

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

3
4 **CAUSE NO. G 322 OF 2012**
5

6 **BETWEEN:**
7

8 **FIRST CARIBBEAN INTERNATIONAL**
9 **BANK (CAYMAN) LIMITED**

10 **Plaintiff**

11 **AND**

12 **MALLY & PLANT CONSTRUCTION**
13 **(CAYMAN) LIMITED**

14 **Defendant**

15
16 **Appearances:**

Ms. Joanne Verbiesen for the Plaintiff

17 Mr. Clive Smith in person for the Defendant in his
18 capacity as sole director.
19

20 **Before:**

Hon. Justice Richard Williams

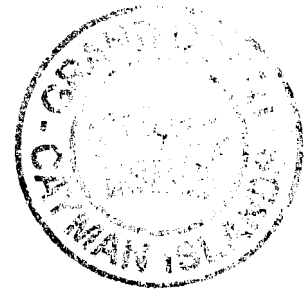
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22 **Heard:**

28th August 2014

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24 **Draft transcript provided:**

28th August 2014

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26 **Perfected transcript circulated:** 2nd September 2014
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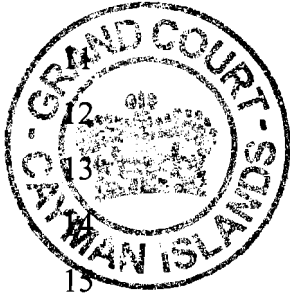
30 **TRANSCRIPT OF EX TEMPORE JUDGMENT**
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- 32 1. Due to the urgency for the Court to make a decision because of an offer to
33 purchase, I feel it important to give the parties an immediate decision and the
34 reasons for my decision. Accordingly, rather than providing a written ruling at a

1 later date I now deliver this ex tempore judgment. I trust that the parties will
2 understand why it may not read as a formal written ruling.

3

4 2. By Summons issued on 6 August 2014, the Plaintiff Bank ask for an order setting
5 aside paragraph 4 of the order of Hall J. dated 12 August 2013 in which she set a
6 reduced reserve price of CI\$631,000 in relation to the property known as
7 Registration Section George Town South Block 14D, Parcel 356 (“the Property”)
8 and an order permitting the Plaintiff to accept an offer to purchase the Property
9 for CI\$500,000. The latter application is made by the Plaintiff Bank being
10 conscious that Paragraph 2 of the Practice Direction No. 4 of 2014 provides that:



11 *“Where that open market process yields an offer which the chargee*
12 *wishes to accept but is concerned (for reason that the offer price is*
13 *significantly below the reserve price or for some other good*
14 *reason) to seek the sanction of the court pursuant to Section 77,*
15 *such an application may be granted at the discretion of the court.”*

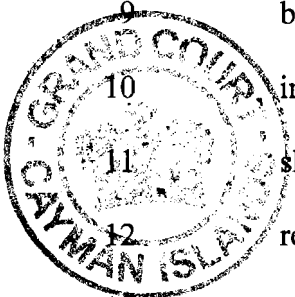
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17 3. The proceedings were commenced by the Plaintiff’s Originating Summons issued
18 on 17 July 2012. That Originating Summons was amended by order of Hall J.
19 made on 13 June 2013. The Amended Summons came before Hall J. on 12
20 August 2013. The Defendants did not attend that hearing. At that hearing the
21 Learned Judge granted leave to sell the Property by private treaty. Despite having
22 a valuation from BCQS of CI\$545,000 and a valuation from Integra Realty
23 Resources of CI\$675,000, the Bank only sought and obtained an order that the
24 Property be sold at a reserve price of CI\$694,500. The order also provided that if
25 the Property remained unsold after three months the reserve price would be

1 reduced to CI\$631,000 and if it remained unsold after a further three months the
2 Plaintiff then had liberty to apply for a further reduction.

3

4 4. The Property was first listed on the Multiple Listing Service (“MLS”) by
5 Rainbow Realty on 6 January 2014 at a price of CI\$694,500. The Property was
6 also advertised on alternate weeks in the Cayman Compass newspaper (“the
7 Compass”) and in the Spring Edition of the 2014 CIREBA Real Estate Magazine.
8 By June 2014 there had been little interest shown in relation to the Property, there
9 being only three requests for showings by local businessmen. The realtor
10 indicated that the follow-up information from the viewers was that the Property
11 should have had a value of around CI\$500,000 due to the likely return from
12 rentals. No offers were made.



13

14 5. The Bank being conscious of the Preamble to Practice Direction No. 4 of 2014
15 dated 6 January 2014 which states:

16 *“Where the reserve price is not met within a reasonable time, the*
17 *discretion in the chargee to instruct its agent gradually to lower*
18 *the reserve until the true market price is realised, must also be*
19 *recognised.”*

20

21 instructed the realtor to list the Property at CI\$555,500 from 25 June 2014. The
22 Property was marketed on alternate weeks in the Compass and in the MLS system
23 at a price of CI\$556,000 and on the Realtor’s website for CI\$555,500. Having
24 regard to the above methods utilised, I am satisfied that the realtor has marketed
25 the Property in an appropriate manner. There is no merit in Mr. Smith’s

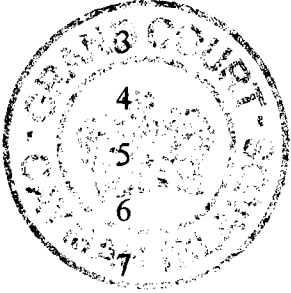
1 submission made in Court this morning that there is a conspiracy, in which the
2 realtor is acting unprofessionally to promote the interests of the Plaintiff Bank and
3 thereby not attempting to obtain the proper price for the Property.

