

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**
3 **CIVIL DIVISION**

Cause No: G 0139/2012

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6 **BETWEEN:**

- 7 **1. PHILLIP HYRE**
8 **2. KEVON HYRE**

9
10 **PLAINTIFFS**

11
12 **AND:**



13 **HSBC BANK (CAYMAN) LIMITED**

14
15 **DEFENDANT**

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18 **Appearances:**

Mr. Dennis Brady for the Plaintiffs

19
20 **Mr. William Jones of Ogier for the**
21 **Defendant**

22
23 **Before:**

The Hon. Mr. Justice Charles Quin

24 **Heard:**

25 **26th October 2012 and 9th November**
26 **2012**

27 **JUDGMENT**
28

29 1. This is the hearing of Plaintiffs' Originating Summons dated the 14th March
30 2012 in which they claimed the following relief:

- 31 i. An injunction restraining and prohibiting the Defendant whether by
32 itself, its servant or agent or otherwise from any and all action
33 pursuant to s.64(2) of the Registered Land Law (2004 Revision)
34 ("the Law") the objective of which is to proceed to sell the several

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properties owned by the Plaintiffs and for which properties the Defendant holds the first legal charges.

ii. An order of mandamus that the Defendant provides the requisite consent to:

- a) the stratifying of the housing units situated at Registration Section Prospect, Block 22E Parcels 78 and 80;
- b) the sale of raw land situated at Registration Section, West Bay North West Block 4E Parcels 118, 119 and 120;
- c) the sale of the apartment units after being stratified in order that the Plaintiffs might realise monies from the sale of the said units in order to pay off the sum of monies owed to the Defendant.



iii. An order that the two percentage surcharge by the Defendant be reversed.

The Plaintiffs believe that the Defendant equally contributed to the problems by failing as a lender to work with the Plaintiffs. In short there was no contract of an *uberrimae fidei*. Had the Defendant allowed the Plaintiffs not only to stratify the property but also allowed the sales to be effected based on paragraph 8 clause 9 of the Covenants section of the Mortgage Loan contract, the loan would have been paid off.

1 2. The evidence supporting the Plaintiffs’ Originating Summons was taken from
2 the affidavits of the Plaintiffs dated the 14th March 2012; the affidavits of
3 Bennard Sherrin Ebanks and Torrance Bobb – both filed on the 18th October
4 2012; the affidavit of Nicole Bogle-Stewart filed on the 19th October 2012; and,
5 the evidence of the First Plaintiff before the Court on the 26th October 2012.

6 3. The Defendant relied on the evidence contained in the First Affidavit of Ms.
7 Levada Burton (“Ms. Burton”) dated the 1st May 2012 and Ms. Burton’s
8 evidence before the Court on the 9th November 2012.

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CHRONOLOGY

4. Many of the material facts in this matter are not in dispute and there is common ground relating to much of the documentation as set out below. The dispute between the parties relates to the interpretation of the documentation and surrounds the steps which were taken, and the steps which were not taken, by the First Plaintiff and the Defendant.

5. On the 10th February 2009 the Plaintiffs made an application to the Defendant for a credit facility to assist with the refinancing of mortgages over five parcels of property on Grand Cayman namely:

- i. An existing Duplex at Registration Section Prospect Block 22E Parcel 78, which became known during the hearing as (“the Duplex”);
- ii. An existing Triplex at Registration Section Prospect Block 22E Parcel 80, which became known during the hearing as (“the Triplex”) and which is adjacent to the Duplex;
- iii. Three parcels of raw land at Registration Section West Bay North West Block 4E Parcels 118, 119 and 120.



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THE MORTGAGE FACILITY

6. On the 26th March 2009 the Defendant offered the Plaintiffs the credit facility in the form of a mortgage – offering the sum of US\$1,189,024.66 on a 23-year term at a variable interest rate of the bank’s base rate plus .50% per annum, with an effective rate of 3.75% per annum at the time of the offer.

The Plaintiffs accepted the Defendant’s offer and the bank proceeded to lend the Plaintiffs the sum of US\$1,189,024.66, pursuant to the terms and conditions of the Facility Letter dated the 26th March 2012, agreed to by the parties.

SECURITY OF THE MORTGAGE

7. As part of the security for the mortgage the Defendant registered (a) first legal charges against the properties by way of a variation of charge against the Triplex, which was previously charged to Scotia Bank and (b) collateral charges against the Duplex and the raw land.

CONDITIONS OF THE MORTGAGE

8. The terms and conditions of the mortgage agreement entered into by the Plaintiffs and the Defendant were:

- i. The mortgage was to be repaid by way of variable monthly repayments representing blended payments of principal and interest amortized over the 23-year term, with payments initially in the sum of US\$6,436.05 per month, with the first payment due on the 30th April 2009.



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- ii. Interest on overdue monthly repayment sums would be charged at a rate of 2% per annum above the variable interest rate.
- iii. The Plaintiffs were to obtain adequate all-risks insurance for the full replacement value of the Duplex and Triplex, with the Defendant noted as the mortgagee on the insurance policy.
- iv. The Plaintiffs were to maintain life insurance in amounts sufficient to cover the mortgage at all times.
- v. The Plaintiffs agreed not to sell, part with possession, lease, let or mortgage the properties without first obtaining the Defendant's approval.
- vi. The Plaintiffs agreed to promptly notify the Defendant of the occurrence of any event which could reasonably be expected to materially and adversely affect their ability to perform their obligations under any Facility document.
- vii. The conditional assignment of all rents received from the rental of units in the Duplex and the Triplex.
- viii. The Plaintiffs were to provide cash security in the sum US\$97,500.00.
- ix. The mortgage loan will remain payable on demand at the Defendant's discretion.



1 9. On the 24th April 2009 the Defendant agreed to amend the cash security
2 provision set out in the Facility Letter dated the 26th March 2009, and waived
3 the requirement for a cash security deposit in the sum of US\$97,500.00. In its
4 place, the agreement was amended for the Plaintiffs to make a lump sum
5 payment of CI\$20,000.00, with monthly payments of US\$5,000.00 until the sum
6 of US\$97,500.00 was reached. This amended condition was agreed to by both
7 Plaintiffs on the 24th April 2009.

