to obtain a witness statement may serve a witness summary instead. He must, however, certify on the summary why a statement could not be obtained. I am of the view that the final sentence in the documents is explanation sufficient.

21. It is clear from each of the documents who the witness was, and the Court is allowed to treat the witness summary like a witness statement where the witness is called to testify. Both witnesses were present and testified that the summaries were their evidence in chief. The Defendant was not prejudiced in any way.

22. The final statement in support of the Defendant's objection that the documents are written in the first person is a desperate plea to semantics and we have gone far beyond this in our pursuit of justice and the fulfillment of the overriding objective.

23. For these reasons and in this particular circumstance, the documents are deemed witness summaries and will be allowed into evidence.

Non-disclosure of Status of Loan Accounts:

24. After the evidence in this case was concluded and for the first time during the proceedings, the Claimants raised the issue of non-disclosure of certain information relating to the Claimant's loan accounts. The Court indicated then that there were no orders which it could properly make to assist at that time but encouraged the Defendant to issue a statement of the accounts.

25. The Claimants again raised it in their submissions. Although the Court is well aware that this issue forms no part of the matter now before it, it will be briefly addressed only because of their insistence and a need to bring some quietus.

26. While there were many opportunities to properly raise this issue before the trial date and certainly before the evidence was admitted, the Claimants choose to avail themselves of none. That was their choice. They obviously saw no real need to have that information before the Court particularly as the Claim was not related to the loans at all but rather to the variation of the charge.

27. An order for standard disclosure had been made since May 2021. The **CPR** has a veritable treasure trove of aids, all at a party's disposal if they are of the view that they have not been provided with documents that ought to have been disclosed under standard disclosure. An order for specific disclosure **Rule 28.5**, enforcement of an order for disclosure **Rule 28.13 (2)** or request for information under **Part 34** immediately come to mind. In any event this Court will not and can not consider the Claimants assertion of a lack of information to be a viable issue at this juncture.

Abandonment of Claim:

28. The Court also noticed that the Claimants seemed to submit what would in fact be an abandonment of their pleaded claim. At paragraph 15 of their submissions they state *"Claimants seek: Declarations that only the two charges which combined is BZ$124,000.00 is* (sic) *to be entered against the property…"* This seemed to be an acceptance that a charge of some BZD$124,000.00 was to be entered.

29. However, it was stated under the heading *"The Claim"* but clearly formed no part of the Claim. Further, their lengthy submissions which followed did not support this statement in any measure. The Court will, therefore, deal with the issues that do arise on this claim.

Request for Remedy against the Central Bank:

30. The Central Bank is no party to this Claim and has had no opportunity to defend any allegation made against it (of which I find none in this case). The claim for any remedy against the Central Bank is dismissed out of hand.

The Issues as this Court finds them are:

1. Was the variation of the charge entered into on the 19th of October 2018 done negligently, in error or in breach of the original charge agreement? (A) Whether the Registered Power of Attorney allowed the Defendant to prepare and file the variation of the said charge dated the 18th of October 2018 or was the 2nd Claimant's further knowledge or consent needed?

2. If the answer to 1 is in the positive, what remedies are available to the Claimant?

Was the variation of the charge entered into on the 19th of October 2018 done negligently, in error or in breach of the original charge agreement? (A) Whether the Registered Power of Attorney allowed the Defendant to prepare and file the variation of the said charge dated the18th October 2018 or was the 2nd Claimant's further knowledge or consent needed?

The Claimants' Submissions:

31. The Court had a very difficult time trying to follow the submissions made. They dealt with issues such as mismanagement of accounts, vicarious liability, full and frank disclosure of accounts (status of loans), defalcation and fundamental rights. None of which had been pleaded. This means that the Court was not able to consider much of what had been stated there.

32. This synopsis is gleaned from the reply which means that it had clearly not been used in the manner in which a reply is intended. It was also difficult to follow, and I apologize if I misunderstood or now misstate any of the submissions made.

33. Counsel seemed to state that the 2005 Mortgage had never been registered as a charge once the Property became registered land. Further, that the Power of Attorney under which the Defendant purported to act to vary the charge was executed on 28th June 2018 while the loans themselves were done in 2011. She added at paragraph 32 that *"(t)he standard procedure is, once the loan undertaken against a free loan property it is automatic the power of an attorney power (sic) be launched. From the two loans lodged against Parcel 3642 they were both lodged without a power of attorney being present. The Power of Attorney is dated after 28 June 2018 13 years after the first loan was undertaken. The procedures undertaken by the defendant were flawed or fettered. It's impractical for a power of attorney dated 2018 to be used when enforcing two loans that rate purportedly taken out in 2011."*

34. Counsel then discussed cheques which the second Claimant had testified he never applied for or signed. She stated that there were no entries of a charge in the Register against the parcel for these cheques. He had also denied signing the variation of charge during his testimony. The Court finds it imperative to state here that there was nothing of this nature pleaded.

35. Finally, she referred to the two Variation documents which the Defendant produced in evidence. She queried why only one had been registered and why only many years after the loans had been taken out.

36. She went on to say that the variation was invalid or voidable because it did not meet the requirements to be filed since it was missing the Power of attorney and the company seal. Again, there was nothing of this nature pleaded.

Defendant's Submissions:

37. The Defendant submitted that originally the charge was to secure the sum of $49,000.00 (the original mortgage). This was later varied to secure the total sum of $120,000.00 which included two promissory notes signed by the second Defendant - one of the 29th July, 2011 and the other of 25th August, 2011. Together they created a total risk of $117,115.00.