4
5 6. The evidence of Billy Culbert, the realtor, set out in his affidavit is that during the
6 four weeks of marketing at the reduced price two requests for showings were
7 made through a separate real estate company, Ritch Realty. The first viewing
8 resulted in no interest. The second viewing was by an overseas investor who made
9 an offer of CI\$500,000. The Bank made a counter offer of CI\$530,000. The
10 prospective purchaser indicated that he would only purchase at CI\$500,000. The
11 Bank accepted the offer of CI\$500,000 conditional upon receiving this Court's
12 sanction for the sale at that price.

13
14 7. On the evidence before me, it is clear that the latter reduced reserve price set by
15 Hall J. of CI\$631,000 is too high and does not reflect the true market value of the
16 Property. Although initially Mr. Smith argued that the Property should be
17 marketed at CI\$694,500, he later contended that the price be CI\$580,000.
18 Therefore, I am satisfied that paragraph 4 of the order of Hall J. made on 12
19 August 2013 setting the reserve price at CI\$631,000 be set aside.

20
21 8. I now go on to consider whether I should make an order permitting the Bank to
22 accept an offer to purchase the Property for CI\$500,000. Henderson J. as far back

1 as 2004 in his judgment in Scotiabank (Cayman Islands) Ltd v William Horter
2 Rankine Cause No: 72 of 2002, stated that in his view:



“The best evidence of the value of real estate is the reaction of the marketplace, always assuming that the property has been listed on the Multiple Listing Service (with accurate particulars) and advertised in a reasonable and competent fashion.”

8 As I have already indicated, I am satisfied that the marketing of the Property has
9 been appropriate. The Property has been marketed and advertised for an eight-
10 month period, and I am satisfied that that is a sufficient period of time to ascertain
11 the realistic market price in the prevailing conditions for such a property.

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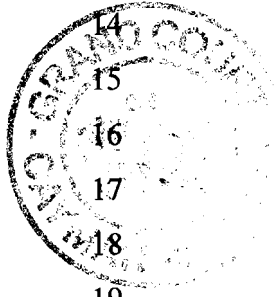
13 9. When I consider whether to sanction a sale for the Property at CI\$500,000 I have
14 regard to the contents of the Practice Direction No. 5 of 2012 and the cases
15 referred to therein. I have regard to the factors set out therein, namely:

- 16 a) that the Property must not be sold at undervalue;
17 b) that the sale has to be in good faith;
18 c) that the best evidence of market value is the reaction to the market;
19 d) that the standard of care required of the Plaintiff Bank is that of a
20 reasonable man in respect of the conduct of his own personal affairs; and
21 e) that leave to sell at a reserve price set by the Court will not usually be
22 granted without previous attempts to market the Property.

23

24 10. Importantly, the Bank has also provided a recent valuation prepared by Bould
25 Consulting dated 15 August 2014. The Court has been informed that the

1 appraiser, Michael Treacy, was not aware of the CI\$500,000 offer when he
2 prepared to report. In the report he gives the market valuation at CI\$490,000. This
3 is CI\$10,000 below the offer. I note that the Property has been on the market for
4 eight months and that the Bank is entitled to have it sold within a reasonable
5 period of time and that Mr. Treacy has given the special assumption valuation
6 with a marketing period of 180 days of CI\$400,000. This valuation is important,
7 as it meets the potential concerns that I may have when considering Practice
8 Direction No. 4 of 2014 that the agent when dropping the price from CI\$631,000
9 straight to CI\$555,500 has not gradually lowered the reserve price until the true
10 market price was realised. The reaction to the market coupled with the appraisal
11 fortifies my view that CI\$500,000 is the appropriate valuation for this particular
12 investment property at this time. Paragraph (i) on page 5 of the Practice Direction
13 No. 5 of 2012 provides that:



14 *“The sanction of the court of the price obtained whether by public*
15 *auction (by listing on the MLS or otherwise) or by private treaty is*
16 *more likely to be granted where the original asking price had been*
17 *set by the chargee by reference to an independent valuation. In this*
18 *way the court will be able more likely to conclude that the charge*
19 *has acted in good faith in exercise of its rights under the charge.”*

20
21 11. In reaching my decision I have also considered that Mr. Smith, the sole director
22 of the Defendant, has been given sufficient notice of this hearing to enable him to
23 prepare for this hearing. I am satisfied that although he is not represented, and
24 having received his indication that he does not seek legal representation, that he
25 has a proper understanding of the application. I have been careful to give him

1 every opportunity to outline to the Court this morning why he feels that the
2 Property is undervalued at CI\$500,000 and detail what evidence he has to support
3 his contention. Regrettably, he has only been able to provide me with his opinion
4 and no evidence to support a contention that the proper figure is nearer
5 CI\$580,000. I note his concern that a sale at CI\$500,000 would leave him with
6 negative equity of over CI\$50,000. However, this does not affect my view about
7 the proper valuation of the Property, nor does it introduce an element of
8 unfairness or unreasonableness in the Plaintiff Bank's application.

9

10 12. I am satisfied that the Plaintiff Bank has taken all reasonable steps to comply with
11 its obligations and is therefore entitled to an order approving the sale of
12 CI\$500,000.

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14 Dated this 28th day of August 2014.
15 Perfected this 2nd day of September 2014

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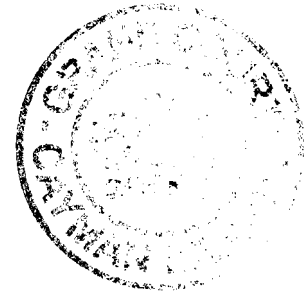
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THE HONOURABLE MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT