

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 CAUSE NO. 75 OF 2015

3 IN THE MATTER OF THE REGISTERED LAND LAW (2004 REVISION)

4 BETWEEN: FIRST CARIBBEAN INTERNATIONAL BANK PLAINTIFF
5 (CAYMAN) LTD.
6

7
8 AND: GREEN THUMB NURSERY AND LANDSCAPING DEFENDANT
9 LIMITED
10

11 Mr. Matthew Dors, of Ritch & Connolly for the Plaintiff.

12
13 Mr. Paul Keeble of Hampson & Co for the Defendant.
14

15 IN CHAMBERS

16 Heard: 17th & 18th June 2015

17 Reasons for Judgment Delivered: 26th June 2015

18 *Registered Land Law-sections 72, 75, 77- Order 96 of the Grand Court Rules- sale by sealed*

19 *bid process- whether sale by public auction or by private treaty*

20 Before the Honourable Justice Ingrid Mangatal

21 REASONS FOR JUDGMENT

22 1. On the 18th June 2015, I granted the following orders which had been sought by the Plaintiff

23 First Caribbean International Bank (Cayman) Limited ("FCIB") by way of Originating

24 Summons dated May 7 2015:



- 1 “1. The Plaintiff is entitled to sell the property for US \$2,300,000.00.
- 2 2. The Plaintiff is entitled to immediate possession of all that property registered in
- 3 the Cayman Land Register being particularly known as Registration Section:
- 4 George Town Central, Block 13D, Parcel 37 (“the Property”).
- 5 3. The Plaintiff is granted leave, pursuant to the *Grand Court Rules* (“the GCR”) *Order 45 Rule 3(1) and (2)*, to issue a Writ of Possession in respect of the
- 6 Property.”
- 7
- 8 2. At the time of giving my decision, I promised to provide my reasons for the decision at a
- 9 later date. This is a fulfillment of that promise.

10 **Background**

- 11 3. The Originating Summons was supported by two Affidavits, both filed May 7 2015. These
- 12 were the Affidavits of Patrick Cover, Senior Corporate Manager of FCIB, and Jeremy Hurst,
- 13 President, Broker and Owner of International Realty Group Limited (“IRG”).
- 14
- 15 4. On July 13 2010 FCIB entered into a non-revolving demand loan agreement with the
- 16 Defendant Green Thumb Nursery and Landscaping Limited (“Green Thumb”) for the sum of
- 17 US\$3,822,953.00 in order to consolidate and restructure Green Thumb’s other loans and
- 18 overdraft facilities (“the Loan Agreement”). The sums loaned were secured by a legal charge
- 19 dated June 17 2010 registered against George Town central, Block 13D, Parcel 37 (“the
- 20 Property”). The Property is registered in the name of Green Thumb.
- 21
- 22



1 5. Green Thumb defaulted on the terms of the Loan Agreement and by March 12 2012 was six
2 months in arrears. Accordingly, FCIB's Attorneys served statutory notices on Green Thumb
3 pursuant to sections 72 and 64 of the Registered Land Law ("**RLL**") with a view to
4 enforcing the Bank's rights under the charge instrument. Green Thumb failed to pay the
5 arrears within 3 months. Clause 9.3 of the Charge provides that upon exercise of the power of
6 sale, FCIB had the right to sell the Property by private treaty as well as by public auction.

7
8 6. FCIB and Green Thumb entered into a Forbearance Agreement on August 31 2012 and that
9 Agreement was further extended until February 28 2013 so that Green Thumb could produce
10 its financial statements and allow FCIB to carry out a comprehensive assessment of Green
11 Thumb's accounts.

12
13
14 7. Mr. Cover in his affidavit states that by 28th February 2013, Green Thumb failed to comply
15 with the terms of the Forbearance Agreement. Further, that on 1 May 2013, Green Thumb
16 was put on notice that FCIB would invoke its statutory power to sell the Property pursuant to
17 section 75 of the **RLL**.

18
19 8. In or about June 2013, the Property was listed on the CIREBA Multiple Listing System
20 ("The MLS") through listing agent and realtor IRG at a list price of CI\$3,000,000.00. This
21 list price was in accordance with a valuation report that FCIB had obtained from BCQS
22 International ("BCQS") Valuers stating the market value to be CI\$3,000,000.00.



1
2 9. By letter dated August 20 2013, Stuarts, Attorneys, wrote to FCIB's Attorneys, Ritch &
3 Connolly, confirming that they now acted for Green Thumb, and enclosing a valuation from
4 DDL Studio Ltd, ("DDL") Valuers, which stated the market value was CI \$5,675,000.00.

5
6 10. By letter dated September 5 2013 Ritch & Connolly replied, stating that the DDL valuation
7 was not accepted because, for a number of reasons, it was flawed. The letter pointed out,
8 amongst other matters, that in any event, the Property had, by that stage, already been listed
9 for three months at CI \$3,000,000.00 without attracting any serious interest.

10
11 11. Approximately a month later, in a letter dated October 2 2013, Stuarts informed Ritch &
12 Connolly that Green Thumb had entered into a contract to sell the Property at a price of
13 US\$4,800,000.00 (CI\$3,936,000.00). According to Mr. Cover, (at paragraph 14),:-

14
15 *"The contract, which was provided with the letter, was dated 2 August*
16 *2013. It was surprising that an unknown overseas purchaser would offer to*
17 *purchase the property at such a price without having had any contact with*
18 *the listing agent, IRG, and that [Green Thumb] failed to notify [FCIB] of*
19 *the contract until 2 months after it was signed."*

20
21 12. On October 8 2013, it was agreed that FCIB would remove the listing of the Property for a
22 period of seven days to allow Green Thumb to provide further documentation and



1 information to show that the proposed sale was genuine. IRG were immediately instructed to
2 remove the listing.

3
4 13. However, by November 13 2013, when no further documentation and information had been
5 received from Green Thumb, Ritch and Connolly informed Stuarts that the Property would
6 be placed back on the Market if no response was received by November 15 2013.

