

**IN THE SUPREME COURT OF BELIZE A.D. 2014
(CIVIL)**

CLAIM NO. 729 of 2014

BETWEEN

**Placencia Land and Development
Company Ltd.
Marco Caruso**

Claimants

AND

**Alfredo Acosta
Angelique Acosta**

Defendants

Before: The Honourable Madame Justice Griffith

Dates of hearing: 16/04/2015; 26/05/15 (on written submissions)

**Appearances: Mr. Yohhahnseh Cave, Young's Law Firm for the
Claimants and Ms. Naima Barrow, Barrow & Co. for
the Defendants.**

DECISION

Introduction

1. The 1st Claimant, the Placencia Land and Development Co. Ltd. is the owner of land on which stands an unfinished condominium unit situate in Placencia Belize, registered as Parcel 3311 (H11), Block 36 of the Placencia Registration Section ('the property'). The 2nd Claimant is a director of the 1st Claimant and the Defendants are business persons to whom the 2nd Claimant owes \$US350,000 ('the debt'). By agreement styled a 'Deed of Release and Compromise' dated 31st October, 2013, the parties agreed inter alia, that the property would be listed and marketed by them both with the intention that it be sold to satisfy the 2nd Claimant's debt to the Defendants.

- The agreement also provided that the Claimant was to have paid the Defendants the debt within one year, failing which the 1st Defendant was entitled to auction the property to recover the debt.
2. The debt was not paid within one year, therefore in December, 2014, the Defendants, via a licensed auctioneer, attempted to hold an auction to have the property sold. The Claimants applied for an injunction to restrain the auction, on the basis that the agreement did not validly create a power of sale exercisable by the Defendants or in the alternative, that the sale was being conducted in breach of the terms of the agreement which specified certain steps to be taken in effecting the sale. The Defendants' position is that the agreement did not seek to confer a power of sale but in fact created a power of attorney for the Defendants to market the property for sale and to conduct an auction. The defendants acknowledge that at best they can procure a sale by auction and that the agreement provides no basis upon which the 1st Claimant can do anything else but voluntarily execute any agreement or transfer to give effect to any such sale.

The Issues

3. The issues which arise for determination are as follows:-
 - (i) Did the agreement confer a power of sale, as generally regarded by way of charge, on the defendants?
 - (ii) If not, did the agreement confer any other kind of power or authority to the Defendants to act in relation to the sale of the property?
 - (iii) Is this an appropriate case for the exercise of the Court's power to grant summary judgment?

The Court's consideration

(i) Did the agreement confer a power of sale on the defendants?

4. The Claimants firstly contend that the agreement takes effect as a charge over the property with the result that the defendants are seeking to exercise a power of sale as chargees. Further, given that the land is registered land, the provisions of the Registered Land Act¹ apply and the agreement does not comply with the legal requirements for the creation or registration of a charge under that Act, thus rendering the agreement void. Secondly, it is contended that the agreement is invalid as it seeks to affect interests in land and not being an agreement recorded as required under section 70 of the General Registry Act², it is invalid.
5. The land in question is indeed registered land, thus the Court agrees with the submissions on behalf of the Claimant, that the disposal of any interest in the land must be in accordance with the Registered Land Act. However, the Court accepts the submission of the Defendants that the agreement did not purport to create a charge over the property. The Defendants contend that their authority to sell, arises by other means, namely the contractual terms of the agreement creating a power of attorney. No question therefore arises, of compliance or not, with the requirements for creation of a valid charge under the Registered Land Act. Instead, what the Court must consider, is on the one hand, the true nature of the act the Defendants seek to exercise in relation to the property, and on the other hand, whether the basis of the authority asserted in relation to that act, is capable of subsisting as a matter of law.

¹ Registered Land Act, Cap. 194, Laws of Belize.

² General Registry Act, Cap. 327, Laws of Belize.

(ii) Did the agreement provide any other power or authority entitling the Defendants to sell the property.