8 On this date, the Defendant advanced the loan to the Plaintiffs and the charges
9 were registered against the aforesaid properties.

10 10. On the 27th April 2009 the Plaintiffs and the Defendant agreed to vary the said
11 charge over the Triplex so that the principal sum of CI\$349,000.00 was reduced
12 to CI\$345,726.19 and converted to the US\$ amount of US\$411,578. The
13 principal was then increased by US\$777,445.20 to give a total principal of
14 US\$1,189,024. In addition to varying the Defendant's charge over the Triplex,
15 on this date the Plaintiffs agreed to charge their interest in the Duplex and the
16 land as collateral charges to secure the repayment of the principal amount to the
17 Defendant.

18 11. On the 29th June 2009 the Registrar of Lands' Variation of Charge against the
19 Triplex and the variation of collateral charges against the Duplex, and the land,
20 were duly registered.

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1 *PLAINTIFFS' PAYMENTS FROM MAY TO OCTOBER 2009*

2 12. In accordance with the amended agreement dated the 24th April 2009 the
3 Plaintiffs made their monthly payments towards the cash security provision
4 (referred to in paragraph 7 above) from May until October 2009, making a total
5 deposit of US\$21,207.00.

6 In November the Plaintiffs failed to make their monthly payment towards the
7 required cash security and instead withdrew the sum of US\$11,500.00.
8 Accordingly, the balance on the Plaintiffs' account was reduced from
9 US\$21,207.00 to US\$9,707.00.

10 13. In January 2010 the Defendant's liaison officer, Ms. Laveda Burton ("Ms.
11 Burton"), conducted a review of the Plaintiffs' mortgage facilities and
12 discovered that in addition to the failure to make the monthly cash security
13 payments of US\$5,000.00, the property insurance certificate which the Plaintiffs
14 supplied related in part to an incorrect property, namely Block 20D Parcel 78,
15 which is not the Duplex – Registration Section Prospect Block 22E Parcel 78.

16 In addition, Ms. Burton discovered that the property insurance certificate
17 provided that each of the properties was insured for the sum of C\$300,000.00,
18 which meant that the Triplex and the Duplex were underinsured by
19 approximately C\$90,000.00 each. The agreed replacement cost of each building
20 was C\$390,000.00 as set out in the property appraisals performed by Deloitte
21 on the 10th February 2009.



1 14. On the 20th January 2010 the First Plaintiff and Ms. Burton had a meeting to
2 review the Plaintiffs' mortgage. The First Plaintiff stated that they would be able
3 to pay the monthly mortgage installments but not the US\$5,000.00 per month
4 towards the cash security.

5 15. The First Plaintiff stated that the withdrawal of the US\$11,500.00 was due to
6 damage to one of the apartments by a former tenant.

7 16. The First Plaintiff said that they would increase the level of property insurance
8 to the required and agreed amounts as soon as possible.

9 17. At this meeting on the 20th January 2010 the First Plaintiff also told Ms. Burton
10 that he intended to sell the raw land, which had a value of CI\$220,000.00 and
11 also that he hoped to achieve this sale in 3 to 5 months.

12 18. As a result of the representations made by the First Plaintiff the Defendant
13 agreed to waive the requirement, pursuant to the amended agreement, for the
14 Plaintiffs to pay US\$5,000.00 per month towards the cash security for a period
15 of six months, in order to allow the Plaintiffs to sell the land.

16 The Defendant agreed to this 6-month waiver on condition that the Plaintiffs
17 provide proof of their efforts to advertise the land for sale. Furthermore, the
18 Plaintiffs agreed that if they were unable to sell the land within six months, they
19 would make payments of US\$7,500.00 per month towards the cash security, in
20 addition to the monthly mortgage installments.

21 19. On the 25th January 2010 the Plaintiffs duly accepted the new conditions, and
22 the Defendant granted the six-month waiver.



1 20. On the 25th July 2010 the agreed six-month period within which the land was to
2 have been sold had expired.

3 21. In September 2010 Ms. Burton conducted a further review of the Plaintiffs'
4 mortgage facilities and discovered the following issues:

5 a. The Plaintiffs had failed to sell the land within the six-month timeframe.

6 b. The Plaintiffs had failed to provide any proof of their advertising of the land
7 for sale as agreed with the Defendant on the 20th January 2010.

8 c. The Plaintiffs had failed to make the increased payments of US\$7,500.00
9 towards the cash security for the months of July, August and September
10 2010.

11 d. The Plaintiffs were frequently included in the Defendant's delinquent
12 reports in respect of their mortgage facilities and their credit cards.

13 *PLAINTIFFS' APPROACH TO SCOTIABANK*

14 22. On or about this time Mr. Burton received a telephone enquiry from a
15 representative of Scotiabank Cayman Ltd as to the Defendant's policy for
16 granting second or third charges on a secured property.

17 23. It is unchallenged that the Scotiabank representative informed Ms. Burton that
18 the Plaintiffs were seeking credit financing from Scotiabank to construct
19 additional apartments on the properties on which the Triplex and Duplex were
20 built, and against which the Defendant held the first and collateral charges.



1 24. In her evidence before the Court Ms. Burton said that, as a consequence of the
2 aforesaid breaches of the agreement of the 25th January 2010, and as a
3 consequence of receiving the information that the Plaintiffs seemed to be
4 attempting to obtain second charges on the mortgaged the properties without
5 first obtaining the Defendant's approval, she wrote to the Plaintiffs on the 10th
6 September 2010 to raise these issues, which were of concern to the Defendant.

7 Ms. Burton's letter of the 10th September 2010 also included a request for the
8 Plaintiffs to provide the cash security of US\$97,500.00 as collateral security for
9 the mortgage facility, by close of business on the 17th September 2010.