7
8 14. There were a number of other communications back and forth with regard to the relisting of
9 the Property, when suddenly on 13 January 2014, Stuarts emailed Ritch and Connolly
10 informing that the sale pursuant to the contract dated August 2 2013 was to proceed and close
11 two days later on January 15 2014. Stuarts requested redemption figures which were
12 subsequently provided.

13
14 15. By a letter dated February 3rd 2014, Stuarts confirmed that the proposed sale had fallen
15 through, allegedly as a result of the advertisement of the Property by IRG.

16
17 16. Between February to April 2014, Ritch and Connolly and Stuarts continued to exchange
18 correspondence, with Ritch and Connolly attempting to seek confirmation that Green Thumb
19 would cooperate with the marketing and sale of the Property and Stuarts repeatedly asserting
20 that Green Thumb would not cooperate with marketing and sale of the Property, at what
21 Green Thumb considered to be an undervalue.



1

2 17. It is Mr. Cover's evidence that, as a result of the continuing dispute with Green Thumb
3 regarding the value of the Property and the difference between the valuation reports provided
4 by BCQS and DDL, FCIB instructed an expert in valuation, Michael Treacy of Bould
5 Consulting ("Bould") to examine and report upon the BCQS and DDL valuations.

6

7 18. In essence, the conclusion of the Bould Report was that the two valuations were flawed, that
8 the DDL report should not be relied upon and caution should be exercised in relation to the
9 BCQS Valuation.

10

11 19. Bould were also instructed to itself provide a further valuation report. In that Report dated
12 March 2014 Bould stated that the market value of the Property was CI\$1,950,000.00, or
13 US\$2,378,049.00. It was also stated that the market value with a special assumption of a 180
14 day marketing period was CI\$1,560,000 or US\$1,902,439.00.

15

16 20. Mr. Hurst deposed in his affidavit that he has been a member of the Cayman Islands Real
17 Estate and Brokers Association ("CIREBA") since 1997. He established IRG, after having
18 worked in the Cayman Islands Real Estate Market, including the commercial, development
19 and luxury residential property sectors, since arriving in the Cayman Islands in 1988. Prior to
20 that, he worked in the UK commercial property industry.

21

22



1 21. Mr. Hurst indicated that in July 2013, on the instructions of FCIB, he listed the Property on
2 the CIREBA MLS with a listing price of CI\$3,000,000.00 and the Property was immediately
3 advertised on the IRG and the CIREBA websites. Preparations were also made for wider
4 marketing, including photography of the Property, design of signage and design of a
5 marketing flyer.

6
7 22. On September 20 2013, IRG sent a marketing email, marketing the Property, to IRG's
8 commercial property investor database which comprised approximately 150 known
9 commercial property investors locally and internationally. IRG, Mr. Hurst stated,
10 administered its standard practice, which was to follow up with personal calls to key local
11 and international buyers.

12
13 23. IRG also placed an advertisement in the CIREBA Fall/Winter 2013 Magazine which is a free
14 magazine that is readily available from numerous retail outlets and business premises and of
15 which 14,000 copies are printed.

16
17 24. Mr. Hurst indicated that, having been informed by FCIB's Attorneys that Green Thumb had
18 complained that the listings and advertisements did not make it clear that it was only the
19 Property that was for sale (and not the Green Thumb business), in December 2013 he wrote
20 to CIREBA to request that the listing for the Property be revised to expressly state that it was
21 only the Property that was for sale. In January 2014 that amendment was made to the IRG



1 website. An advertisement was also placed in the CIREBA Spring/Summer 2014 magazine
2 which has a print run of 7,500 copies.

3
4 25. Mr. Hurst confirmed that upon a number of occasions, IRG was instructed by FCIB to
5 remove the Property from the IRG website and the MLS and then IRG would be
6 subsequently instructed to put it back on again. On one occasion, it was removed for the
7 reason that Green Thumb claimed to have an alleged contract for sale at US\$4.85 Million,
8 and another subsequent occasion, for FCIB to seek further advice from a Valuer.

9
10 26. On the 6th May 2014 FCIB instructed IRG to relist the Property with a list price of CI
11 \$3,000,000.00. On or about the 16th May 2014 Mr. Hurst was instructed that Mr. Godfrey
12 Dawkins, the principal of Green Thumb, continued not to agree to a "For Sale" sign being
13 put at the Property, unless the list price was increased to US\$4,850,000.00 or CI\$3,977,000
14 and Mr. Hurst was instructed to increase the list price, which he did accordingly.

15
16 27. By July 2014, a year after the Property had initially been listed, Mr. Hurst stated that there
17 had been no serious interest in the Property and no offers.

18
19 28. It was in those circumstances that Mr. Hurst said he recommended to FCIB that there should
20 be a sealed bid auction to try and attract some offers. At paragraph 20 of his Affidavit, Mr.
21 Hurst opined as follows:



1 *"20..... The advantages of a sealed bid auction in a case such as this are:*

2 *20.1. An intense period of "bid-specific" marketing brings the property to*
3 *the attention of a wider range of local and international investors who*
4 *otherwise would not notice the opportunity.*

5 *20.2. The process plays on the competitive nature of investors and creates*
6 *intrigue as to what is a sealed bid and how the process works.*

7 *20.3. Investors are not aware how many other bidders there are nor if there*
8 *are one of five bids and nor are they aware of the content of any other bid*
9 *again highlighting the competitiveness of the process. This enables us to*
10 *leverage one bidder against another.*

11 *20.4. The Information Memorandum is a formal, professionally-produced*
12 *document with a description of the property offering and bid process and*
13 *copy of the contract that the successful bidder will be expected to enter into*
14 *however the bid form is a simple one page form, easy to complete and*
15 *submit.*

16 *20.5. The opportunity often exists once a bid or bids have been received to*
17 *try and negotiate the bid price higher.*

18 *20.6. The whole process typically takes around 3 months, which, relatively,*
19 *is a very short period considering the time-on-market for a commercial*
20 *property in Cayman can be one to two years and that only 75% of all the*
21 *properties do not sell in any one year.*



1 20.7. IRG's... success rate with Sealed Bids has been around the 80% level
2 with the property either selling as a direct result of the bid process or
3 thereafter to one of the original bidders. "

4
5 29. FCIB accepted Mr. Hurst's recommendation.

6
7 30. In July 2014, IRG sent out an e-newsletter to their data base of approximately 2,500
8 subscribers in which the Property was the Feature Commercial Prime Listing. The
9 advertisement included the list price of US\$4,850,000.00 but also included the words
10 "sealed bid" in bold. The listing on the IRG website was also amended.

11
12 31. IRG ran a full colour back page advertisement in the Caymanian Compass on 31st July
13 2014 under the heading "Sealed Bids". The same advertisement appeared again on the 19
14 August 2014 and 3 October 2014.

15
16 32. In early August 2014 also a prominent colour advertisement for the Property was placed
17 on two occasions in the Caymanian Compass. The advertisement made it clear that the
18 Property was "available for purchase by sealed bid" and that interested parties should
19 contact Mr. Hurst.



1 33. On nine occasions between 11 August 2014 and 5 September 2014 IRG ran a prominent
2 black and red advertisement in the Caymanian Compass headed "For sale by Sealed Bid"
3 and the advertisement also instructed interested parties to register for information
4 packages. The deadline for the submission of bids was stated to be 12 noon on 5
5 September 2014. In addition, IRG also made personal calls to approximately 20 key local
6 and international buyers to encourage them to take part in the sealed bid process.

7
8 34. IRG prepared a detailed document entitled "Information Memorandum,
9 Acknowledgements and Instructions for the Sealed Bid Sale of 'Green Thumb Property' "
10 that was provided to any potential purchasers who registered an interest.

11
12 35. In total, Mr. Hurst stated that IRG received seven enquiries from potential purchasers, of
13 whom four registered and were sent information packs.

14
15 36. Two sealed bids were received which Mr. Hurst stated that he delivered to, and opened in
16 the presence of FCIB's Attorneys. One offer was from a Mr. Eyal Patel, which was for US
17 \$2,085,000.00 and the other was from one Kenneth C. Hall, for US \$2,300,000.00.

18
19 37. In paragraph 28 of his Affidavit, Mr. Hurst indicated, that as Mr. Hall states in his offer,
20 both he and Mr. Hurst own shares in an unrelated business. However, he continued, that as
21 a result of his relationship with Mr. Hall (and in addition in his offer letter Mr. Hall



1 indicated that he was the charge holder for the adjacent property), he was aware that Mr.
2 Hall had loaned Mr. Dawkins funds to facilitate the purchase of the parcel of land adjacent
3 to the Property and held a charge over it. It was Mr. Hurst's evidence that because Mr.
4 Hall held a charge over the adjacent parcel, Mr. Hall had a particular interest in the
5 Property over and above that which any other potential purchaser might have had. Mr.
6 Hurst also indicated his understanding to be that the possibility of combining both
7 properties was of particular interest to Mr. Hall.

8
9 38. FCIB subsequently informed Mr. Hurst that they wanted to accept Mr. Hall's offer,
10 subject to obtaining the Court's approval.

11
12 39. Mr. Hurst gave evidence that, throughout October, November and December, he had
13 several discussions with Mr. Hall and FCIB's Attorneys with a view to agreeing
14 contractual terms but unfortunately this did not meet with success. One of the concerns
15 that Mr. Hall raised during discussions with him was whether FCIB would be able to
16 secure the Court's approval of the sale price and possession of the Property. Mr. Hall
17 stated that it was his understanding that Mr. Dawkins intended to fight FCIB through the
18 Courts.

19
20 40. Mr. Hurst advised that even following the sealed bid process, IRG continued to market the
21 Property. In October 2014, IRG sent out a Multi-Property e-Mail Out featuring the



Property to its approximately 2,500 subscribers. An advertisement was also placed in the CIREBA Fall/Winter Magazine, again with a 14,000 copy print run.

41. In December 2014, IRG were instructed by the Bank to reduce the list price to CI\$2,500,000.00. Both the IRG website and the MLS listing were amended accordingly.

42. Mr. Hurst's Affidavit continued that in February 2015, he was informed by FCIB's Attorneys that they had succeeded in obtaining judgment against Mr. Dawkins as Green Thumb's Guarantor. Mr. Hurst stated that he contacted Mr. Hall again to see whether, in light of the fact that FCIB had demonstrated that it could succeed in Court against Mr. Dawkins, he would be prepared to proceed with the purchase of the Property at the price that he had previously offered. After further discussions with FCIB's Attorneys and Mr. Hall, contractual terms were eventually agreed.

43. The Sale and Purchase Agreement between FCIB and Mr. Hall is dated the 23rd March 2015. Two of the Vendor's Conditions contained therein are as follows:

"5.1. This Agreement shall be conditional upon the approval of the Grand Court of the Sale of the Property to the Purchaser at the Purchase Price within 90 days of execution of this Agreement.

5.2 This Agreement shall be conditional upon the granting by the Grand Court of an Order for Possession of the Property and a Writ of Possession to be executed within 90 days of the execution of this Agreement.



1 44. The Agreement also provided for vacant possession on completion and the Vendor, FCIB,
2 warranted that upon completion it would have installed locks on all entry and exit doors
3 and the yard entrance and would pass the keys over to the Purchaser.

4
5 45. Mr. Hurst indicated that the Property remains listed on the MLS and advertised on the
6 CIREBA website.

7
8 46. It was Mr. Hurst's evidence that, other than the two offers received as part of the sealed
9 bid process, no offers have been received for the Property and there has been no other
10 serious interest.

11
12 47. In paragraphs 37 and 38 of his Affidavit, Mr. Hurst stated as follows:

13 *"37... It is my firm belief, based on my general experience as a realtor in*
14 *Cayman and my specific experience of marketing the Property that the*
15 *agreed sale price of US\$2,300,000.00 is the highest price obtainable in the*
16 *current circumstances.*

17 *38. I believe that Mr. Hall's unique interest in combining the Property with*
18 *the adjacent parcel has influenced the fact that he has put forward the*
19 *highest offer. If this sale does not proceed, I consider it unlikely that there*
20 *will be another offer at this level without a change in the current market*
21 *conditions."*



1 **Proceedings by FCIB against Godfrey Dawkins**

2 48. It is not necessary to go into this matter in detail. However, a brief summary and outline
3 of the history and developments with regard to that matter may prove useful. In August
4 2014, FCIB brought separate proceedings, in Cause No. 0169 of 2014 against Godfrey
5 Dawkins as Guarantor of the Loans to Green Thumb. Mr. Dawkins attempted to add
6 Green Thumb to those proceedings by way of Third Party Notice and alleged that FCIB
7 had breached its duty when exercising its power of sale. It should be noted that those
8 proceedings did not directly concern the sealed bid process, the accepted bid of Mr. Hall,
9 and agreed sale now under consideration.