6. Clause 2 of the agreement provides that the Claimants agree to list the property for sale and upon a successful sale to pay the Defendants the debt. Clause 4 authorizes both the 1st Defendant and 2nd Claimant to sell the property. Clause 8 also authorizes the 1st Defendant to sell the property and specifies the circumstances in which the 1st Defendant is authorized to effect such a sale. Clause 8 of the agreement reads as follows:-

"In the event MC defaults in the payment of US\$350,000 within twelve (12) months from the date of this agreement, it is hereby agreed that FA shall be allowed to and shall proceed with an auction of Parcel 3311(H11) at a reasonable market value to recover the sum of US\$350,000 with the excess in the proceeds of sale going to MC".

7. The circumstances defined in clause 8 require a default in payment of the debt after 12 months have elapsed from the date of the agreement. This default occurred as of 31st October, 2014. Upon this default, clause 8 is clear in its intention that the 1st Defendant is authorized to conduct an auction to sell the property at a reasonable market value. Learned Counsel for the Defendants says that it is this clear authorization that provides the basis for her client to sell the property by auction; that this clear authorization is a power of attorney from the 1st Claimant to the 1st Defendant, for the latter to sell the property by way of auction. The Court must thus determine if clause 8 does in fact create a valid and enforceable power of attorney.

8. As stated before, any dealings with the land in question must be effected in conformity with the Registered Land Act. With respect to a power of attorney, the cumulative provisions of sections 109 and 110 of the Act require that execution and verification of a power of attorney be effected in a certain manner.

In this regard, section 114(1) provides that in order for any instrument effected by an agent (the donee of a power) to be accepted by the Registrar, that instrument must be executed and verified in accordance with sections 109 and 110. Additionally, by section 114(2), a power of attorney is required to be filed in the Land Registry and by section 116(2), be presented in a prescribed or otherwise approved form. Does the agreement comply with these requirements?

9. The agreement whilst executed in accordance with section 109 of the Act, has not been verified in the manner required by section 110. Section 114(1) would then apply with the result that the Defendants would be unable to present any instrument dealing with the land for registration. The Defendants' case however, is that they are not claiming a right to effect the transfer of the property. The Defendants are claiming the right merely to hold the auction and that thereafter, the transfer required to give effect to the sale brought about by the auction, still has to be voluntarily signed by the Claimants. With that reasoning, it is accepted, that section 114(1) is not applicable. This notwithstanding, it must still be considered whether the agreement validly creates a power of attorney to hold an auction without further consent of the Claimants. In determining that question, one must consider the nature of an auction.
10. An auction is a manner of selling or letting property by bids, usually to the highest bidder, by public competition³. The auctioneer is the agent of the seller and a binding contract for sale with the highest bidder, is concluded upon the auctioneer's acceptance of the highest bid.⁴ The Defendants' case is that the agreement by power of attorney, authorizes the 1st Defendant to sell the property by auction. This requires engaging an auctioneer who would as agent of the vendor, (by virtue of the power asserted, the 1st Defendant herein), conclude a sale by acceptance of a bid at the auction. Under the laws of Belize, an auctioneer is required to

³ Halsbury's Laws of England, 5th Ed. Vol. para 1.

⁴ Ibid @ para 7 et seq.

be licenced and has certain statutory powers to impose penalties where upon acceptance of the highest bid, a purchaser fails to complete the contracted created within a certain time. This is all stated to say, that the vendor of property, (whether by voluntary or forced auction), contracts an auctioneer by distinct agreement and under the law of agency, to carry out the process of an auction which results in a concluded contract of sale on his the vendor's behalf.

11. As a general principle, a power to deal with land must be express and where the dealing is with registered land, the power must be exercised through a power of attorney, validly created and registered under the Registered Land Act. This, the agreement does not accomplish, firstly, as it is not verified as required by section 110 of the Act and further, as it is neither registered nor in a form prescribed, as required by section 114(2) of the Act. Even if one were to overlook the form, which can be otherwise approved by the Registrar, the agreement is certainly not registered as a power of attorney, which in the Court's view is absolutely critical in order for the Defendants to be clothed with the authority as agent, to engage an auctioneer to carry out the auction, as is contemplated in clause 8 of the agreement. The Court does not accept the Defendants' argument that along with an authorization to sell by auction, came an implied authority to engage an auctioneer.
12. In the circumstances, as the authority claimed by the Defendants does not comply with essential provisions of the Registered Land Act as relates to powers of attorney, the agreement insofar as it purports to authorize the 1st Defendant to sell the property by way of auction, is invalid. More particularly, clauses 4 and 8 are found to be invalid insofar as they purport to convey a power to the Defendants to sell the property by auction. These clauses, therefore are to be severed from the agreement, to the extent of their invalidity. The question as to the validity of the remaining agreement can now be considered.