10 In this letter Ms. Burton highlighted the fact that the properties Registration
11 Section West Bay North West Block 4E Parcels 118, 119, and 120 had not been
12 sold – either by the 24th July or even by the 20th August 2010.

13 Ms. Burton expressed the Defendant's concern that the Plaintiffs had not
14 honoured their agreement to produce evidence that the properties had been
15 advertised for sale, and further, that there was no evidence of any efforts on the
16 part of the Plaintiffs to sell the properties.

17 In addition, Ms. Burton highlighted the Defendant's concern regarding the
18 prospect of the Plaintiffs borrowing against the property at Registration Section
19 Prospect Block 22E Parcel 78 and Parcel 80, and made reference to the
20 Plaintiffs' application for the approval for new loans from another financial
21 institution in relation to these two properties. Ms. Burton reminded the Plaintiffs
22 in her letter that the Defendant had already declined the request to amalgamate
23 these properties given the amounts of the Plaintiffs' existing obligations.



1 Finally, Ms. Burton stated in her letter of the 10th September 2010, on behalf of
2 the Defendant, that if the required cash collateral security was not met by the
3 17th September the Defendant would increase the mortgage rate by an additional
4 2%, and, that the outstanding balance of the credit cards would be set off from
5 the funds currently held in the Plaintiffs' accounts, and the credit cards would be
6 cancelled.

7 25. On the 14th September 2010 the Plaintiffs wrote to the Defendant and apologized
8 for the "areas of concern". The Plaintiffs then stated that the sale of the West
9 Bay properties – Block 4E Parcels 118, 119 and 120 had been advertised, but no
10 sale had been realised.

11 In addition, in this letter, the Plaintiffs admitted that they had sought financing
12 for the amalgamation of Registration Section Prospect Block 22E Parcels 78 and
13 80, and said it was likely that they would receive approval for this financing.

14 The Plaintiffs indicated that they could meet the bank's request for
15 US\$90,000.00¹ as collateral security, but asked for further time.

16 The Plaintiffs also stated in this letter that they had received Planning
17 permission to construct four one-bedroom apartments on Registration Section
18 Prospect Block 22E Parcel 78 and 80, and that construction had already
19 commenced.



¹ The Court recognises that this figure commenced as US\$97,500.00. However, the figure changes at this point in the Judgment in keeping with the Exhibits placed before the Court.

1 The Plaintiffs stated that the estimated costs to construct these new four new
2 units would be CI\$355,000.00. The Plaintiffs estimated that the combined sales
3 of the new units would be approximately CI\$500,000.00, which would realise a
4 profit of CI\$145,000.00 to the Plaintiffs.

5 The Plaintiffs asked that the additional financing be granted to them on the
6 premise that all four new units are pre-sold.

7 The Plaintiffs requested permission to amalgamate the properties on which the
8 Triplex and Duplex were built.

9 26. On the 17th September 2010 Ms. Burton replied to the Plaintiffs, stating that the
10 Defendant Bank had decided that, due to the Plaintiffs' failure to provide the
11 required collateral cash security of US\$90,000.00, the Bank had decided to
12 continue with the actions contained in the letter dated the 10th September 2010.
13 The mortgage rate was to be increased by an additional 2%, and the outstanding
14 balance of the Plaintiffs' credit card will be offset from the funds currently held
15 in their bank account, and the credit cards cancelled.

16 27. On the 14th February 2011 the First Plaintiff wrote to Ms. Burton thanking her
17 for meeting with him previously. He stated in this letter that the Plaintiffs were
18 experiencing financial difficulties and they were seeking the Defendant's
19 permission to sell all the properties held as collateral with the Defendant. In
20 order to sell the properties, the Plaintiffs were also seeking permission to stratify
21 the units on Registration Section Prospect Block 22E Parcels 78 and 80 –
22 because they felt the stratification into individual units would make it easier to



1 sell the property. The First Plaintiff said they would undertake to ensure that all
2 the proceeds from the sale would go towards paying off the debt.

3 28. On the 11th March 2011 the First Plaintiff wrote another letter to the Defendant
4 with a further request to amalgamate the Triplex and Duplex properties, and
5 thereafter, to stratify the apartments. Again, the First Plaintiff stated that once
6 the development and sale of the property were completed, the proceeds would
7 go towards reducing the loan provided by the Defendant.

8 Included in this letter was a proposal asking the Defendant to provide the
9 Plaintiffs with additional financing in the sum of US\$358,000.00 in order to
10 finance the remainder of the construction of the four new apartment units and to
11 refinance the mortgage. In support of this request the Plaintiffs provided
12 property valuations from JEC Property Consultants Limited (“JEC”) dated the
13 20th March 2011. The JEC valuation disclosed that the Plaintiffs’ had already
14 invested the sum of CI\$101,540.00 towards the construction of the four new
15 apartment units.

16 29. In her affidavit and in her viva voce evidence in Court, Ms. Burton said that this
17 recent disclosure that the Plaintiffs had invested funds in the four new apartment
18 units on the mortgaged property caused the Defendant additional and
19 considerable concern, because the investment occurred while the Plaintiffs
20 remained in breach of the conditions of their Facility Letter dated the 26th March
21 2009.

22 The Plaintiffs had failed to provide the cash security in the sum of
US\$90,000.00. The Plaintiffs’ property insurance and life insurance obligations



1 remained due and in arrears. Ms. Burton told the Court that she and the First
2 Plaintiff had several conversations in which she sought an explanation for the
3 Plaintiffs' failure to provide the required cash security to the Defendant whilst
4 being able to invest over C\$100,000.00 in a construction project on the
5 mortgaged property.

6 30. Ms. Burton informed the Court that the Defendant's credit committee
7 considered the Plaintiffs' request to amalgamate and to stratify the apartments,
8 and to refinance the mortgage and decided that, in light of the Plaintiffs' failures
9 to comply with the terms and conditions of the mortgage, the Defendant would
10 refuse both requests.

11 31. On the 18th March 2011 Ms. Burton wrote to the First Plaintiff and referred to
12 his letters dated the 14th February 2011 and the 11th March 2011 which requested
13 the stratification of the properties registered as Registration Section Prospect
14 Block 22E Parcels 78 and 80 and the refinancing of the existing mortgage
15 facility and advised the Plaintiffs that the Defendant had made the decision to
16 decline both requests. Ms. Burton explained to the Plaintiffs that this decision
17 was based on the Plaintiffs' breach of the terms and conditions of the mortgage
18 agreement – as outlined in the Defendant's letter dated the 10th September 2010.

19 32. In this letter Ms. Burton also reminded the Plaintiffs that their life and property
20 insurance payments remained due and owing.

21 33. The Plaintiffs did not respond to Mr. Burton's letter of the 18th March 2011 and
22 failed to provide the Defendant with the requested cash security or the requested
23 life and property insurance certificates.



1 34. On the 31st May 2011 the First Plaintiff wrote to Ms. Burton stating that the he
2 had received an offer to purchase Registration Section West Bay North West
3 Block 4E Parcel 119 and that closing was take place on or before the 17th June
4 2011. The First Plaintiff stated that all proceeds from the sale, except the real
5 estate commissions, would go towards paying down the Plaintiffs' loan balance.
6 In this letter the First Plaintiff also stated that he had listed the other properties
7 for sale and, again, restated his request for the Defendant to grant permission for
8 him to combine Registration Section Prospect Block 22E Parcels 78 and 80 so
9 that he could sell the apartments individually. The First Plaintiff enclosed a copy
10 of the purchase agreement for Registration Section West Bay North West Block
11 4E Parcel 119 and confirmed that all sale proceeds would go towards paying
12 down/off the mortgage.

13 35. As a result of this letter, Ms. Burton's evidence is that she conducted a further
14 review of the Plaintiffs' mortgage facilities, which revealed that the Plaintiffs
15 had failed to make the monthly mortgage payments for over a month. At that
16 time, the most recent payment was a partial payment on the 26th April 2011 in
17 the sum of US\$1,124.38.

18 36. Ms. Burton's evidence is that the Plaintiffs proposed to sell Registration Section
19 West Bay North West Block 4E Parcel 119 for CI\$48,000.00 – which is
20 CI\$17,000.00 below the JEC valuation of March 2011. Ms. Burton said that, as
21 a result of this shortfall the Plaintiffs' debt ratio between the outstanding amount
22 of the mortgage and the total value the Defendant's security would increase to
 85% - which figure exceeded the Defendant's maximum allowable ratio of 80%.



1 Accordingly, Ms. Burton said the Defendant decided to refuse the Plaintiffs'
2 request and thus deny them permission to sell Registration Section West Bay
3 North West Block 4E Parcel 119 and also deny them permission to amalgamate
4 and stratify the apartments.

5 37. Ms. Burton told the Court that she had telephoned the First Plaintiff and advised
6 him that the Defendant had refused their request.

7 38. On the 8th June 2011 a member of the Defendant's credit board, Ms. Megan
8 Campbell ("Ms. Campbell"), wrote to the Plaintiffs advising them that their
9 mortgage payments were in arrears in the sum of US\$16,075.23, and that the
10 payments had been overdue for a period of 44 days. Ms. Campbell's letter
11 demanded that the Plaintiffs bring their mortgage account up to date within
12 seven (7) days, failing which, the Defendant would have no choice but to refer
13 the account to the Defendant's legal counsel.

14 39. On the 16th June 2011 the Plaintiffs wrote to the Defendant. In this email the
15 Plaintiffs stated that their financial situation had worsened and that, as a result,
16 they were not able to honour their mortgage obligations unless their
17 circumstances changed. In this email the Plaintiffs again sought permission to
18 stratify the apartments and requested a sabbatical or loan holiday whilst they
19 continued with their efforts to liquidate their assets.

20 40. Ms. Burton told the Court that she passed on this request to Ms. Campbell and
21 the Defendant's credit board. Ms. Burton said that it was her understanding that
22 the Plaintiffs were advised by telephone that the Defendant was unwilling to
23 allow the Plaintiffs to stratify the apartments or to grant any loan holiday.



1 41. On or about the 13th July 2011 Ms. Burton conducted a further review of the
2 Plaintiffs' mortgage facility with the Defendant. Ms. Burton told the Court that
3 this review raised additional matters of concern which were:

4 a. Despite repeated requests by email and by telephone the Plaintiffs had failed
5 to bring the mortgage into good standing and the facility was delinquent by
6 74 days;

7 b. The Plaintiffs remained in breach of both the property insurance and the life
8 insurance conditions set out in the facility letter of the 26th March 2009;

9 c. The Plaintiffs had failed to provide the Defendant with the cash security in
10 the sum of US\$90,000.00.

11 42. In this review, as in a previous review, Ms. Burton noted that the First Plaintiff's
12 company, Hycam Enterprises, was continuing to offer financing to the public.
13 Ms. Burton downloaded the Hycam Group Limited letter which invited the
14 public to "*call us now – it's quick and easy to get a personal loan for any*
15 *purpose. Hycam Group is involved in construction, CCNN Forex, Loans and*
16 *Real Estate.*"

17 Hycam was described as a lending institution which is licensed by the Cayman
18 Islands Trade and Business Licensing Board – a Department of Commerce and
19 Investment of the Cayman Islands Government. Hycam also states that the
20 company facilitates small personal loans by way of financial leverage to
21 qualified individuals living and working in the Cayman Islands. Hycam also
states that it offers no security down and a quick turnaround in terms of



1 uncollateralized loans. Hycam sates that its services are convenient and provides
2 a streamlined service to all borrowers.

3 In his evidence before the Court the First Plaintiff said he was a 50%
4 shareholder of Hycam, and the Second Plaintiff was the other 50% shareholder.

5 43. On the 13th July 2011 Ms. Burton wrote to the First Plaintiff. Ms. Burton
6 referred to the Plaintiffs' numerous requests for approval to stratify the
7 properties Registration Section Prospect Block 22E Parcels 78 and 80 and for
8 further refinancing. Ms. Burton in this email confirmed that the Defendant
9 would not approve these requests. Ms. Burton also told the First Plaintiff that the
10 Defendant would not consider any further requests until the Plaintiffs' mortgage
11 facility had been brought into good standing. Ms Burton highlighted that the
12 mortgage facility was now in arrears in the sum of US\$24,123.65 and that the
13 life insurance and property insurance conditions remained unfulfilled.

14 44. The evidence is that the Plaintiffs failed to bring the mortgage into good
15 standing and the Defendant decided to write to the Plaintiffs to make formal
16 demands for payment in full on the mortgage.

17 45. On the 29th August 2011 the Defendant served formal demand notices on each
18 of the Plaintiffs pursuant to s.64(2) and 72 of the Registered Land Law.

19 46. No payments were made by the Plaintiffs in response to these notices and there
20 is an outstanding principal amount to the Defendant of US\$1,128,327.04, with
21 outstanding interest in the sum of US\$31,418.69 – making the total sum due



1 US\$1,159,745.73, with interest continuing to accrue at a rate of 6.25% per
2 annum or US\$195.89 per day.

3 47. The Plaintiffs failed to repay the mortgage in full or at all within in the
4 prescribed three months.

5 48. On the 28th November 2011 the First Plaintiff wrote to Ms.Burton stating that he
6 had misplaced the letter from the Defendant's attorneys and requested a copy of
7 same.

8 49. Ms. Burton then provided to the First Plaintiff HSBC's attorneys' details and
9 contact information for Mr. William Jones ("Mr. Jones").

10 50. On the 1st December 2011 the Defendant's attorneys emailed the Registered
11 Land Law Notices to the First Plaintiff, stating that the Plaintiffs' mortgage
12 balance, as at the 1st December 2011 was US\$1,179,022.57 and indicating that,
13 in light of the Plaintiffs' failure to repay the full outstanding balance within the
14 prescribed three months the Defendant intended to proceed to sell the properties.

15 51. On the 20th January 2012 the First Plaintiff telephoned the Defendant's
16 attorneys' offices to request a meeting to discuss the status of the mortgage.

17 52. On the 25th January 2012 the First Plaintiff met with the Defendant's attorneys
18 and asked for a further three to four months to allow him to refinance the
19 mortgage with another bank. Additionally, the Plaintiff again sought permission
20 to stratify the properties to be able to sell the apartments individually.



- 1 53. On the 31st January 2012 the First Plaintiff wrote to the Defendant’s attorneys –
2 referring to their meeting of the 25th January 2012 – and asking whether the
3 Defendant would agree to the request for a 3-month period to secure
4 refinancing.
- 5 54. On the 31st January 2012 the Defendant’s attorneys wrote to the First Plaintiff
6 and said that the Defendant agreed to hold off on commencing the public
7 auction of the Plaintiffs’ properties for a period of 30 days from the 31st January
8 2012, in order to allow the Plaintiffs time to refinance the mortgage facility with
9 another Bank.
- 10 55. The Plaintiffs were unable to refinance the mortgage by close of business on the
11 1st March 2012.
- 12 56. On the 14th March 2012 the Plaintiffs issued the proceedings which are now
13 before this Court.



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1 *PLAINTIFFS' SUBMISSIONS*

2 57. The Plaintiffs maintain that the First Plaintiff ran a successful real estate
3 company and a successful construction company, whilst, at the same time, he
4 ran Hycam Corporation. However, the First Plaintiffs' evidence was that from
5 2008 and onwards he ran into some "*bad luck*" and, as a result, both his real
6 estate company, and his construction company, were failing.

7 58. The First Plaintiff sought the Defendant Bank's approval to agree to the
8 amalgamation of the properties on which the duplex and triplex stood, because
9 he had approval from the Planning Department for further development of these
10 properties and, he contends, that there were interested buyers for a pre-sale
11 initiative.

12 The Plaintiffs submit that the Defendant Bank was unreasonable in not
13 supporting these proposals.

14 59. The Plaintiffs do not argue that the Defendant Bank has not complied with the
15 Law. In particular, the Plaintiffs accept that the Defendant Bank followed the
16 provisions of s.72 of the Law.

17 60. However, the Plaintiffs submit that the Defendant Bank is in breach of s.75(1) of
18 the Law, which is the provision in the Law dealing with power of sale and reads:

19 *"A chargee exercising his power of sale shall act in good faith and have*
20 *regard to the interests of the chargor, and may sell or concur with any*
21 *person in selling the charged land, lease or charge, or any part thereof,*
22 *together or in lots, by public auction for a sum payable in one amount or by*
23 *installments subject to such reserve price and conditions of sale as the*
24 *chargee thinks fit, with power to buy in at the auction and to resell by public*
25 *auction without being answerable for any loss occasioned thereby."*



1 In addition, the Plaintiffs rely upon the provisions of s.67(f) and (g) of the Law.

2 Section 67(f) reads:

3 *“In the case of a charge of land or of a lease not to lease the charged land*
4 *or any part thereof, or sublease the whole or any part of the land comprised*
5 *in the charged lease for any period longer than one year without the*
6 *previous consent in writing of the chargee, but such consent shall not be*
7 *unreasonably withheld.”*

8

9 And s.67(g) reads:

10 *“.....not to transfer the land, leased or charged or any part thereof without*
11 *the previous written consent of the chargee, but such consent shall not be*
12 *unreasonably withheld.”*

13

14 61. The Plaintiffs submit that the Defendant Bank’s decision not to consent to the
15 amalgamation, stratifying and sale of the properties could *“never be viewed by*
16 *any right-thinking, objective observer as commercially professional”*. The
17 Plaintiffs further submit that the Defendant’s decision now to sell the properties
18 is exactly what the Plaintiffs were trying to acquire the Bank’s consent for over
19 the past two years. The Plaintiffs state that this is the clearest evidence of the
20 Bank acting in *“bad faith”* – having previously unreasonably withheld its
21 consent to the sale of the said properties.

22 62. The Plaintiffs rely upon the case of *John Kennedy Appellant v. Mary Annette*
23 *de Trafford* 1897 A.C. 180 where the Privy Council held:

24



1 “The only obligation incumbent on a mortgagee selling under and in
2 pursuance of a power of sale in his mortgage is that he should act in good
3 faith. In determining whether the mortgagees conduct in that respect comes
4 up to the required standard regard must be had to the circumstances of the
5 particular case.”

6 Furthermore the Plaintiffs rely on the dicta on Lord Hershell in *John Kennedy*
7 *Appellant* where he states on page 185:

8 *If he (the mortgagee) willfully and recklessly deals with the property in*
9 *such a manner that the interests of the mortgagor are sacrificed, I should*
10 *say that he had not been exercising his power of sale in good faith.”*

11
12 63. The Plaintiffs’ counsel submits that bad faith does not become evident and
13 relevant only in the period that the mortgagee (the Defendant) decided to
14 exercise its power of sale. Counsel for the Plaintiffs submits that if the
15 Defendant Bank’s conduct can be shown to have crafted the circumstances
16 leading up to the exercise of this “bad faith” the Plaintiffs’ claim concerning the
17 Defendant’s bad faith is equally cogent.

18 The Plaintiffs submit that the Defendant Bank’s conduct leading up to the
19 decision to sell the Plaintiffs’ properties demonstrates bad faith, and that is the
20 inescapable conclusion from the circumstances of this particular case.

21 64. The Plaintiffs submit that, for reasons best known to the Defendant, the
22 Defendant unreasonably withheld its consent for the Plaintiffs to amalgamate the
23 properties, stratify them and proceed with the sale options they, the Plaintiffs,
24 had proposed.

25 The Plaintiffs submit that they were real estate dealers and were strategically
26 placed and qualified to get the best price for the properties. For example, the



1 Plaintiffs submit that the Defendant's position that parcel 119 was being sold
2 under value is at best, unmeritorious.

3 65. The Plaintiffs submit that the Defendant's terms and, in particular, the added
4 percentage to the monthly payments on the mortgage, were "unconscionable" in
5 all the circumstances, and demonstrated a pattern of conduct which appeared to
6 be designed to psychologically impact the Plaintiffs in a negative way.

7 66. The Plaintiffs maintain that they were always, and at all material times, best
8 suited to conduct the sale of the properties, as they had every assurance that they
9 would obtain the best prices.

10 67. The Plaintiffs rely on *Barrett v. Halifax Building Society* (1996) 28 HLR 634.
11 In that case it was held:

12 *"(2) The fact if the sale went ahead it would not accord with the policy of*
13 *the respondents (Bank) not to permit borrowers with negative equity*
14 *themselves to conduct sales of their property, without also, at the same time,*
15 *making proposals for repayment of the resulting deficiency, was not a*
16 *circumstance which ought to be taken into account in the exercise of the*
17 *court's discretion; the only possible advantage to the respondents appeared*
18 *to be that in the event of conducting the sale themselves they would take the*
19 *full benefit of the purchase price payable, and would leave the agents and*
20 *solicitors who had acted for the mortgagors without payments when in due*
21 *course the sale was completed, no doubt through their own agents and*
22 *solicitors; in the circumstances, where the Court had expressly stayed the*
23 *possession order in order to enable the mortgagor to obtain the best*
24 *possible purchase price for the property, this was not an advantage which*
25 *ought to be taken into account.*

26 *(3) There was no discernible advantage to the Respondents in refusing*
27 *to allow the sale, whereas there was an obvious advantage to the applicants*
28 *in completing the proposed sale at what was accepted to be the market*
29 *price; the advantages which the Court was obliged to balance came down*
30 *demonstrably in favour of the applicants."*



1 68. The Plaintiffs rely on the dicta of Evans-Lombe J. in *Barrett v. Halifax*
2 *Building Society*. The Plaintiffs submit that the Defendant's conduct was
3 inexplicable and, in addition, the Defendant was in breach of the implied
4 agreements set out in s.67(f) and s.67(g) of the Law not to unreasonably
5 withhold its consent to the Plaintiffs' desire to sell the mortgaged properties.

6 69. Mr. Brady, counsel on behalf of the Plaintiffs, submits that on the facts as set out
7 above, the Defendant unreasonably withheld its consent and therefore acted in
8 bad faith. To put it another way Mr. Brady submits that the Defendant
9 engineered the circumstances in which the Plaintiffs ultimately found
10 themselves and the Defendant's behaviour towards the Plaintiffs was
11 unconscionable and unreasonable.

12 70. Mr. Brady on behalf of the Plaintiffs relies upon the Cayman Islands Court of
13 Appeal decision in *Paradise Manor Limited (In Liquidation), W.M. Becker*
14 *and M.L. Becker v. Bank of Nova Scotia* 1984-85 CILR 437 and submits the
15 exercise of this power of sale be tempered with the requirement of the
16 mortgagee to be seen to act in good faith. Counsel goes on to submit that, from
17 an examination of the conduct of the Defendant, it is apparent that the Defendant
18 had some ulterior motive which drove the withholding of consent to the sale
19 proposals put forward by the Plaintiffs – which the Plaintiffs maintain would
20 have resulted in the realization of money to pay down the Plaintiffs' debt.

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DEFENDANT'S SUBMISSIONS

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71. The Defendant submits that the Plaintiffs' application is entirely misconceived and, the Originating Summons dated the 14th March 2012 should be dismissed in its entirety.

72. Mr. Jones, counsel on behalf of the Defendant, submits that the Plaintiffs have sought to cast the Defendant in a negative light, despite the fact that the Defendant has complied with its obligations under the Facility Letter, and despite the fact that the Defendant gave the Plaintiffs a number of opportunities to comply with their own obligations, before proceeding to demand repayment of the loan.

