

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION**

**CAUSE NO. G 478 OF 2012**

**BETWEEN:**

**CAYMAN NATIONAL BANK LTD.**

**Plaintiff**

**AND**

**SCOTT BERTRAM HENDERSON**

**Defendant**

**Appearances:**

Mr. David Collier & Mr. Travis Ritch of Ritch & Conolly  
for the Plaintiff  
The Defendant in person

**Before:**

Hon. Justice Richard Williams

**Heard:**

26 August 2019

**Draft Judgment provided:** 27 August 2019

**Perfected judgment  
Circulated:** 28 August 2019



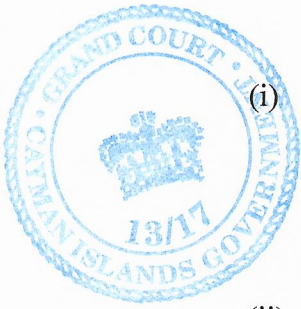
**HEADNOTE**

*Land Law – charges – power of sale - order for possession s.75(2) Registered Land Law (2018 Revision)*

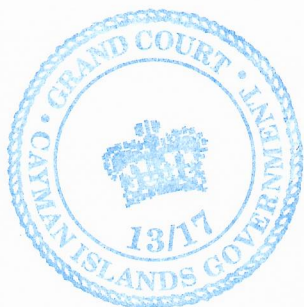
**JUDGMENT**

**Application**

1. On 26 August 2019 I heard the Plaintiff's Summons filed on 19 July 2019 in which the following relief is claimed:



- (i) An order that the Plaintiff be granted an Order for Possession in respect of the property registered as Savannah, Block 27C, Parcel 409 (“the Property”); and
  - (ii) An order that the Plaintiff do have leave to issue a Writ of Possession in relation to the Property.
  
2. The evidence supporting the Plaintiff’s Summons was taken from the Third Affidavit of Vadonna McLaughlin which was sworn on 18 July 2019. I have also read Vadonna McLaughlin’s affidavits sworn on 10 March 2016 and on 25 January 2013, the Affidavit of Rick Burgos sworn on 9 March 2016 and the affidavit of the Defendant sworn on 15 April 2016.
  
3. At the outset of the hearing the Defendant applied for an adjournment to organise legal representation from Chapmans who had represented him at a hearing before Mangatal J in March 2016. The application to adjourn was opposed by the Plaintiff. The Defendant stated that he has had insufficient time to prepare for the proceedings and to obtain the services of an attorney. He said that his proposed attorneys only contacted him last week, indicating that they would require a \$6,000 retainer to enable them to represent him. He said that he does not have \$6,000 and was not clear when he would be in a position to properly instruct them. However, he was served on 31 July 2019, just under four weeks prior to the hearing. Although sympathetic to his predicament, I was satisfied that the

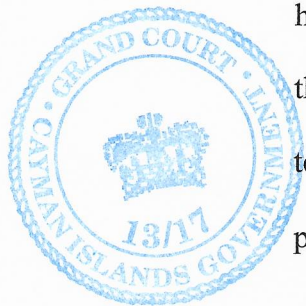


Defendant had been given sufficient notice to obtain legal representation and I refused the application for an adjournment. In reaching my decision, I have regard to the Overriding Objective and my duty to deal with every case in a just, expeditious and economical manner. At the hearing, it became clear that Mr. Henderson is an intelligent individual and that he was able to lucidly present his case.

4. After hearing the submissions of the parties, I made an order in the terms of the Summons. The Plaintiff's Counsel indicated that the vacant possession date and the date for leave to issue a writ of possession should be three to four weeks. When carrying out the balancing exercise, I felt it appropriate that eight weeks be given, namely 21 October 2019.

### **Background**

5. On 16 August 2011 a charge over the Property in favour of the Plaintiff was registered for the principal sum of US\$369,600 ("the Charge"). It was a provision of the Charge dated 27 April 2011 that monthly payments would be made of principal and interest in the sum of US\$2,649. No issue has been taken by the Defendant at any time during these proceedings concerning the form of the Charge.



6. Unfortunately, within only three weeks of signing the Charge, the Defendant lost his employment. The Defendant has not had the benefit of a regular income since that date and, as a consequence, he has struggled to make the required payments to the Bank. He has also been through divorce proceedings and has been the parent responsible for bringing up the 9 year old daughter of the marriage.
  
7. The Defendant was unable to pay the full amount due each month from around September 2011. By 25 January 2013 arrears in payments amounted to US\$24,026.48, with the last payment being made on 19 July 2012.
  
8. The Plaintiff decided that it needed to regularise the position. Notices under s.64(2) and 72(1) of the Registered Land Law (2004 Revision) (“the Law”) dated 2011 demanding full payment of the sums outstanding were properly served on the Defendant. Due to the Defendant continuing to default, an Originating Summons was issued on 3 December 2012 in which orders were sought, pursuant to the provisions of the Law.
  
