

✓ 28-2-12
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 298 of 2010

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

BETWEEN:

SCOTIABANK & TRUST (CAYMAN) LTD.

Plaintiff

AND

1. CECILIA EBANKS (AS ADMINISTRATRIX OF THE
ESTATE OF ALLAN ANTHONY EBANKS)
2. RUDOLPH GORDON (AS ADMINISTRATOR OF
THE ESTATE OF ALLAN ANTHONY EBANKS)

Defendants

Appearances:

Ms. Helen Spiegel of Appleby for the Plaintiff

The Second Defendant appeared In Person

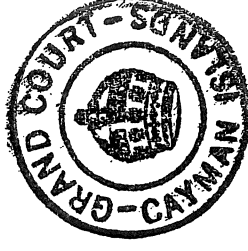
The First Defendant did not appear

Before:

Hon. Justice Henderson

Heard:

January 12, 2012



Ruling - Scotiabank & Trust (Cayman) Ltd. v. Cecilia Ebanks (As Administratrix of the Estate of Allan Anthony Ebanks) et al Cause No. 298 of 2010 28.02.12

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RULING

SCOTIABANK

1. During the course of this mortgage enforcement proceeding I have been asked by Counsel to provide some guidance on two issues:

- 1) whether the sale of property through the Multiple Listing Service amounts to a public auction; and
- 2) if so, whether it is appropriate for this court to set the reserve (or list) price.

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: *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: *Law*, s. 75(1). The nature and extent of that obligation has been canvassed in depth by our Court of Appeal in *Paradise Manor Limited (in liquidation) et al. v. Bank of Nova Scotia* [1984-85] CILR 437. Each of the three justices addressed the question in separate judgments but similar terms:

What was the duty of the bank and the standard of duty in exercising its power of sale? The bank had to show that the sale was made in good faith and that the bank had taken all reasonable precautions to obtain the best price reasonably obtainable at the time. In Tse Kwong Lam v. Wong Chit Sen (6) Lord Templeman stated ([1983] 3 All E.R. at 59):

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1 “In the view of this Board on authority and on principle
2 there is no hard and fast rule that a mortgagee may not sell
3 to a company in which he is interested. The mortgagee and
4 the company seeking to uphold the transaction must show
5 that the sale was in good faith and that the mortgagee took
6 reasonable precautions to obtain the best price reasonably
7 obtainable at the time.”
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10 *In Cuckmere Brick Co. Ltd. v. Mutual Fin. Ltd. (1) in considering the duty of a*
11 *mortgagee, Salmon, L.J. stated ([1971] 2 All E.R. at 643):*
12

13 “It is well settled that a mortgagee is not a trustee of the power of
14 sale for the mortgagor. Once the power has accrued, the
15 mortgagee is entitled to exercise it for his own purposes whenever
16 he chooses to do so. It matters not that the moment may be
17 unpropitious and that by waiting a higher price could be obtained.
18 He has the right to realize his security by turning it into money
19 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,
21 even though the auction is badly attended and the bidding
22 exceptionally low. Providing none of these adverse factors is due
23 to any fault of the mortgagee, he can do as he likes. If the
24 mortgagee’s interests, as he sees them, conflict with those of the
25 mortgagor, the mortgagee can give preference to his own interests,
26 which of course he could not do were he a trustee of the power of
27 sale for the mortgagor.” (per Zacca, P)
28

29 *In my view the weight of authority is in favour of a duty to take such care*
30 *in realizing the true market value on the sale of the charged property as a*
31 *reasonable man would in his own private affairs. (per Kerr, JA)*
32

33 *In the final analysis the bank’s obligation is that imposed by a s.75 of the*
34 *Law to “act in good faith and have regard to the interests of the chargor*
35 *....” This however does not mean that the bank is required to put the*
36 *chargor’s interest before its own. The bank must take all steps reasonably*
37 *necessary to ensure that it obtains the true value of the property to be*
38 *sold. But the true value is essentially the price which the property will*
39 *fetch at the particular time on the open market. (per Henry, JA)*
40
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42 3. The Law contemplates that such a sale will be by “public auction”. The terms of
43 many charges provide that in the case of a default the property may also be sold

1 by private treaty. Section 77 of the Law authorizes this court to sanction a
2 variation of the power of sale in the charge to permit a sale by private treaty; the
3 authorities on this subject are canvassed by McDonald-Bishop, J (Ag) in
4 *Butterfield Bank Cayman Limited v. Thornton & Thornton, (unreported) Cause*
5 *307/10, March 29, 2011*. The court provides its sanction for a bargain to which
6 the parties have already agreed. When granting approval under s. 77, the court
7 has a broad jurisdiction to impose conditions which ensure fairness for both
8 parties. This jurisdiction does not emanate from the terms of the Law but from
9 the general equitable jurisdiction of the court described in s. 16 of the *Grand*
10 *Court Law (2008 Revision)*. In the words of Malone, CJ (in *Cayman National*
11 *Bank Limited v. Smith and Pierson 1992-93 CILR 235*)

12 *... it seems to me that the intention of the legislature was to give*
13 *the court a supervisory role over sales by private treaty*
14 *notwithstanding that the chargee is answerable to the chargor if he*
15 *fails to act in good faith and to have regard to the interests of the*
16 *chargor. It is a paternalistic provision to protect chargors from*
17 *unscrupulous and unconscionable chargees.*
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21 4. In recent years, the practice has been for chargees to apply by originating
22 summons for a declaration that the chargor is in default and, at the same time, to
23 present evidence of at least one recent valuation of the property by a licensed
24 appraiser or chartered surveyor. The valuation expresses an opinion on the true
25 current market value and an opinion on the market value if the property must be
26 sold within a short period of time such as 90 days. The latter has been called,
27 variously, the “forced sale value”, the “estimated restricted realization price” and
28 the “market value with special assumption” .
29