73. Counsel for the Defendant submits that the Plaintiffs have been in breach of the cash security condition of the facility letter since the grant of the mortgage in March 2009, despite the Defendant's efforts to work with the Plaintiffs by twice agreeing to amend the terms of the facility letter.

74. Counsel further submits that the Plaintiffs were, in fact, capable of complying with that cash security provision as the requirement was for cash security in the sum of US\$97,500.00 and it was subsequently discovered by the Defendant that the Plaintiffs had already invested CI\$101,540.00 in the construction of the apartment complex.

75. The Defendant contends that the Plaintiffs have failed to make a single mortgage repayment since the partial payment on the 26th April 2011 and the Plaintiffs



1 have failed to provide the Defendant with the current property insurance or life
2 insurance since March 2011.

3 76. The Defendant submits that in light of the Plaintiffs' ongoing failures to comply
4 with the terms and conditions of the Facility Letter, and to make the required
5 mortgage repayments since April 2011, the Defendant was fully entitled, under
6 the Law, to instruct its attorneys to serve the notices on the Plaintiffs on the 29th
7 August 2011. The Defendant submits that the said notices fully complied with
8 the provisions of the Law and that the Defendant is therefore entitled to proceed
9 to sell the properties by public auction.

10 77. The Defendant contends that having complied with the provisions of the Law
11 the Plaintiffs' decision to issue the Originating Summons in circumstances
12 where the Defendant Bank is fully entitled to sell the properties by public
13 auction, is a textbook example of improper and unreasonable conduct.

14 78. Counsel for the Defendant argues that the reasonableness of the Defendant's
15 conduct is further illustrated by the fact that the Defendant, at the Plaintiffs'
16 request, agreed to hold off on proceeding with the public auctions for a period of
17 30 days, to allow the Plaintiffs to re-finance the mortgage – giving the Plaintiffs
18 a total of six months since the date the notices were served. However, the
19 Defendant maintains that, rather than attempting to refinance the mortgage, the
20 Plaintiffs proceeded to use that window to prepare and issue the Originating
21 Summons.

22 79. The Defendant relies on the evidence of Ms. Burton who states in paragraph 58
of her affidavit:



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“In light of the Plaintiffs’ inability or failure to make a single payment towards the mortgage for over a year, the Bank therefore seeks an order that it be permitted to recover its costs from the sums realised once the properties are sold by the Bank.”

80. Moreover the Defendant submits that the Plaintiffs’ Originating Summons should be dismissed and the Plaintiffs pay the Defendant’s costs on an indemnity basis pursuant to GCR O.62 r.4(11), in that the Plaintiffs have *“conducted the proceedings improperly, unreasonably and negligently.”*



1 *ANALYSIS AND CONCLUSION*

2 81. The Court must ask itself whether the Defendant, exercising its power of sale, is
3 acting in good faith and with regard to the interests of the chargor, and further,
4 whether the Defendant, at any time, unreasonably withheld its consent for the
5 Plaintiffs to transfer, lease or charge the land. Before answering these questions,
6 the Court must examine the conduct of both parties from March 2009 up to the
7 14th March 2012 when the Plaintiffs issued and filed their Originating Summons.

8 82. I have read the affidavits filed by both parties and I have heard the *viva voce*
9 evidence given by the First Plaintiff and by Ms. Burton on behalf of the
10 Defendant Bank.

11 83. When one reviews the terms set out by the Defendant in its Facility Letter dated
12 the 26th March 2009 and accepted by the Plaintiffs, together with the covenants
13 which the Plaintiffs agreed to in the variation of charge executed by the
14 Plaintiffs on the 21st day of April 2009, the following facts emerge:

15 i. The Plaintiffs never, at any time, lodged the agreed cash security
16 sum of US\$97,500.00.

17 ii. The Plaintiffs failed to make their monthly payments agreed to in
18 the variation of the 27th April 2009.

19 iii. The Plaintiffs failed, at any time, to make the lump sum payment of
20 US\$20,000.00 or after October 2009, the monthly payments of
21 US\$5,000.00, referred to in paragraph 9 above. Instead, the
22 Plaintiffs actually withdrew the sum of US\$11,500.00, and, by



1 doing so, failed to honour their agreement in relation to the cash
2 security provision.

3 iv. The Plaintiffs failed, since March 2011, to provide adequate all-
4 risks insurance for the Duplex at Registration Section Prospect
5 Block 22E Parcel 78 and the Triplex at Registration Section
6 Prospect Block 22E Parcel 80.

7 v. The Plaintiffs failed, at any time, to provide the assignment of life
8 insurance policies in amounts sufficient to cover the loan amount.

9 84. On the 20th January 2010 the Defendant waived the requirement for the
10 Plaintiffs to provide cash security payments for a period for six months in order
11 to allow them time in which to sell a parcel of the raw land². The Defendant
12 agreed to the six-month waiver on the monthly payments towards the cash
13 security, on the condition that the Plaintiffs provided proof of their efforts to
14 advertise the mortgaged land for sale.

15 It transpired that the Plaintiffs failed to sell the mortgaged land within the six-
16 month period. What must have been of more concern to the Defendant is that the
17 Plaintiffs failed to provide any evidence whatsoever of any efforts on their part
18 to sell or advertise for sale the mortgaged property.



² See paragraph 18 of this Judgment.

1 Furthermore, at the expiry of the six-month waiver period, the Plaintiffs failed to
2 make the agreed monthly payments of US\$7,500.00 towards to the cash security
3 to cover the months of July, August and September.

4 85. In addition, there is clear evidence that the Plaintiffs had begun making
5 arrangements to re-mortgage the properties without first notifying the Defendant
6 of their plan to do so and without first obtaining the approval of the Defendant.

7 86. The Plaintiffs had not notified the Defendant that they had applied for and had
8 received Planning permission to construct four one-bedroom apartments on the
9 Duplex and Triplex properties at Registration Section Prospect Block 22E
10 Parcels 78 and 80. Further, the Plaintiffs had not notified the Defendant that
11 construction had already commenced on the mortgaged property.

12 87. Consequently the Plaintiffs were in breach of their contractual agreement made
13 with the Defendant in the schedule to the variation of charge not to make or
14 permit or suffer to be made, any material change to the properties without first
15 obtaining the Defendant's written approval. Additionally, the Plaintiffs were in
16 breach of their agreement to promptly notify the Defendant of the occurrence of
17 any event which could reasonably be expected to materially and adversely affect
18 their ability to fulfill their contractual financial obligations to the Defendant.

19 88. When one examines the evidence, it is clear that the Defendant complied with
20 Plaintiffs' requests, and was accommodating of the Plaintiffs' delays and
21 defaults in payment from the date of the Facility Letter – the 26th March 2009.
 The Defendant complied with the Plaintiffs' request for more time in which to
 pay the cash security deposit. It was only after the Plaintiffs had failed to sell the



1 land and had failed to provide evidence of trying to sell the land that the
2 Defendant showed an unwillingness to be flexible. Consequently, on the basis
3 that the Plaintiffs had consistently failed to comply with the existing terms and
4 conditions of the mortgage, in late 2010 and in 2011, the Defendant denied the
5 Plaintiffs' requests to amalgamate and to stratify the apartments and to refinance
6 the mortgage.

7 89. I carefully listened and watched as Ms. Burton gave evidence in Court on behalf
8 of the Defendant. Even under rigorous and detailed cross examination from
9 counsel for the Plaintiffs, I find her to be an honest and reliable witness. I could
10 find no evidence placed before the Court which could support the Plaintiffs'
11 contention that the Defendant was acting with any ulterior motive.

12 90. The Defendant had given the Plaintiffs a number of opportunities to make
13 payments on the security deposit and the mortgage. The Defendant also granted
14 the Plaintiffs time to sell the properties and waited for the Plaintiffs to provide
15 proof that the properties had been advertised for sale. The Plaintiffs had not only
16 failed to sell the properties, but produced no evidence whatsoever of any
17 attempts to advertise the properties on the open market during the 6-month
18 waiver period in 2010.

19 91. The Defendant was faced with chargors who had failed to honour their
20 obligations under the mortgage agreement. The Plaintiffs had failed to make the
21 mortgage payments and made a final partial payment in April 2011.

92. The Court finds that the Defendant was entitled to serve the formal demand
notices on the Plaintiffs pursuant to s.64(2) and s.72 of the Law – which give the



1 Defendant the power to sell the mortgaged properties by public auction and
2 private treaty. Accordingly, I reject the Plaintiffs' claim for an injunction to
3 restrain and prohibit the Defendant from selling the mortgaged properties
4 pursuant to the terms of the mortgage and the provisions of the Law.

5 93. The Court notes that the Plaintiffs operated a business known as Hycam
6 Enterprises. The First Plaintiff appeared to be the directing mind of this
7 enterprise, which advertises that it is able to provide personal loans for any
8 purpose. The Plaintiffs' company, Hycam, represents that these loans can be
9 obtained without the borrower providing any security, and the company claims
10 that a quick turnaround for disbursements can be provided for uncollateralized
11 loans.

12 Based on the clear evidence of the First Plaintiff's involvement in the Hycam
13 Group of companies, which included loans for any purpose, property
14 development and construction, the Court can infer that the First Plaintiff was a
15 person who understood the commercial operation of loans and mortgages.

16 Consequently I find that at all material times the Plaintiffs were fully aware of
17 the terms and conditions of the mortgage and the agreed amendments.

18 94. On the evidence before me I find that the Defendant acted reasonably and
19 accommodated many of the Plaintiffs' demands. On the other hand, the
20 Plaintiffs constantly breached the terms and conditions of the mortgage and did
21 not update the Defendant with any information regarding their application for
Planning permission and the construction they had already commenced on the
mortgaged property.



1 95. On the evidence before me, I reject the Plaintiffs' contention that the Defendant
2 acted in bad faith and I reject the Plaintiffs' contention that the Defendant
3 somehow crafted the circumstances leading up to the exercise of this purported
4 bad faith.

5 96. Accordingly, having reviewed the evidence put before the Court on the 26th
6 October and the 29th November 2012, I find that it was quite reasonable for the
7 Defendant not to provide its consent to the stratifying of the housing units
8 situated at Registration Section Prospect Block 22E Parcels 78 and 80 and not to
9 provide its consent to the sale of raw land situated at Registration Section West
10 Bay North West Block 4E Parcels 118, 119, and 120 and to the proposed sale of
11 the apartment units set out in the Plaintiffs' Originating Summons.

12 97. For all the reasons set out above I hereby dismiss the Plaintiffs' Originating
13 Summons.

14 98. At the hearing on the 9th November 2012 counsel for the Defendant applied for
15 costs to be paid on an indemnity basis pursuant to GCR O.62 r.4(11).
16 Subsequent to the hearing counsel for the Defendant referred the Court to
17 paragraph 14 of the schedule relating to the variation of charge executed by the
18 parties on the 24th April 2009 and registered on the 29th June 2009. Paragraph 14
19 reads:



“That the Plaintiffs shall pay on demand ...all fees and expenses that may be hereafter incurred by the (Defendant) of, and incidental to, the protection and enforcement from time to time of the [Defendant's] rights.”

1 99. Mr. Jones, on behalf of the Defendant, submitted in writing that in light of that
2 provision, and pursuant to GCR O.62 r.4(3), that the Defendant is entitled to
3 recover its legal fees and expenses from the Plaintiff in full without the need for
4 taxation.

5 100. Before making a final order in relation to costs I think it is only fair to give
6 counsel for the Plaintiffs the opportunity to respond to the submissions made in
7 this regard by counsel for the Defendant.

8 101. Accordingly, I grant both parties until the 1st February 2013 to submit their
9 written submissions on the question of the costs of these proceedings.

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12 **Dated this the 4th day of January 2013**

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16 **Honourable Mr. Justice Charles Quin**
17 **Judge of the Grand Court**

