2016-HC-DEM-CIV-APL-50

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

In the matter of the Rules of the High Court CAP 3:02

-and-

In the matter of Order 46 Rule 18 of the Rules of the High Court, CAP 3:02

-and-

In the matter of Orders 20 and 21 of the Rules of the High Court, CAP 3:02

BETWEEN:

CITIZENS BANK GUYANA INC. a company incorporated under the provisions of the Companies Act, Chapter 89:01, Laws of Guyana, and continued user the provisions of the Companies Act No. 29 of 1991, Laws of Guyana, whose registered office is situate at Lot 201 Camp and Charlotte Streets, Lacytown, Georgetown, Guyana LIMITED, a company incorporated in Guyana and continued under the 1991 Companies Act, with its Registered Office situated at Lot 69-72 Eccles Industrial Site, East Bank Demerara.

Plaintiff/ Respondent

-and-

1. DUNSTAN BARROW
2. CHERYLL BARROW

Defendants/ Applicants

The Honourable Chief Justice Roxane George and Justice Navindra A. Singh.

Mr. Stephen Fraser and Ms. Shantel Scott representing the Applicants.

Mr. Neil Boston S.C. representing the Respondent.

Heard January 3rd, February 3rd and June 28th 2017.

DECISION

The Respondent instituted Civil High Court Action No. 1046-CD of 2015 on September 29th, 2015 against the Applicants claiming monies owed on several loans totalling in excess of two hundred and twenty three million dollars made to the Applicants by the Respondent at the Applicants' request.

The loans were secured by five mortgages in favour of the Respondent on two properties owned by the Applicants and, in the circumstances, the Respondent further claimed "***foreclosure***" of the said mortgages in HCA 1046-CD of 2015.

On November 24th, 2015 the Applicants caused a Summons to be filed praying that the claim be struck out and the action dismissed on the ground that the claim did not disclose a cause of action since a claim for "***foreclosure***" does not exist in the Roman Dutch mortgage.

On March 4th, 2016, having heard the parties, Justice Insanally dismissed the Summons.

The Applicants filed this appeal challenging the correctness of Justice Insanally's decision on March 17th, 2016.

ISSUE I

The Applicants sole resistance and defense to the claims in HCA 1046-CD of 2015 is that the concept of "***foreclosure***" does not exist in the Roman Dutch mortgage and therefore that Writ ought to be dismissed since it discloses no/ no legal cause of action.

But, what is meant by the use of the term "***foreclose***" with respect to mortgages in the Republic of Guyana?

ANALYSIS

More than 100 years ago Sir Charles Major CJ in **Re Demerara Turf Club Ltd. (In liquidation) British Guiana Mutual Fire Insurance Co. Ltd.** *v* **Demerara Turf Club Ltd.** [1915] L.R.B.G. 191 clarified the use of the word "***foreclosure***" in this country (Guyana).

At page 193 he explained the right of the mortgagee as follows;

"*By the law of this colony a mortgagee has a right, upon failure of his debtor to observe and perform any of the covenants, stipulations and conditions contained in the instrument of mortgage, to take proceedings to enforce the security given for his so doing. The proceedings take the form of an action for ascertainment (where*

that is necessary) of the amount of the debt and for a decree that the mortgaged property be declared liable to be taken in execution and sold to satisfy same."

The learned Chief Justice then opined at page 194 that the use of the term "***foreclose***" in this jurisdiction is "*inaccurate and misleading*". I do believe that the learned Chief Justice use of the phrase "*inaccurate and misleading*" was based solely on his perception that the word "***foreclose***" should only be used when referring to the rights of a mortgagee under an English mortgage or a mortgage taken in England under English law.

On this point I tend to disagree with the Learned Chief Justice since there really is no such fixed allocation for the word. In fact thefreedictionary.com defines "***foreclose***" as follows;

"*To enforce (a lien, deed of trust, or mortgage)* ***in whatever manner is provided for by law***". (Bold mine)

Nevertheless, despite not being pleased with the use of the word "***foreclose***", the Learned Chief Justice goes on at page 195 to explain the "**foreclosing**" **of a mortgage** as follows;

"*The mortgagees hold an instrument thereunder the mortgagors specifically bind and oblige their property Bel Air and furthermore, agree that the mortgagees shall in case of default, have the right of "****foreclosing****" the said mortgage - [that is of enforcing the security for the performance of the terms in respect of which default has been made] and of bringing the property thereunder mortgaged to sale at execution.*"

Fast forward six decades and the Court of Appeal of Guyana quoted with approval the following excerpt from Duke's Treaties on the Law of Immovable Property in British Guiana (1923) with approval in **Elsie Persaud *v* Charles Ogle** (1979) 27 WIR 160 @ 171 per Crane CJ;

"*A "****foreclosure****" action may be of one of two kinds. It may either be an action against the mortgagor himself, or it may be an action in rem against the very property. In the latter case, the defendant's name is not given. He is merely described as the owner or representative of the land in question and the writ is*

served by affixing a copy "to the principal building upon such land or plantation, or if there be no building or plantation, to any railing, tree or to some conspicuous place on such land or plantation. In the former case, if the proceeds of the sale are insufficient to meet the amount of the mortgagee's claim, then the mortgagee is at liberty to proceed against other property of the mortgagor for the recovery of the balance. But in the latter case, the mortgagee can look only to the proceeds of the sale for the recovery of his debt."