1 In the typical case, the court sanctions the listing of the property by the chargee
2 with a licensed real estate agent on the Multiple Listing Service at a list price at
3 least as high as (and often higher than) the true current market value. After
4 some time (typically 90 days) has passed without a sale, the chargee is
5 authorized to list the property at a lower price. If the property is not sold, the list
6 price is reduced again.
7

8 **Is the Sale of Property Through the Multiple Listing Service a Public**
9 **Auction?**
10

11
12 5. No judicial definition of a public auction has been brought to my attention. An
13 auction is nothing more than “a public sale in which goods or property are sold to
14 the highest bidder” (*Oxford Dictionaries Online*) or “a sale of property to the
15 highest bidder” (*Merriam-Webster Dictionary*). The variant in which the property
16 is offered initially at a high price which is lowered progressively until a sale is
17 effected is called a “Dutch” or “reverse” auction. U.S. Treasury bills are sold
18 under this system. The listing of real estate on the Multiple Listing Service has
19 all the essential attributes of a reverse auction. The list price is set at a high level
20 initially then lowered progressively until a sale is made. The property is
21 advertised widely and is available to any member of the public with an interest in
22 purchasing. In substance, the sale of property through the Multiple Listing
23 Service is a public auction.
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Should the Court Set the Reserve (List) Price?

1 6. Section 75(1) of the Law gives to the chargee a power of sale "subject to such
2 reserve price and conditions of sale as the chargee thinks fit". Although nothing
3 in the Law requires it, the practice in recent years has been for the court to
4 sanction the listing of the property on the Multiple Listing Service at a specified
5 reserve (or list) price as I have described above. This approach offers significant
6 protection to both chargor and chargee. The chargor, who is usually
7 unrepresented by counsel, is protected by the court's insistence upon a recent
8 valuation by a competent professional with knowledge of the local market and by
9 the initial listing of the property at a price as high as or higher than its market
10 value without any assumption about the need for a forced sale. The chargee
11 finds comfort in the knowledge that, provided it adheres to this established
12 practice, it is unlikely to be accused of bad faith or negligence after the fact. The
13 involvement of the court in setting the reserve (or list) price is entirely in keeping
14 with Malone, CJ's description of the "supervisory role" of the court intended to
15 protect chargors.

16
17 7. Counsel has referred me to the decision of the Supreme Court of the Turks and
18 Caicos Islands in *Barclays Bank PLC v. Henry & Henry*, (*unreported*) December
19 15, 1999 Action no. CL-80/99. There, Ground, CJ described some apparent
20 difficulties which may arise if the court approves or fixes the price:

21 *If the Court is to be involved in approving or fixing the price, then*
22 *that poses real difficulties as to evidence and the mode of proof.*
23 *How is the Court to determine the appropriate price? May it rely*
24 *upon affidavit evidence alone, or, if there is a dispute, should it*
25 *hear expert evidence from both sides? If it is required to hear live*
26 *expert evidence with cross-examination, then the trial of the issue*
27 *may be protracted, and that may severely impede the chargee in*
28 *exercising its remedies under the charge. On the other hand, if it*

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1 is to proceed summarily on affidavit evidence alone, then it may be
2 faced with making difficult decisions on contested facts without the
3 benefit of cross-examination. Moreover, if the Court is supposed
4 to fix the price by some such summary means, that is taking away
5 from the chargor's common law right to bring an action after sale
6 to challenge the sale price. In any such action the question of
7 valuation would be dealt with by live evidence. If, therefore, the
8 Court is to proceed summarily under section 77, the chargor will
9 be deprived of the opportunity to canvass the valuation issues with
10 live evidence. Where the valuation issues are complex, or the
11 value of the property itself high, that may be a very significant
12 circumstance of the chargor's rights.
13
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15 9. In the Cayman Islands, the practice I have described has posed little difficulty.
16 The chargee is expected to present an affidavit of a valuer attesting to his opinion
17 on market value. This evidence is provided on the initial application for a
18 declaration that the chargor is in default. Most chargors are in difficult financial
19 circumstances and unrepresented by counsel. Ordinarily, they are not in a
20 position to adduce opinion evidence on value. If a chargor does present his own
21 conflicting evidence of value, the court may (and likely will) give a direction under
22 O. 28 r. 4 of the Grand Court Rules permitting cross-examination of the
23 competing experts. If necessary, the proceeding may be converted into a writ
24 action under O. 28 r. 8. Such cases are rare in this jurisdiction.
25

26 10. As Chief Justice Ground has observed, the fixing of a list price by the court "is
27 taking away from the chargor's common law right to bring an action after sale to
28 challenge the price". That right is more illusory than real, as most chargors are
29 impecunious and unable to retain counsel to pursue an action of that sort. The
30 involvement of the court in setting the reserve (or list) price does, however,
31 provide a significant measure of protection to chargors at an early stage. It is

1 preferable, in my view, to encourage the early involvement of the court even if
2 one side effect is to circumscribe a chargor's ability to argue later in a separate
3 proceeding that the sale price was too low.

4

5 11. My conclusion is that both parties derive some benefit from asking the court to
6 set the reserve (or list) price. I trust the practice will continue. Of course, a
7 chargee retains the right under s. 75(1) of the Law to set a reserve price without
8 reference to the court if it is willing to accept a greater vulnerability to an
9 allegation of an undervalued sale later on.

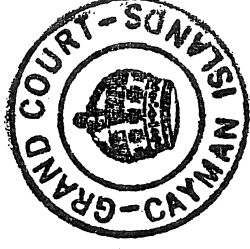
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11 Dated this 28th day of February, 2012

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14 Henderson, J.
15 Judge of the Grand Court
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