9. No issue has been taken at any time concerning the above Notices. On 26 April 2013, upon hearing Counsel for the Plaintiff and the Defendant in person, Quin J ordered:
  - (i) That subject to paragraph (iii) the Plaintiff shall be entitled to sell the Property by either private treaty or public auction;



- (ii) that subject to paragraph (iii) the Property may be listed in the CIREBA Multiple Listing System (“MLS”) with a list price of CI\$475,000<sup>1</sup> and with the Plaintiff having leave to conduct any proposed sale; and
- (iii) that paragraphs (i) and (ii) of the order would be stayed for a period of nine months, so the Defendant can attempt to regularise his borrowing with the Plaintiff to its satisfaction.

10. The Property was listed for sale on the MLS system on 14 April 2014 and an offer was not received until the list price was reduced to CI\$325,000. An offer was made in the sum of CI\$300,000, but the counter offer of CI\$320,000 was rejected by the potential purchaser. By 10 March 2016 the arrears on the mortgage had increased to US\$112,706.52, with interest, continuing to accrue at a daily rate of US\$77.98. The principal sum had increased to \$469,840.91. The Plaintiff contends that the realtor had difficulties showing the Property due to a lack of cooperation from the Defendant. The Defendant indicated during the hearing before me that this was not the case and that he was frequently out of the jurisdiction on business when requests were made to show the Property. For the purpose of today’s hearing, I am not required to explore that issue.

11. With the Practice Direction No. 5 of 2012 and the Practice Direction No. 4 of 2014 in mind the Plaintiff issued a Summons on 1 February 2016 seeking an order

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<sup>1</sup> Quin J having reviewed valuation reports submitted by the Plaintiff.



for vacant possession, leave to issue a Writ of Possession and an order setting aside the reserve price of CI\$475,000.

12. At a hearing before Mangatal J on 19 April 2016, the parties, with the assistance of their legal counsel, arrived at a consent order. It was agreed that the Defendant would provide unrestricted free access to any realtor, agent or buyer who wished to inspect the Property for viewing and marketing upon 24 hours' notice. In addition, the order of Quin J made on 19 April 2013 was varied to remove the reserve list price of \$475,000. It is evident that the parties, consistent with the order of Quin J, still recognised that the Plaintiff was entitled to sell the Property, but they were conscious that, following the practice directions which had been issued in the interim, the Court need not set a list price.
  
13. From 2016 until December 2018 various offers were made to purchase the Property. The Plaintiff again outlined issues that they say the realtor experienced in relation to cooperation from the Defendant in relation to viewings. The Defendant has made clear that these are not accurate representations and that he was cooperative and he contended that it was unreasonable to have expected him to have the Property available to show on twenty four hours' notice when he was out of the jurisdiction on business. On 30 November 2018, an offer of CI\$250,000 was received by the Plaintiff, to which a counter offer of CI\$350,000 was made. The purchaser then made an offer of \$265,000 on 4 December 2018, which was



accepted by the Plaintiff. That purchaser has obtained financing for the purchase and the Plaintiff says that the purchaser is pressing the Plaintiff to complete the sale of the Property. Ms. McLaughlin, in her latest affidavit, set out the Plaintiff's concern that if the sale cannot be completed in short order, the purchaser will decide not to complete the purchase and that is why the current application is made.

14. Since November 2013, only two payments have been made towards the mortgage and these were both on 17 May 2017, one for US\$175.00 and one for US\$535.71. As of 31 March 2019, the balance of the loan had increased greatly to US\$611,109.47, which is far in excess of the value of the Property.

### **The Law**

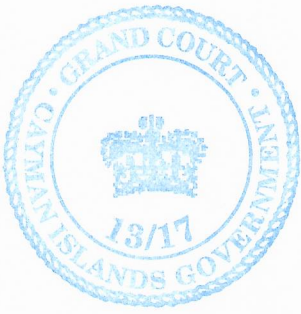
15. Section 72 of the Law provides:

*“(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.*

*(2) If the chargor does not comply within three months of the date of service, with a notice served on him under subsection (1), the chargee may*

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*(a) ...,*



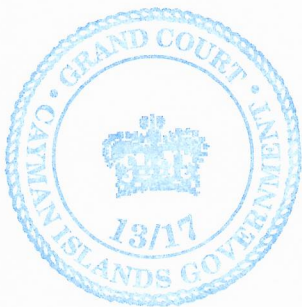
*(b) sell the charged property.”*

It is clear that Quin J recognised that, in the circumstances of this case, under this section, the Plaintiff had a right and power to sell the charged Property if the Defendant had defaulted in payment of the secured loan after three months’ notice to remedy the default.

16. Section 75 of the Law, marginal note, “Power of Sale”, provides at sub-sections (1) and (2):

*“(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 and to resell by public auction without being answerable for any loss occasioned thereby.*

*(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.” (My emphasis).*



The application before me is concerned with subsection (2) and the right of the Plaintiff to possession. It is a matter in which Quin J has already sanctioned the Plaintiff's sale of the Property.<sup>2</sup>

17. In *Scotiabank & Trust (Cayman) Limited v Ebanks and Gordon* [2012 (1) CILR 401] Henderson J found that “*sale by public auction*” does not require a formal auction with the bidding process conducted by an appointed auctioneer but “*in substance, the sale of a property through the Multiple Listing Service (MLS) is a public auction.*” This is confirmed by paragraph h. in Practice Direction No. 5 of 2012 which refers to the decision of Henderson J. In the Cayman Islands a sale through the MLS, as in the matter before me, is a sale by public auction.
18. Consistent with Smellie CJ's observations at paragraph 6 in *Butterfield Bank v Jervis & Jackson* 2011 (1) CILR 54 Counsel for the Plaintiff made clear that the Plaintiff recognised that it had a duty to act in good faith and was therefore required to seek to get the best price that the market will yield (“the market price”).
19. The Privy Council in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 considered the conditions upon which the mortgagor's power of sale should be

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<sup>2</sup> Since the issuing of Practice Direction No. 5 of 2012 it is clear that it not necessary for the Court to sanction a sale by public auction/ MLS.

exercised. The Court of Appeal did the same in *Cuckmere Brick Co. Ltd v Mutual Fin. Ltd* [1971] 2 All ER 633 at 643 when Salmon LJ stated:



*“It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power of sale has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting, a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is anything to prevent a mortgagee from accepting the best bid he can get at an auction even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee’s interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do, were he a trustee of the power of sale for the mortgagor.”*

20. Although this is not a case in which the Court has been asked to sanction the sale at a price, to inform and assist the unrepresented Defendant moving forward, I draw his attention to the contents of the Practice Direction No. 5 of 2012 and the cases referred to therein. I note the factors set out therein, namely:

- a) that the Property must not be sold at an undervalue;
- b) that the sale has to be in good faith;
- c) that the best evidence of market value is the reaction to the market;
- d) that the standard of care required of the Plaintiff Bank is that of a reasonable man in respect of the conduct of his own personal affairs; and



e) that leave to sell at a reserve price set by the Court will not usually be granted without previous attempts to market the Property.

21. It is clear that the power of sale had arisen at the time that the Property was marketed and at the time the contract of sale has been entered into. In the matter before me, having regard to all of the abovementioned sections from the Law, the abovementioned case law, and the Practice Directions, but without the Court determining the appropriateness of the sale price, I am satisfied that the Plaintiff has exercised its right of sale properly.

22. The Defendant informed the Court that he is exploring the possibility of borrowing CI\$300,000 from a third person. He says that he would be willing to use that money to pay into the mortgage account held with the Plaintiff on the basis that it be received as full payment/settlement for the full balance which is over US\$600,000. He says that it may take him two weeks to find out whether that borrowing would be available. He placed no meaningful evidence, for example an affidavit from the third person showing where the funds would come from and verifying his willingness to lend, to show how realistic his proposal was. Even if this borrowing was available, this is not a case in which the Plaintiff would be restrained from exercising its power of sale on the basis that the Defendant has tendered to the Plaintiff or paid into Court the amount claimed to be due. No such payment has been made and it is now too late to do that as a



contract for the sale of the Property has been entered into. The only way that the Court could interfere at this stage to stop the sale is if the sale is improper. The sale is not improper and even if there was a dispute about the amount due that would not restrain the sale. No application is before me for an injunction to restrain sale.

### **Conclusions**

23. The Plaintiff has followed the appropriate procedures as required by the Law. The Defendant being in possession of the charged Property, pursuant to s.75(2) of the Law, the Plaintiff became entitled to recover vacant possession of the Property upon accepting the Offer to Purchase.
  
24. The Plaintiff is entitled to the relief sought. The account has been in arrears from 2012 with a history of highly inconsistent payment and non-payment spread over a seven-year period, a pattern which started only a few months after the charge agreement was made between the parties due to the Defendant losing his employment. On the evidence it appears that the Plaintiff, when exercising its power of sale confirmed by order of Quin J, has acted appropriately by marketing the Property with an established real estate firm.

25. Although I am sympathetic to the predicament of the Defendant and his young dependent daughter, I am satisfied that the Plaintiff has taken all reasonable steps to comply with its obligations and is therefore entitled to seek the orders sought.
26. I note that the Defendant has two tenants who require 30 days' notice to vacate. More importantly, I note that he is responsible for the care of a young daughter and he will need to find alternative accommodation. In a case in which the sale of the Property was agreed in December 2018, eight months ago, I am satisfied that an activation date for the order two months hence is appropriate and will not affect the sale.
27. Accordingly I order:
- (i) The Defendant shall give vacant possession of the Property registered as Savannah, Block 27C, Parcel 409 (“the Property”) to the Plaintiff by no later than 21 October 2019; and
  - (ii) The Plaintiff shall have leave pursuant to Grand Court Rules Order 45, Rule 3(1) and (2), to issue a Writ of Possession in respect of the Property after 21 October 2019.

  
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**THE HONOURABLE MR. JUSTICE RICHARD WILLIAMS**  
**JUDGE OF THE GRAND COURT**