10

11 49. FCIB took the position that such issues should only be dealt with and raised in the event
12 that a sale was agreed and FCIB undertook, in correspondence dated respectively 10th and
13 18th September 2014, to apply to the Court for sanction of any sale.

14

15 50. Mr. Dawkins and Green Thumb did not agree to that course and continued to allege that
16 FCIB had breached its duty when exercising the power of sale.

17

18 51. FCIB applied for summary judgment in those proceedings. On 11th February 2015,
19 Malcolm J (Ag) heard that application, and on the 24th February 2015, in a written
20 judgment, Malcolm J granted the Bank's summary judgment application and dismissed



1 Mr. Dawkins' Third Party Notice. In the course of his judgment, examining the issue of
2 good faith on the part of FCIB, at paragraph 66, Malcolm J stated as follows:

3 *"66. Is there any credible evidence that the Bank did not act in good faith*
4 *or that the standard of their care fell below that of a reasonable man in*
5 *respect of the conduct of his own affairs? There is no such evidence....."*

6
7 52. The important point to appreciate as relates to the present application is that it was
8 against that background and during those proceedings that FCIB had indicated that it
9 would seek the Court's sanction in the event that FCIB decided to accept one of the offers
10 arising out of the sealed bid process.

11
12 **ORDERS MADE**

13 53. On the 22nd May 2015, this matter first came on for hearing, based upon the date set out
14 in the expedited form of Originating Summons filed on behalf of FCIB. At that time, Mr.
15 Dors, Counsel for FCIB indicated that the matter was urgent, as FCIB were required by
16 the terms of the Agreement to obtain the Court's approval and order for possession by the
17 21st June 2015,(a Sunday), in order to comply with the terms agreed.

18
19 54. An Acknowledgement of Service had been filed by the Firm of Hampson and Co on
20 behalf of Green Thumb, indicating that the latter intended to contest the proceedings. In
21 light of the urgent nature of the matter, I ordered, firstly, at the request of Mr. Dors, that



1 in light of the tight schedule of matters on the Cause List of the Grand Court that would
2 have previously been fixed for hearing, the matter be listed tentatively for the 17th June
3 2015 at 9:30 a.m., with a time estimate of three hours. With a view to avoiding the last
4 minute filing of evidence, again at Mr. Dors' request, I also ordered that all further
5 affidavits and evidence upon which the parties intended to rely, be served by 4:00 p.m. on
6 the 10th June 2015. No evidence was served on behalf of Green Thumb in accordance
7 with the time period set out in the Order.

8
9 55. This matter came back before me for hearing on the 17th June 2015. On the morning of
10 the hearing, Mr. Paul Keeble, who appeared for Green Thumb sought to have an affidavit
11 of a Mr. Collins, a former employee of IRG, put into evidence. Mr. Keeble stated that he
12 was in this position because Green Thumb learnt very late that the Real Estate Agent with
13 whom Green Thumb had been discussing certain relevant points was unable to give an
14 affidavit by reason of the CIREBA Code of Conduct, and in addition, Counsel had
15 himself been off island until recently. He submitted that the late service and introduction
16 of the Affidavit would not cause FCIB any insurmountable difficulty and would only deal
17 with two points. Mr. Dors strenuously opposed the grant of leave to allow the late
18 Affidavit, indicating that what Mr. Collins purports to give is opinion evidence, which of
19 course, only an expert can be allowed to give. The Affidavit was not an expert report and
20 Mr. Dors indicated that it would be quite prejudicial to his client because he would not be
21 in a position to take instructions on, respond to, or comment on, the contents of this
22 affidavit. Further, that this late service of the Affidavit flies in the face of the Court's case
23 management and time-tabling orders.



1 56. I refused to grant leave for Green Thumb to refer to and rely upon the Affidavit. In my
2 view, it was too late to allow this Affidavit in evidence as it would be unfair to FCIB to
3 do so. Further, the Orders of the Court were made for the very reason that the Court
4 wished to avoid the last minute receipt of evidence in order to maintain a fair balance
5 between the parties, and to allow for proper preparation by the parties, and indeed the
6 Court, particularly in relation to a matter requiring urgent resolution.

7
8 **The Submissions**

9 **FCIB**

10 57. Both a written skeleton argument and oral submissions were made on behalf of FCIB by
11 Mr. Dors. Counsel referred to section 72 of the **RLL** which, so far as material, provides as
12 follows:

13 *"72. Chargee's remedies*

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



1 (2) If the chargor does not comply within three months of the date of
2 service, with a notice served on him under subsection(1), the chargee
3 may-
4
5 (b) sell the charged property.....”

6
7 58. A section 72 notice was served on Green Thumb from as far back as the 12th March 2012.
8 Reference was also made to section 75, marginal note, “Power of Sale”, sub-section (1),
9 which provides as follows:

10 “(1) A chargee exercising his power of sale shall act in good faith and
11 have regard to the interest of the chargor, and may sell or concur with
12 any person in selling the charged land, lease or charge, or any part
13 thereof, together or in lots, by public auction for a sum payable in one
14 amount or by installments, subject to such reserve price and conditions of
15 sale as the chargee thinks fit, with power to buy in at the auction and to
16 resell by public auction without being answerable for any loss
17 occasioned thereby.”



18
19 59. Reference was made to **Practice Directions 5 of 2012, and 4 of 2014**, and to a number of
20 Caymanian authorities, including **Scotiabank (Cayman Islands) Limited v Rankine**
21 [2004-05 CILR Note 26], **Bank of Butterfield (Cayman) Limited v Jervis and Jackson**

1 [2011 (1) CILR 54], *Scotiabank & Trust (Cayman) Limited v Ebanks and Gordon*
2 [2012 (1) CILR 401], and to **Order 28 of the Grand Court Rules**, which deals with “
3 Originating Summons Procedure”.

4
5 60. Reference was made to the affidavit evidence and to the Agreement for Purchase and
6 Sale dated 23rd March 2015. Mr. Dors also referred to paragraph 2 of Practice Direction 4
7 of 2014, which states that:

8 “ *Where that open market process yields an offer which the chargee*
9 *wishes to accept but is concerned (for reason that the offer price is*
10 *significantly below the reserve price or for some other good reason) to*
11 *seek the sanction of the court pursuant to section 77, such an application*
12 *may be granted at the discretion of the court. The court will, however,*
13 *always be mindful of the fact that a chargee is not obliged to seek the*
14 *sanction of the court in the exercise of its power of sale granted by Section*
15 *75 and will reserve its discretion as to the appropriate order for costs that*
16 *it might make on any application.*”



17
18 61. It was noted by Mr. Dors that his client did not apply for, and was not seeking an order
19 from the Court as to the costs of this application, FCIB’s position being that the sale is
20 really one at public auction under section 75. Further, that in this case, the application
21 here, was really akin to there being “some other good reason”, in the sense that FCIB had

1 previously indicated, in light of the position taken by Mr. Dawkins and Green Thumb at
2 earlier stages, that it would seek the Court's approval or sanction.

3
4 62. Counsel also relied upon subsection (2) of section 75 of the **RLL** which states as follows:

5 *"75... (2) Where the chargor is in possession of the charged land or the*
6 *land comprised in the charged lease, the chargee shall become entitled to*
7 *recover possession of the land upon a bid being accepted at the auction*
8 *sale."*

9
10 63. Mr. Dors submitted that FCIB has, by accepting Mr. Hall's offer, accepted a bid at an
11 auction sale. Counsel further submitted that:

12 a. FCIB has complied with its duty to act in good faith and with due regard to the
13 interests of the chargor, Green Thumb.

14 b. The agreed sale price of US\$2,300,000.00 represents the current 'market price' of the
15 Property.

16
17 64. Accordingly, FCIB sought the Court's sanction of the sale price of US\$2,300,000.00 and
18 an immediate Order for Possession.



1 **Green Thumb**

2 65. Mr. Keeble, on behalf of Green Thumb, made a number of oral submissions. He said that
3 in the first place, one is not sure what the nature of the application by FCIB is. He posed
4 the question whether this sale is taking place by public auction or is it by private treaty?
5 He queried whether FCIB is proceeding on the basis that it is carrying out a sale under
6 section 75, or is it seeking the Court's sanction pursuant to section 77 of the **RLL** to act
7 upon a variation to the charge?

8
9 66. Section 77 of the **RLL** provides as follows:

10 *"77. Variation of powers.*

11 *"The provisions of sections 70(2) and (3), 72, 73, 74 and 75 may, in their*
12 *application to a charge, be varied or added to in the charge:*

13 *Provided that any such variation or addition shall not be acted upon*
14 *unless the court, having regard to the proceedings and the conduct of the*
15 *parties and to the circumstances of the case, so orders."*

16
17 67. It was submitted that it was not open to Mr. Dors to say that the sale is one by public
18 auction, but that if the Court was not with him on that point, to then ask the Court to
19 treat the sale as a sale by private Treaty. According to Mr. Keeble, FCIB must "nail its
20 colours to the Mast". It was submitted that this was not a sale by public auction; it was a
21 sale by a sealed bid, by private treaty and is not a sale by public auction Mr. Keeble noted



1 also that it appears from Mr. Hurst's affidavit, the sealed bid sale was not advertised on
2 the MLS system at any time.

3 68. Mr. Keeble also referred to a very recent amendment to the *Grand Court Rules, Order*
4 *96*, which was amended on the 16th March 2015 and is headed "The Registered Land
5 Law". He submitted that the provisions of this Order make it abundantly clear that FCIB
6 must demonstrate where its case falls, because different Rules apply, depending upon
7 whether it is a public auction after which possession is being sought, or whether a
8 variation is being sought under section 77. Where the chargee is seeking to recover
9 possession after a public auction, it was submitted that the right to the writ of possession
10 occurs following the sale by public auction. Reliance was placed on Order 96 Rule 2 that
11 indicates Form No. 78 is the Form of Originating Summons appropriate for an
12 application by a chargee for recovery of possession. Reliance was also placed upon Order
13 96 Rule 3 which pertains to section 77 of the *RLL* and requires that the originating
14 summons be titled in the matter of an application under section 77 of the *RLL* and to
15 specify the section or sections of the *RLL* the variation of, or addition to which, the
16 Plaintiff seeks sanction.



17
18 69. Mr. Keeble also made an alternative submission in the event that the Court was not with
19 him on those procedural points previously discussed. He referred to the fact that one or
20 more of the advertisements stated that the premises were only 14,000 square feet whereas
21 the square footage of the Property was variously stated to be, by BCQS, 14,647, DDL
22 15,000, and Bould, 14,560, square feet. He also stated that the advertisements should

1 have included photographs of the warehouse, which was what was being sold. He
2 submitted that in the circumstances FCIB did not act in the manner required by law,
3 which was to act like a reasonable man in the conduct of his own affairs, and also to have
4 due regard for the interests of the chargor Green Thumb.

5
6 **Submissions in response**

7 70. As Mr. Dors had had no notice of these legal points to be taken by Mr. Keeble, no
8 skeleton argument having been provided to Mr. Dors or to the Court prior to the hearing,
9 I allowed him to reply in some detail. Mr. Dors conceded that the Originating Summons
10 here does not say what section of the *RLL* the application is filed under. However, his
11 primary position was that the application is one for the Court to approve the sale after
12 public auction, at a price that represents the market value and that FCIB seeks an order
13 for recovery of possession under section 75(2). He submitted that the evidence is clear
14 that throughout the process, the Property was listed on the MLS, and that it is trite law
15 that a sale through the MLS is a sale by public auction. He further submitted that the fact
16 that the sale took place by way of sealed bids does not take us beyond the realms of sale
17 culminating after listing on the MLS and sale through public auction. It was further
18 posited that although FCIB had reserved the right not to sell, if it so desired, upon
19 receiving the sealed bids, the sale was in effect a sale to the highest bidder since Mr. Hall
20 was in point of fact the highest bidder and his bid was accepted.



1 71. Mr. Dors made the point that, although he used the expedited Form of Originating
2 Summons, Form 3, instead of the new Form 78, there is no substantive difference, since
3 the Form he used has set out the relief claimed. He submitted that it could not be correct
4 to interpret the language of Form 78 as meaning, as Mr. Keeble argued, that FCIB cannot
5 get a Writ of Possession until after there has been a sale of the property, as the language
6 of the Statute in section 75(2) is “upon a bid being accepted”, and not “upon sale being
7 completed”. He said an interpretation that meant that the parties would complete the sale
8 in circumstances where the chargor may or may not leave the premises voluntarily would
9 make no sense.



10
11 72. Mr. Dors argued alternatively, that in the event that the Court found that the sale was not
12 one by way of public auction, but was instead a sale by private treaty, requiring the
13 Court’s sanction under section 77, then he submitted that the fact that there was no
14 compliance with the new Order 96 Rule 3 was not fatal, as argued by Mr. Keeble.
15 Reference was made to Order 2 Rule 1 of the Grand Court Rules which states that the
16 failure to comply with the requirements of the Rules shall be treated as an irregularity and
17 shall not nullify the proceedings. Reference was also made to Rule (3) which addresses
18 the Court’s power to allow such amendments to be made, and to make such order if any
19 dealing with the proceedings generally as it thinks fit. Counsel also submitted that in so
20 far as Order 96 Rule 3 required the filing of an originating summons in Form 2, and not
21 Form 3, there was no material defect, because this matter is urgent, and this was the
22 reason why he used the expedited Form. Secondly, in so far as Form 2 requires a concise
23 and precise statement of the questions for determination, the subject Originating

Summons did contain a concise statement as to the issues requiring the Court's determination.

The Law

73. In *Scotiabank & Trust (Cayman) Limited v Ebanks and Gordon* [2012 (1) CILR 401] Henderson J reviewed a number of leading authorities, including the decision of the Court of Appeal in *Paradise Manor Ltd v Bank of Nova Scotia* 1984-1985 CILR 437. That case itself reviewed some of the leading cases, notably *Tse Kwong Lam v Wong Sit Sen* [1983] 3 All E.R. 54, and *Cuckmere Brick Co. Ltd. v Mutual Fire Ltd.* [1971] 2 All E.R.633. At pages 403-404 of *Scotiabank v Ebanks* , Henderson J discussed some of the relevant considerations as follows:

"The context

2. If there is a default in payment under a charge, the chargee (after serving the requisite notices) may proceed to sell the charged property : the Registered Land Law (2004 Revision) ("the Law"), s. 72(2)(b). This entitlement is not free of obligation or risk. When exercising a power of sale, a chargee is obliged by the law to act in good faith and with regard to the interests of the chargor; the Law, s. 75(1). The nature and extent of that obligation have been canvassed in depth by our Court of Appeal in Paradise Manor Ltd. v Bank of Nova Scotia. Each of the three Justices of Appeal addressed the question in separate judgments but similar terms. Zacca P. said (1984-85 CILR at 453-454):



1 *"What was the duty of the bank and the standard of duty in exercising its*
2 *power of sale? The bank had to show that the sale was made in good faith*
3 *and that the bank had taken all reasonable precautions to obtain the best*
4 *price reasonably obtainable at the time. In Tse Kwong Lam v Wong Chit*
5 *Sen Lord Templeman stated ([1983] 3 All E.R. at 59):*

6 *' In the view of this Board on authority and principle there is no hard and*
7 *fast rule that a mortgagee may not sell to a company in which he is*
8 *interested. The mortgagee and the company seeking to uphold the*
9 *transaction must show that the sale was in good faith and that the*
10 *mortgagee took reasonable precautions to obtain the best price*
11 *reasonably obtainable at the time.'*

12 *In Cuckmere Brick Co. Ltd. v. Mutual Fin. Ltd..... In considering the*
13 *duty of a mortgagee, Salmon LJ stated ([1971] 2 All E.R. at 643):*

14 *'It is well settled that a mortgagee is not a trustee of the power of sale for*
15 *the mortgagor. Once the power has accrued, the mortgagee is entitled to*
16 *exercise it for his own purposes whenever he chooses to do so. It matters*
17 *not that the moment may be unpropitious and that by waiting a higher*
18 *price could be obtained. He has the right to realize his security by turning*
19 *it into money when he likes. Nor, in my view, is there anything to prevent a*
20 *mortgagee from accepting the best bid he can get at an auction, even*
21 *though the auction is badly attended and the bidding exceptionally low.*
22 *Providing none of these adverse factors is due to any fault of the*



1 mortgagee, he can do as he likes. If the mortgagee's interests, as he sees
2 them, conflict with those of the mortgagor, the mortgagee can give
3 preference to his own interests, which of course he could not do were he a
4 trustee of the power of sale for the mortgagor."

5 Kerr, J.A. said (ibid, at 472):

6 "In my view, the weight of authority is in favour of a duty to take such
7 care in realizing the true market value on the sale of the charged property
8 as a reasonable man would in his own private affairs."

9 Henry J.A said(ibid, at 487-488):

10 "In the final analysis the bank's obligation is that imposed by s. 75 of the
11 Law to 'act in good faith and have regard to the interests of the charger
12 [sic]....' This does not mean that the bank is required to put the chargor's
13 interest before its own. The bank must take all steps reasonably necessary
14 to ensure that it obtains the true value of the property to be sold. But the
15 true value is essentially the price which the property will fetch at the
16 particular time on the open market."

