

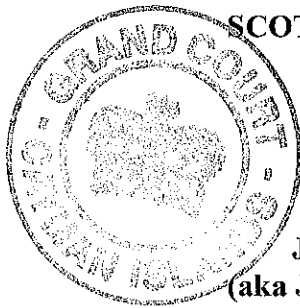
IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. GC 0190 of 2016

IN THE MATTER OF THE REGISTERED LAND LAW (2004) (The Law)

AND IN THE MATTER OF an Application for possession under section 75(2) of the Law in respect of the property comprised in Registration Section George Town South, Block and Parcel No. 14D 419H27 and known as Windsor Lakes, Block L, Unit 203. (the Property).

BETWEEN



SCOTIABANK & TRUST (CAYMAN) LTD

PLAINTIFF

AND

JOSEPH MCCONNELL BARNES  
(aka JOSEPH MCCONNELL CHRISTIAN)

DEFENDANT

IN CHAMBERS

Before: Hon. Justice Ingrid Mangatal

Appearances: Mr. Hector Robinson and Ms. Nicosia Lawson of Mourant Ozannes for the Plaintiff.

Mr. James Kennedy of Samson & McGrath for the Defendant.

Date of Hearing: 20 December 2016.

Ex Tempore  
Judgment

Delivered: 21 December 2016

EX TEMPORE JUDGMENT

1. The application originally listed before me last Wednesday, 14 December 2016, is an application by way of Originating Summons, pursuant to Order 96, r. 2 of the Grand Court Rules 1995 (*"the G.C.R."*). The Plaintiff Scotiabank & Trust (Cayman) Ltd. *"the Bank"* seeks an order against the Defendant (*"Mr. Barnes"*) to recover possession of the

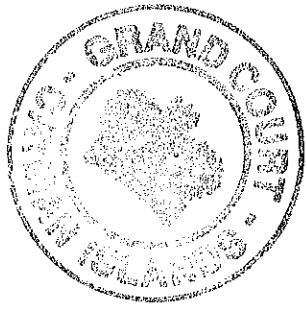
Property on the ground that the Property has been sold by public auction pursuant to section 75(1) of *the Registered Land Law (2004 Revision)* ("*the Law*"), that the Bank is entitled to possession, and that the Bank do have leave to issue a writ of possession against Mr. Barnes.

2. The matter did not go ahead on 14 December for a number of reasons, including the fact that documents were received by the Court very late, and also that the version of the Originating Summons served on Mr. Barnes did not have the date inserted in it and therefore Counsel Mr. Kennedy, who appeared for Mr. Barnes, was not aware of the date until the evening of 13 December 2016.
3. I fixed the hearing for Tuesday the 20 December, and ordered, amongst other directions, that the summons, which Mr. Kennedy indicated his client wished to file, and all further affidavits be filed and served by 3:00 p.m. on 16 December 2016.
4. The summons filed on behalf of Mr. Barnes, seeks numerous types of relief as follows:
  1. That the contract for sale of the Property dated 5 October 2016 be set aside.
  2. That the Bank be enjoined from completing the sale of the property pursuant to the contract for sale of the Property dated 5 October 2016.
  3. An order that all costs incurred by the Bank in seeking sale of the property are irrecoverable as having been unreasonably and improperly incurred.
  4. Costs to Mr. Barnes on an indemnity basis.

AND in the alternative:

5. A declaration that the Bank breached its duty to obtain the best price reasonably obtainable for the Property:
6. An order that the Bank account to Mr. Barnes for the sale of the Property at an under-value, with damages to be assessed.





7. An order that all costs incurred by the Bank in seeking sale of the property are irrecoverable as having been unreasonably and improperly incurred.
  8. An order for costs on an indemnity basis.
5. It is not in dispute that the Property is Land registered under *the Law*, and that the Bank has a charge/ mortgage over the Land, as exhibited to the First Affidavit of Bridget Bond, Cross Border Adjuster in the Caribbean South Collections Unit Department of the Bank, and who is familiar with the history of this account and Mr. Barnes. This Charge, the Variation of Charge, represented a consolidation of a first and second charge.
6. It is not in dispute that Mr. Barnes has defaulted on his mortgage payments, and that a letter of demand dated 8 October 2014 was served on Mr. Barnes, demanding payment of the outstanding balance. It is also not in dispute that the Bank served on Mr. Barnes a "section 72" Notice dated 16 September 2015, under the signature of the law firm Mourant Ozannes, Attorneys-at-Law for the Bank.
7. What Mr. Barnes says (at paragraph 9 of his affidavit), is that after he received the letter of 16 September 2015, he "... went into the bank and spoke with Bridgette Bond and agreed a payment plan, the agreement was that I paid the full arrears of approximately \$2,600 and then pay monthly again. I paid the \$2,600 over the counter and had every intention of continuing to pay". It is common ground that Mr. Barnes has not paid anything since September 2015, which he says he was unable to do because of health issues and inability to work.
8. In her First Affidavit at paragraph 12, Ms. Bond indicated that Mr. Barnes not having made any further payments, the Bank in exercise of its powers set out at Clause 7 of the Schedule to the Variation of Charge and section 75(1) of *the Law*, proceeded to list the property for sale on the CIREBA Multiple listing system, through the Bank's authorized agent Century 21, for the sum of CI \$75,000. This appears to have been on 16 June 2016.





- (1) That the Bank has not complied with its obligation to provide notice of its intention to sell the charged property under section 72 of *the Law* in accordance with the service provisions under section 153.
- (2) The Bank has not complied with its requirement to provide notice or demand for payment in compliance with clause 11.3 of the Schedule to the Charge over the Property.
- (3) The Bank has not sought a variation of section 72 of *the Law* by the Grand Court utilizing section 77 of *the Law* which entitles it to vary the requirement to provide notice under section 72 of *the Law*.
- (4) The Bank has not complied with its duty under section 75(1) to act in good faith, including, an allegation that the sale is at an under-value. Counsel sought to particularize those breaches in his written skeleton argument.

15. Sub-sections (1), (2) and (3) of section 75, provide as follows:

*“Power of Sale*

- (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 installments, 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.*
- (3) A transfer by a chargee, in exercise of his power of sale, shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person*



*suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.*

.....”

16. In this case, there is no allegation of fraud on the part of the Bank or of collusion between the Bank and the purchasers.

17. I accept Mr. Robinson’s submission on behalf of the Bank that the procedure under Order 96, Rule 2 is a summary procedure. It recognizes that, under sub-section 75(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.

18. I am of the view that sub-section 70(1) of *the Law*, which deals with the chargor’s right of redemption, is also instructive. It provides as follows:

*“Right of redemption*

*70(1) Subject to this section, a chargor, on payment of all money due and owing under the charge at the time of payment on fulfillment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 72, may redeem the charged land, lease or charge at any time before it has been sold under section 75, and any agreement or provision which purports to deprive the chargor of this right of redemption shall be void; and, for the purposes of this subsection land, a lease or a charge shall be deemed to be sold when a bid has been accepted at the auction sale.”*

(My emphasis)

19. Two points can easily be disposed of. Firstly, the Bank is not purporting to exercise any variation or addition to the charge, such as is dealt with by section 77 of *the Law* and Order 96, Rule 3. There is no need for an application to the Court for sanction when what

the Bank is doing is exercising its power of sale by way of public auction. – See Practice Direction No. 5 of 2012, page 5, letter j. and *Bank of Butterfield (Cayman) Ltd. v Jervis and Jackson* 2011(1) CILR 54.

20. The sale of the Property through the MLS is a public auction - *Scotiabank & Trust (Cayman) Ltd. v Cecilia Ebanks (as administrator of estate Allan Ebanks and Rudolph Gordon (as administrator of estate of Allan Ebanks))* GC Cause No. 298 of 2010, judgment delivered 12 January 2012.

21. The other point is that it seems clear that there was no need for the Bank to serve another Notice under section 72 of *the Law*, other than the Notice it served by way of the letter dated 16 September 2015, the last paragraph of which plainly said that Ms. Bond could be contacted to arrange payment in full of the balance due or, “*without prejudice to the Bank’s entitlement to exercise any of the powers as set out in the Charge, or under the Law*”, to agree a satisfactory payment plan. It is plain that after paying the arrears then due in September 2015, Mr. Barnes paid nothing further in reduction of his indebtedness. This Notice followed the initial demand letter of 8 October 2014.

22. It is to be noted that the Schedule to the Charge also contains the following provisions:

*“7. Powers of the Bank*

...

*7.7 No purchaser or other persons shall be bound or concerned to see or enquire whether the right of the Bank or any receiver appointed by it to exercise any of the powers hereby conferred has arisen or not or be concerned with notice to the contrary or with the propriety of the exercise or purported exercise of such powers.*

.....

*11. Miscellaneous*

*11.1 No failure or delay by the Bank in exercising any right or remedy shall operate as a waiver thereof nor shall any single or partial*





*exercise or waiver of any right or remedy preclude its further exercise of another right or remedy.”*

23. In relation to the issue of good faith and undervalue, the burden is on Mr. Barnes to prove breach of the Bank’s duties as Mortgagee. I must say that I am not entirely convinced that it is appropriate for Mr. Barnes to simply file a Counter summons seeking declarations from the Court, and injunctive relief, and without filing a Writ of Summons and properly pleaded Statement of Claim, particularizing, in particular, the alleged breaches of good faith and undervalue. However, this is not the basis upon which I am refusing the relief sought by Mr. Barnes. The summons has also not been served on the Purchasers, as parties who would be affected, but again, I do not take that as a critical issue, having regard to the view which I take of the matter overall.
24. It seems to me that sub-section 70(1) of *the Law* means that Mr. Barnes no longer has a right of redemption, since the Property is deemed to have been sold upon the Bank accepting the Bid at auction. The Bank is by virtue of sub-section 75(2) entitled to recover possession.
25. It does appear as if at this time, Mr. Barnes’ remedy, if any, sounds in damages if he can make out that the power of sale was irregularly or improperly exercised, or the bank breached its obligation of good faith, or that the Property has been sold at an undervalue. It is trite that if damages are, or are deemed an adequate remedy, then injunctive relief will not be granted.
26. I would not wish to make too much of a pronouncement, or definitive ruling on these issues, in the event that Mr. Barnes still would wish to pursue that remedy in the appropriate manner. I can say that on the evidence presently before me, the burden on the mortgagor of establishing such matters has not been met. Reference can be made to the comparative sale No. 1, set out at page 3 of the First Valuation report. That report also states as follows at Addendum 1, page 10:

*“Addendum 1*

*SPECIAL ASSUMPTION VALUE*

*Opinion of Market Value with a Special Assumption that the marketing period is restricted to a sales period of 9 months. In our opinion, in this instance, under such conditions, a reduction of approximately 20 % from our Market Value figure may be necessary to attract a purchaser. We would recommend a full professional marketing campaign in order to dispose of the subject property where restricted conditions apply. The difference in value between the Market Value and the value where restricted conditions apply is due to the nature of the subject property, along with current market and economic conditions, and the likely impact of the restricted conditions.*

*CI \$60,000 (Sixty Thousand Cayman Islands Dollars)”*

27. As I have stated, should Mr. Barnes wish to proceed with a claim for damages, that can be done by Writ of Summons and Statement of Claim, in which event, both he and the Bank would then have the opportunity to plead their case properly.
28. In my judgment, the Bank is entitled to an Order for possession and to issue a Writ of Possession. Although it is unfortunate that this Order has to be made right in the Christmas Season, I fear that Mr. Barnes has only himself to blame for the tardiness in dealing with the situation, having had several opportunities, over an extended period of time, to do so. I will ask the Bank to see whether the Purchasers will agree to a completion date of 28 December 2016, in which case that is the date that I will order the Bank to recover possession on or before, and to issue the writ of possession for. The Defendant’s Summons filed 16 December 2016 is dismissed.

  
**THE HON. JUSTICE INGRID MANGATAL**  
**JUDGE OF THE GRAND COURT**