13. The Claimants submit that the entire agreement (that they signed voluntarily) is invalid. Outside of the invalidity of clauses 4 and 8 to the extent that they purport to authorize the 1st Defendant to sell the property by auction, the agreement very clearly creates other obligations which exist independently of the failed authority to sell. In particular, the Claimants agreed to list the property for sale and pay the Defendants their debt from that sale. The agreement also entitles to Defendants to list and market the property for sale and contains a few other terms for payment of certain sums of money to the Defendants. After severing those parts of the agreement that are invalid, the agreement retains valid and enforceable obligations in relation to other matters incidental to or otherwise not connected with the sale of the property and the Defendants are entitled to the benefit of those obligations.

Summary Judgment

14. Pursuant to Rule 15.6⁵, the Court may give summary judgment on any issue of fact or law whether or not it would bring the proceedings to an end. The Court finds the decision of **Swain v Hillman et al**⁶ useful in considering the approach to be undertaken on an application for summary judgment. The court should determine whether there is a 'real' as opposed to 'fanciful' prospect of success of the claim or defence. That utilizing the court's power on summary judgment furthers the overriding objectives of the rules, in that it *'saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interests of justice'*⁷. The Court however, heeds the warning in **Hillman** which was urged by learned counsel for the Claimants, that the procedure is not meant to dispense with the need for a trial where there are issues which should be investigated at a trial.

⁵ Supreme Court (Civil Procedure) Rules, 2005

⁶ [2001] 1 All ER 91, CA

⁷ Ibid.

15. Contrary to the Claimant's contention of the existence of issues to be ventilated and determined at trial, the Court's position is that the determination of the proceedings rests upon the single issue of construction of the nature of the authority to sell claimed by the Defendants. As a matter of law, this issue has been fully addressed by the application for summary judgment. There is no triable issue as to whether the Claimants voluntarily executed the agreement; there is no triable issue as to whether the parties intended to be bound by the agreement. Any question of whether the Defendants were in breach of the agreement by the manner in which they went about the sale is effectively rendered moot by the determination of whether or not the Defendants were entitled to sell in the first place.
16. The determination of that singular issue in this case means that the Claimant is bound to fail in part and likewise the Defendant in part in relation to their respective cases. In the circumstances, the Court having found that the construction of clauses 4 and 8 of the agreement fail to confer any right to the Defendants to sell the property, these proceedings are effectively brought to an end.

Final disposition

17. The Defendants' application for summary judgment is successful in part but in any event the claim is disposed in its entirety as follows:-
(The property' refers to the land registered as Parcel 3311 (H11), Block 36, Placencia North Registration Section, Belize.)
 - (i) A Declaration that the Deed of Release and Compromise dated 31st October, 2013 is null and void is refused;
 - (ii) A Declaration that the Deed of Release and Compromise dated 31st day October, 2013 is incapable of creating a charge over the property is refused on the basis that the Deed of Release and Compromise did not purport to create such a charge;

- (iii) It is declared that the Defendants have no legal authority to effect a sale of the property as provided in clauses 4 and 8 of the Deed of Release and Compromise.
- (iv) It is declared that the said clauses 4 and 8 are void to the extent that they purport to authorize the Defendants or either of them to sell the property.
- (v) It is ordered that to the extent that they fail to grant any valid authority to the Defendants to sell the property, clauses 4 and 8 are severed from the Deed of Release and Compromise.
- (vi) It is declared that subject to the Court's orders at paragraphs (iv) and (v) above, the Deed of Release and Compromise herein remains valid and enforceable in all other respects;
- (vii) There is no order as to costs.

Dated this 30th day of June, 2015.

Shona O. Griffith
Supreme Court Judge.