17
18 74. In **Scotiabank v Ebanks**, Henderson J also decided that "sale by public auction"
19 does not necessarily require a formal auction with a bidding process conducted by
20 an appointed auctioneer but "in substance, the sale of a property through the MLS
21 is a public auction". At page 405, the learned judge stated:



1 *“Is the sale of property through the Multiple Listing Service a public*
2 *auction?”*

3 5 No judicial definition of a public auction has been brought to my
4 attention. An auction is nothing more than “a public sale in which goods
5 or property are sold to the highest bidder” (Oxford Dictionaries Online)
6 or “a sale of property to the highest bidder” (Merriam-Webster
7 Dictionary). The variant in which the property is offered initially at a high
8 price, which is lowered progressively until a sale is effected, is called a
9 “Dutch” or “reverse” auction. US Treasury Bills are sold under this
10 system. The listing of real estate on the Multiple Listing Service has all the
11 essential attributes of a reverse auction. The list price is set at a high level
12 initially, then lowered progressively until a sale is made. The property is
13 advertised widely and is available to any member of the public with an
14 interest in purchasing. In substance, the sale of the property through the
15 Multiple Listing Service is a public auction.”

16
17 75. See also Practice Direction No. 5 of 2012, pages 4-5. In Order 96, Rule 1, “public
18 auction” is a term defined as including the listing and marketing of the charged
19 land for sale on a public multiple listing system approved by the Court.



20
21 76. In *Butterfield Bank v Jervis & Jackson* , Smellie CJ, at paragraph 6, confirmed that the
22 duty upon the chargee to act in good faith requires the chargee to seek to get the best

1 price that the market will yield (“the market price”). In order to do so, the chargee will
2 obtain an independent valuation and seek to market the property for sale by public
3 auction at that valuation price or some other reserve price that the chargee might set
4 pursuant to section 75 of the **RLL**.

5
6 77. The CILR Note of the decision of Henderson J in **Scotiabank v Rankine** states:

7 *“The best evidence of the true value of real estate is the reaction of*
8 *potential purchasers and offers made by them, assuming that the property*
9 *has been listed on the Multiple Listing Service with accurate particulars*
10 *and advertised in a reasonable and competent fashion. Estimates in*
11 *appraisals that are more optimistic than the highest offer received after*
12 *extended exposure of the property to the market place, must be viewed as*
13 *erroneous.”*

14
15 78. This principle was confirmed in Practice Direction 5 of 2012 at paragraph c on page 3.

16 79. In Practice Direction No. 5 of 2012 it was also confirmed, at page 5, that there is no need
17 for an application to the Court for placement of the property for sale by public auction
18 (whether by way of a listing on the MLS or by formal auction) in the first instance by the
19 chargee who, by virtue of the powers given under the charge and section 75 of the **RLL**,
20 can sell by way of public auction without the leave of the Court.



1

2 **Resolution of the Issues**

3 80. It seems plain to me that this property was widely advertised. It was also listed on the
4 MLS for a collectively long period of time, albeit it was delisted from time to time,
5 largely to deal with problems alleged, and objections raised by Green Thumb. Listing
6 prices were set, initially, and listed with the MLS in July 2013 in accordance with a
7 valuation which FCIB had received from BCQS dated February 2013. Although FCIB
8 had in the notices and advertisements listing the Property for sale by sealed Bid reserved
9 the right to withdraw the Property at any time or to reject bids or offers, at the end of the
10 day, the Property was in fact sold to the highest bidder. I accept the evidence of Mr. Hurst
11 that, (other than the 2 offers discussed), no serious expressions of interest were made, and
12 the bid or offer from Mr. Hall was therefore the highest bid. In my judgment, a sealed bid
13 process may not necessarily always be a public auction or be capable of being classified
14 as such. Further, although auctions are usually public, there can also be private auctions,
15 with a limited category of persons being allowed to participate. The surrounding
16 circumstances involved in the process are important.

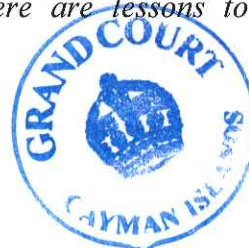


17
18 81. However, I agree with Mr. Dors that, in the circumstances of this case, with the backdrop
19 of listing on the MLS, the IRG website, and the other various and widespread advertising
20 and listing, with the Property being available to any member of the public with an interest
21 in purchasing, the fact that the process carried out was a sealed bid process did not
22 change the real nature of the process as being in essence a sale by public auction. This is

1 the case, in my judgment, along the same or similar lines as identified by Henderson J in
2 **Scotiabank v Ebanks**. In so far as the judgment of Henderson J includes within the
3 definition of public auction, a reverse auction, where a list price may be lowered
4 progressively until a sale is made, and where, like here, the Property was advertised
5 widely and any member of the public with an interest in purchasing could purchase, then
6 the sale under consideration here is in my view, similarly a sale by public auction.

7
8 82. After I had made my decision on the 18th June 2015, and whilst preparing my reasons for
9 judgment, I noted that the Judicial Committee of the Privy Council handed down a
10 decision on the 22nd June 2015, in **Hickox and others v Brilla Capital Investment Master**
11 **Fund SPC Ltd.** [2015] UKPC 30. It was an appeal from the Court of Appeal of the
12 Eastern Caribbean Supreme Court (Anguilla). As Lord Neuberger, who delivered the
13 advice of the Board stated at paragraph 2, the factual background of the case was quite
14 complicated, and involved a bidding process. At paragraph 57 the Board engaged in a
15 useful discussion about sealed bids and contested bidding processes and auctions. This
16 discussion suggests to me that the surrounding circumstances, including the level of
17 advertising and degree of access by the public assist in determining whether a sealed bid
18 process can fall within the meaning, or enlarged meaning (as is the inclusion of listing
19 and marketing on the MLS), of “public auction”. The judgment in its last paragraph,
20 states:

21 “57. The Board would like finally to add that, although the order made by
22 Jacques J is being upheld, there are lessons to be learnt from the



