

Homeowners Protection Act – time to revisit

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In 2017 The Bahamas enacted the Homeowners Protection Act (HPA). The legislation was touted as "groundbreaking" and was designed to provide "meaningful protection to homeowners by ensuring a true and proper discourse" between borrowers and financial institutions (hereinafter 'lenders').⁽¹⁾ As a result of COVID-19 and its adverse impact on the Bahamian economy, increased litigation under the HPA is expected. The HPA will likely become the epicentre of the mortgage market.

Previous state of law

Prior to the enactment of the HPA, lenders would often require borrowers to waive their protection under the Conveyancing and Law of Property Act (CLPA) as a condition for a mortgage. Consequently, when borrowers became delinquent, lenders could expedite the process to enforce their security with little to no impediments.

The previous state of affairs gave lenders inequitable power which necessitated reform. Although the HPA addresses the inequities of the old regime, it also pushes the pendulum of justice unevenly in favour of borrowers, thereby creating a new imbalance on the proverbial scales of justice.

Current state of law

The HPA introduces the following onerous and notable features:⁽²⁾

- Lenders must give specific notice to borrowers before commencing litigation to enforce their security⁽³⁾ and before exercising a non-judicial power of sale.⁽⁴⁾
- Borrowers and their immediate family members that contribute to mortgage payments may approach the court for relief to prevent the enforcement of a lender's security.⁽⁵⁾
- Lenders are under a duty of fair dealing⁽⁶⁾ and directors, employees and their relatives may not purchase foreclosed property.⁽⁷⁾
- Foreclosed property must be sold at market value and lenders can accept the highest bid only after six months.⁽⁸⁾
- If an order is made to postpone a sale by a lender, no further sum will be payable under the mortgage unless the court orders otherwise.⁽⁹⁾
- Under certain circumstances, lenders cannot obtain a deficiency judgment once they have exercised their power of sale.⁽¹⁰⁾
- A violation of the HPA will result in penalties of up to B\$200,000 for lenders and up to B\$100,000 for directors,⁽¹¹⁾ in addition to administrative penalties from regulators.⁽¹²⁾

Recently, the Supreme Court ruled that the HPA had to be strictly complied with before a lender could recover possession of a foreclosed property.⁽¹³⁾ In that case, the court dismissed an action commenced by a lender to enforce its security for non-compliance with the HPA.

Impact

The HPA in its current form will create significant difficulties for lenders in enforcing their security rights. Borrowers have significant powers to delay, interfere with or prevent a lender from enforcing their security through litigation. Practically, given the backlog of cases within the judicial system, it would take months or even years for matters to be heard or conclusively determined. This timeline could be even longer given the likelihood that the HPA will exacerbate the backlog. As a result, potential purchasers may be disinclined to purchase foreclosed properties due to the length of time before transactions can close.

AUTHOR

[Ramonne Gardiner](#)



Egregiously, immediate family members whom lenders have not contracted with, or conducted a risk assessment on, now have statutory rights to interfere with a lender's security. In addition, in recent times, lenders have sought to reduce their costs in the region leading to staff lay-offs and redundancy. If the HPA proves to be oppressive, further job reductions could be expected due to the increased litigation and financial risks associated with residential mortgages.

While the HPA offers greater protection to existing homeowners, it will likely have an adverse effect on prospective homeowners. Lenders are likely to take a risk-adverse approach to future homeowners. Thus, the very law that aids pre-existing homeowners will likely result in a reduced amount of qualified prospective homeowners.

Recommendations

The HPA is in need of amendment with further consultation from industry stakeholders. The legislation needs more detailed definitions, such as what amounts to a reasonable period to postpone a sale of foreclosed property. Further, immediate family members should not be afforded statutory rights to interfere with a lender's security as this would defy basic principles of contract law.

Family members of staff or directors should not be prohibited from purchasing foreclosed property. Rather, the legislation should provide for a more transparent and equitable process of selling foreclosed properties. For example, a requirement that all foreclosed properties be publicly listed could be included in the HPA along with a prohibition on insider trading.

Lastly, the potential fines under the HPA are excessive and too onerous. Fines should not be levied against directors of lenders for breaches of the HPA and administrative fines should be removed. The commercial implications for lenders could prove to be disastrous.

Thus, although the HPA was noble and well intentioned, it has failed to achieve the balance that it sought to accomplish and is in dire need of reform.

For further information on this topic please contact [Ramonne Gardiner](mailto:rgardiner@lennoxpaton.com) at Lennox Paton by telephone (+1 242 502 5000) or email (rgardiner@lennoxpaton.com). The Lennox Paton website can be accessed at www.lennoxpaton.com.

Endnotes

(1) *RBC Royal Bank (Bahamas) Limited v Lawson H Hall* (2020/CLE/gen/000236) at Paragraph 8.

(2) "Bahamas AG Speech for Homeowners Protection Bill", available [here](#).

(3) Section 4.

(4) Section 7.

(5) Section 8.

(6) Section 10.

(7) Section 12.

(8) Section 11.

(9) Section 9(3).

(10) Section 11(8).

(11) Section 20.

(12) Section 21.

(13) *RBC Royal Bank (Bahamas) Limited v Lawson H Hall* (2020/CLE/gen/000236) at Paragraph 8.

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