In this regard it is clear that the use of the word "***foreclose***" has a distinct meaning in this jurisdiction, a meaning that has been understood and upheld by the Courts in this jurisdiction for over a century. Indeed, it would make nonsense of the law should we dwell on semantics.

In addition paragraph (i) of the "**Mortgagors further Covenants**" on each of the **FIVE** Mortgage deeds signed by the Appellants sets out in clear unambiguous terms the consequences of failure to "***pay the Capital Sum and interest thereon whenever demanded or as otherwise hereinbefore provided***", that "***the Bank shall be at liberty to foreclose this mortgage and bring the property and properties hereby mortgaged to sale at execution and recover and receive from the proceeds of such sale the Capital Sum and interest payable hereunder …***"

It is highly improbable that the Appellants would not have understood and appreciated what the consequences of default would be and in the context used, what the word "***foreclosure***" meant.

The Applicants have not raised any other challenge or defense to the Respondent's claim in HCA 1046-CD of 2015, particularly, the Applicants have not denied the advancement of the loans to them by the Respondent at their request nor have they contended that they are not in default of their repayment agreement.

Justice Insanally ruled "**I find therefore the Plaintiff's application satisfies the requirement of the law and is not frivolous and vexatious and an abuse of the process of the Court.**"

CONCLUSION

Justice Insanally's ruling is correct and in accordance with the law. The Statement of Claim in HCA 1046-CD of 2015 does disclose a legal and well founded cause of action.

ISSUE II

The Appellants had applied for a stay of proceedings pending the hearing and determination of this Appeal on June 15th 2016.

That application was refused on September 30th 2016 by a Full Court similarly constituted as this Full Court, to wit, Justice George and Justice Singh.

Counsel for the Appellant submitted that in these circumstances the bench, that is, (now) Chief Justice George and Justice Singh should recuse themselves from hearing the appeal since they would have already made a determination (pre-determination) that the appeal had no chance of success when hearing the application for the stay pending appeal.

ANALYSIS

In considering whether to grant a stay pending appeal one of the things a Court should take into account is the prospect of the appeal succeeding and moreover a stay would usually only be granted where there is a strong likelihood that the appeal will succeed since the grant of a stay is the exception rather than the rule as was explained in the ruling of September 30th 2016 refusing the stay, citing with approval the dicta of the Chief Judge of the High Court of Hong Kong, Ma J, in **Wenden Engineering Services Co. Ltd.** ***v*** **Lee Shing UEY Construction Co. Ltd.** HCCT No. 90 of 1999.

In this particular appeal the sole issue is one of law, in fact, there is no dispute of fact and as such in dealing with the application for a stay of proceeding pending the determination of the appeal the balance of harm would naturally be in favour of the party in whose favour the point of law would most likely be determined in favour of.

In determining the application for a stay pending appeal the Court would have made a determination of the "**likelihood of success**", quite distinct as to making a determination of the merits of the appeal, though, it may seem particularly similar in a case such as this where the sole ground of appeal is a single point of law.

Nevertheless, the consideration/s are not the same and as such it cannot properly be said that there was or may have been a pre-determination by the bench of the appeal.

In support of this proposition Counsel for the Appellants, Mr. Fraser, submitted several English authorities all of which in discussing the issue of "pre-determination" were in relation to the Court reviewing the decision making processes of various statutory bodies , whereby members of the body could be said to have had a mind set regarding the **facts** of the issue before it prior to considering the issue and making a determination.

I have found no authority for this concept applicable to a Court of law, in fact, with respect to a point of law, that would necessarily mean that once a Judge has pronounced upon a point of law, that Judge ought not to ever sit in determination of any case where that point is again raised and may very well throw the doctrine of ***stare decisis*** out of the judicial system.

While it may be that having had to examine certain aspects of the issue subject to appeal while deciding whether to grant a stay pending appeal, it cannot be said that the Court would have made a pre-determination of that issue prior to deciding the actual appeal, since the Court would not have had to make a determination of that issue in considering the application for a stay pending appeal.

CONCLUSION

The request for bench to recuse themselves from the hearing of this appeal reconsidered and again denied.

In the circumstances this Appeal is hereby dismissed with costs to the Respondent in the sum of $250,000.00.

Justice N. A. Singh