1 *procedure which he adopted. Although it was lawful and fair, it was not*
2 *optimal. It appears to the Board that, if, as in this case, a judge has*
3 *decided to take ultimate de facto control of a contested bidding process,*
4 *he would normally be well advised to adopt one of two processes. He*
5 *should either (i) set the rules for an auction and then conduct the auction*
6 *himself or arrange for someone else to do so, or (ii) have a sealed bid*
7 *arrangement. Option (i) would have involved Brilla and Hickox bidding*
8 *openly against each other around 1.15 or 1.30 pm on 30 April, with the*
9 *liquidator's representative taking the bids, until one or other of them*
10 *pulled out. Option (ii) would have involved Brilla and Hickox each*
11 *deciding on their best offer, without knowing what the other was bidding,*
12 *and each of them communicating their respective offer to the liquidators*
13 *or the judge in a sealed envelope by 1.30 pm on 30 April, and the highest*
14 *bid being successful. Of course, the circumstances of a particular case*
15 *may mandate a different procedure, but normally one of these two well-*
16 *established procedures should at least be seriously considered, as they are*
17 *simple, fair as between the potential purchasers, and well suited to*
18 *achieve the best price"*

19
20 83. In my judgment, it seems plain that FCIB has accepted Mr. Hall's bid and entered into
21 this sale in good faith. The market has spoken, and the best evidence of market value is
22 what has been offered. I am satisfied that there is no evidence that the sale is at an
23 undervalue. On the contrary, the sale price is within the ball-park of the figure assessed



1 by Bould in their professional opinion as being the market value. FCIB does appear to
2 have exercised the type of care that a reasonable man would utilize in the conduct of his
3 own affairs. I am satisfied that FCIB took due care to realize the true and current market
4 value of the Property. At page 488 of the judgment in *Paradise Manor* Kerr JA spoke of
5 the sale under consideration by the Court of Appeal in that case in terms that in my view
6 are also apposite to the instant case. The learned Judge of Appeal stated:

7 *"The only realistic offer which the bank has been able to obtain is that in*
8 *respect of which the approval of the court has been sought. This is not a*
9 *case in which the chargee has rushed precipitately to sell the property at*
10 *an inopportune time to the disadvantage of the charger. The bank has*
11 *gone to considerable trouble and expense with a view to ensuring that the*
12 *property could be sold for its true value. It has acted with restraint and*
13 *forbearance and in good faith, to the extent of possibly jeopardizing the*
14 *proposed sale while allowing the charger and the guarantors further time*
15 *to make satisfactory financial arrangements. In my view the bank has*
16 *carried out its obligation in relation to the proposed sale. In all the*
17 *circumstances it does not seem to me that the proposed sale by the bank*
18 *can be regarded as a sale at an undervalue."*

19
20 84. The matter of the square footage being variously stated does not in my view affect the
21 question of whether FCIB has acted in good faith. There is no evidence that the stated
22 square footage at an amount less than in the Valuation Reports (which in any event all



1 state differing square footage) has resulted in interested persons being turned off or
2 dissuaded from looking at, or taking or expressing an interest in the Property. Further, I
3 agree with Mr. Dors that the fact that there is no photograph of the warehouse is of no
4 materiality, particularly given the nature of a warehouse, and that persons purchasing a
5 warehouse are not likely to require viewing of a two-dimensional photograph in order to
6 take an interest in purchasing the Property. Purchasers do not, I agree, ordinarily purchase
7 warehouses for their aesthetic qualities. In any event, FCIB at all times took advice from
8 and allowed the advertising and marketing to be handled by Mr. Hurst and IRG, who
9 appear to be competent and experienced in this regard. There is further and in any event,
10 no evidence to suggest that any of these matters would have had or had an adverse or
11 detrimental effect on the interest of potential purchasers.

12
13 85. I accept the evidence of Mr. Hurst that the agreed sale price is the highest price
14 obtainable in the current circumstances, and further, that Mr. Hall's unique interest in
15 combining an interest, or potential interest in the Property, with the adjacent property, has
16 influenced the fact that he has put forward the highest offer that has been made, in
17 circumstances where the Property has not generated a great amount of interest.

18
19 86. In my view, Green Thumb being in possession of the charged land, FCIB became entitled
20 to recover possession of the Property upon accepting Mr. Hall's bid. There can be no
21 reasonable interpretation that would mean the sale would have to be completed before
22 FCIB could be entitled to a Writ of Possession; such a meaning would defy logic and



1 common sense. The expression "sold by public auction" in Form 78 does not mean that
2 the sale must have been completed before the chargee can apply for a Writ of Possession.
3 Whatever the Form's wording may be, it must either be interpreted, or read in such a
4 manner as to accord and be consistent with the statutory provision as set out in section
5 75(2) of the *RLL*, which speaks to the chargee's entitlement occurring on a bid being
6 accepted at the auction sale, and not to the completion of any sale.

7 (my emphasis)

8
9 87. In the event that I am wrong about the sale being one under section 75 and being a sale
10 by way of public auction, and in the event that this is really a sale by private treaty or
11 some variation requiring the Court's sanction under section 77, in my judgment, the
12 failure of the Originating Summons to mention section 77 or to be in Form 2 is really of
13 no material or substantive significance. To hold as Mr. Keeble asked me to, that FCIB
14 were not entitled to the relief sought, and that I should refuse the application, would be to
15 allow form to triumph over substance. If I had taken the view that this was an application
16 under section 77, as Order 2 indicates, the failure to comply with the very recent Order 96
17 Rule 3 would be a mere irregularity and would be of such a nature that it would be
18 capable of readily being cured by amendment. I cannot in any event see that any
19 prejudice would have been caused to Green Thumb. Further, *Order 2 Rule 2(2)* suggests
20 that points concerning irregularities in procedure should be taken by way of summons or
21 motion, upon notice, and with the grounds of objection clearly set out in the application.
22 This was not done here.

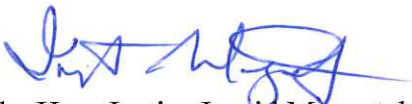


1

2 88. However, as I have indicated, I consider that this sale falls within the section 75 public
3 auction provision and thus I took the view that amendment was unnecessary in all of the
4 circumstances and made the orders set out in the first paragraph of this judgment.
5 Although it was not necessary as a matter of law for FCIB to seek the Court's approval of
6 the sale in these circumstances, I considered it understandable for FCIB to fulfill the
7 undertaking it had given previously to Green Thumb in that regard. In the circumstances,
8 it was appropriate for the Court to grant its approval, making no order as to costs.

9

10



11 The Hon. Justice Ingrid Mangatal
12 Judge of the Grand Court