38. The Defendant said it got its power to prepare and file the variation by virtue of both the original mortgage deed and the Power of Attorney executed by the 2nd Defendant. The Power of Attorney remains registered against the title to the property and remains in force until and unless withdrawn.

39. They also produced an unregistered variation of charge which was executed by the 2nd Claimant as proof that he was well aware of the Defendant's intention to vary the charge.

40. There was therefore no error, negligence, or breach of the original charge agreement on the Defendant's part.

Court's Consideration:

41. Let's begin with the allegations of negligence and breach of the original agreement. No particulars were pleaded, and none even improperly emerged through evidence at trial. So, there need be nothing more said.

42. The facts as the Court finds them are as follows; the original mortgage migrated to the land register at the time of first registration. The dates are the same and there is no evidence to the contrary.

43. Once registered, **Section 26** of the Act mandates that:

> *"Subject to section 30, 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 other 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) ……"*

44. The proprietor is therefore bound by what appears on the register. In the case at bar, the original mortgage now appears as a charge on the register.

45. The original mortgage deed did allow for up stamping without any further license or consent from the mortgagor:

> *"3. The mortgage shall be impressed in the first instance with stamp duty to cover an aggregate liability of the Mortgager to the Mortgagee whether as principal or surety of Forty Nine Thousand Dollars (BZ$49,000.00) but the Mortgagee shall be at liberty and are hereby empowered at any time or times hereafter (without any further licence or consent on the part of the Mortgagor) to impress additional stamp duty heron to cover any sum or sums by which the total liability of the Mortgagor to the Mortgagee may exceed to sum of Forty Nine Thousand Dollars (BZ$49,000.00) it being the intent hereof that this Mortgage shall cover all sums to any aggregate for which the Mortgagor may be liable to the Mortgagee as principal or as surety at any time."*

46. However, **Section 72** of the Act provides that:

> *"The amount secured, the method of repayment, the rate of interest or the term of the charge may be varied by the registration of an instrument of variation executed by the parties to the charge, but no such variation shall affect the rights of the proprietor of any subsequent charge, unless he has consented to the variation in writing on the instrument of variation."*

47. This means that the Defendant could not rely on the original mortgage document to vary the registered charge. Rather, they would have to get the consent of the proprietor in writing either on that variation or by the donation of his power as

the 2nd Claimant did when he executed the Power of Attorney on the 28th June, 2018.

48. Now, there is nothing pleaded which alleges that the 2nd Claimant did not execute the Power of Attorney and he will not be allowed simply to assert that during trial. The Defendant must have an opportunity to refute such a serious allegation.

49. Moreover, a bald statement that *"this is not my signature"* without more is insufficient for the Court to find that a registered document is not in fact duly executed. It is one matter to say I did not consent to a variation it is an entirely different matter to say I never signed a specific document.

50. More so where the same witness recants under cross-examination and accepts that some of the other signatures which he had, in his witness summary said were not his, were in fact his. His counsel of her own tried to assert that this was due to nervousness. I am not so charitable in my view. I found Mr. Rodriguez to be a most unconvincing and not very credible witness.

51. On the other hand, I found the witness for the Claimant to be forthright, clear, and helpful. I choose to believe her testimony which was well supported by documentary evidence.

52. With the Power of Attorney, the Defendant needed no further consent from the 2nd Defendant to prepare and register the variation. The condition of the Power of Attorney is not in issue in this case and the Court will refrain from comment save to say it remains registered and of full force.

53. It must also be noted that the 1st Claimant also accepted under cross-examination that the loans which were secured by promissory notes did in fact amount to just about $120,000.00. The precise total of the charge and the variation which they challenge.

54. This Court is unaware of any standard procedures in the Land Registry for registering a charge with a power of attorney to which Counsel for the Claimant referred. Counsel is certainly not in a position to give this type of evidence as she is no witness in this matter. And the Court can not take judicial notice of any standard procedure. No more need be said on this.

55. So, where the Power of Attorney was registered in 2018 and the variation was done in 2018 but related to loans taken in 2011, this Court can find no error there which would render the variation void and amenable to revocation.

56. Counsel for the Claimants also tried to make much of the unregistered variation signed by the 2nd Claimant. However, it seems to me that where the Defendant had a power of attorney donated by the 2nd Claimant, there was no need to have a variation executed by the 2nd Claimant as the unregistered document had been.

57. I do not find the existence of that signed but unregistered variation suspicious at all particularly where it was the Defendant who disclosed its existence and presented it to the Court in evidence.

58. The Court therefore finds that the variation of the charge entered into on the 19th of October 2018 had not been done in error, negligently or in breach of the original charge agreement. The 2nd Claimant's registered power of attorney did

give the Defendant the power to prepare and file the variation without need for his further knowledge or consent.

59. With that issue 2 falls away.

Costs:

60. The parties agreed to costs on the prescribed basis. This was not a claim for a sum of money, there was no application for a valuation of the claim or for budgeted costs. The Court therefore relies on **Rule 64.5(2) (c)** and will calculate cost on a value of $50,000.00 resulting in prescribed costs of $12,500.00.

Disposition:

61. The Claim is dismissed with Costs to the Defendant in the sum of $12,500.00 calculated on the prescribed basis as agreed between the parties.

SONYA YOUNG
SUPREME COURT JUDGE