

IN THE GRAND COURT OF THE CAYMAN ISLANDS

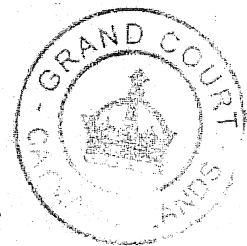
CAUSE NO: 307 OF 2010

BETWEEN BUTTERFIELD BANK CAYMAN LTD PLAINTIFF
AND MONTE LEE THORNTON
IRENE SCOTT-THORNTON DEFENDANTS

IN CHAMBERS

HEARD 18TH & 29TH MARCH 2011

BEFORE THE HONOURABLE JUSTICE McDONALD-BISHOP (Ag)



Appearances: **Ms. Helen Spiegel and Leroy Whorms of Appleby** for the Plaintiff

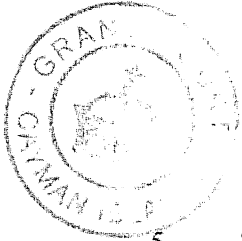
1. Butterfield Bank (Cayman) Limited, the Plaintiff, by Originating Summons, seeks, *inter alia*, the following orders:
 - (i) A Declaration that the Defendants, Monte Lee Thornton (the "First Defendant") and Irene Scott-Thornton ("the Second Defendant") are in default of payments due under a legal charge registered on 5 July 2005 and a Variation of Second Charge registered 9 August 2006 made between the Plaintiff and the Defendants.
 - (ii) That the charge and second charge be enforced by sale of property registered in the names of the Defendants and described as South Sound, Block 7C, Parcel 8REMIH8, Grand Cayman("the property"), by private treaty as well as by public auction.
 - (iii) That the terms and conditions of sale by private treaty be determined, if any.
 - (iv) Leave to the Plaintiff for reasonable access to the property for the purpose of viewing in connection with the Plaintiff's efforts to sell the property.
 - (v) The Defendants deliver up possession of the charged property to the Plaintiff.

FACTUAL BACKGROUND

2. The Plaintiff is a class A bank registered and carrying on business in the Cayman Islands. It engages in retail mortgage lending as part of its regular business activities lawfully conducted in the Cayman Islands.

3. The Defendants who are husband and wife are residents of the Cayman Islands and customers of the Plaintiff. They are also the registered proprietors of the property with which these proceedings are concerned.

4. The Defendants, in or around July 2005, obtained financing from the Plaintiff and charged the property as security in favour of the Plaintiff. The charge was registered on 5 July 2005 to secure the principal sum of CI\$197,600 plus interest. The property was further charged by Variation of a Second Charge registered on 9 August 2006 to secure the principal sum of CI\$13,000 plus interest as specified therein.



5. The Defendants covenanted, among other things, to repay the principal sums on demand together with any interest due in accordance with the terms of the facilities and subject to the provision of the charges. The charges registered against the property provide for, *inter alia*, the sale of the property by public auction or by private treaty in the event of default by the Defendants.

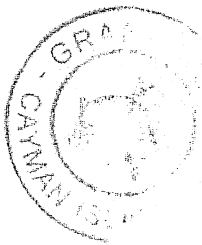
6. The Defendants defaulted on their payment obligations in breach of covenant. The last payment was made by them on 3 August 2009 in the sum of CI\$464. In the light of the Defendants' continuing default, the Plaintiff issued separate notices dated 12 March 2010

in compliance with sections 64(2) and 72 of the Registered Land Law (2004 Revision) ("the Law") notifying the Defendants of their default and demanding payment. The notices were personally served on each of them.

7. Despite the issuance of the requisite statutory notices, the indebtedness of the Defendants continued with no steps taken by them to remedy the breach. The Plaintiff, in the face of this default on the part of the Defendants, set out to exercise its power of sale given within the specific terms of the charges and under the provisions of the Law.

8. This led to the Plaintiff commencing this action against both Defendants. The Originating Summons, together with the evidence in support being relied on by the Plaintiff, has been duly served on the Defendants. Among the exhibits served on them was a valuation report, dated 28 August 2010, in respect of the property prepared by Charterland Limited, Chartered Surveyors and Property Consultants. In that report, the current market value of the property was assessed by to be C\$240,000 with a special assumption value assessed at C\$190,000.

9. The record shows that although all these documents were served on the Defendants, the First Defendant failed to acknowledge service while the Second Defendant acknowledged service but indicated that she would not be contesting the Plaintiff's application nor would she seek legal representation in the matter. So, as it now stands, there is no document filed by the Defendants challenging the Plaintiff's application for permission to sell the property by private treaty and for possession. At the same time, they continue to



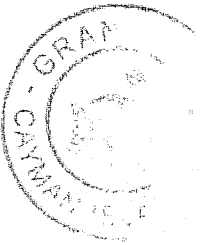
be in default of payment of both principal and interest in respect of the two loan agreements.

THE LAW

10. The Law, in several of its provisions, gives the Plaintiff the right, as chargee, to pursue certain remedies in respect of the charged property in the event of default by the Defendants. As far as is immediately relevant for our purposes, section 72 (1), in summary, provides that where there is default by the chargor for a month, which continues, the chargee may serve a notice in writing demanding payment of the outstanding sum. If the chargor does not comply within three months of the date of service of the demand on him, the chargee may either appoint a receiver or sell the property.

11. Furthermore, each charge itself grants the Plaintiff the right to pursue certain remedies within the permissible ambit of the Law in the event of default by the Defendants. It is specifically agreed between the parties that if the Defendants should fail to discharge all liabilities in full accordance with the terms of the charge, the whole of the principal sum and all interest thereon shall become due and payable and the provisions of section 72 to section 75 of the Law shall apply, subject to certain modifications as specified. Part of the remedies made available to the Plaintiff, by both charges, is the power to sell the property.

12. There can be no question then, and, indeed, there is no dispute, that the Plaintiff's power of sale has arisen in the circumstances of the case both within the provisions of the Law and under the specific terms of the charges. It is clearly at liberty to exercise its power of



sale. However, this freedom to sell is still made subject to the provisions of the Law and it is within this context that section 75 becomes relevant. Section 75 (1) provides:

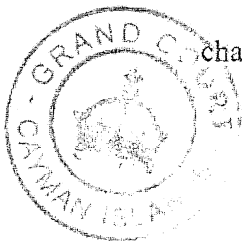
" 75 (1) *A chargee exercising his power of sale shall act in good faith and have regard to the interest of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or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

13. It is clear from section 75(1) that it is open to the Plaintiff to proceed, without more, by way of sale by public auction subject, of course, to the duty to act in good faith and to have regard to the interest of the Defendants. The Plaintiff, however, wishes to be able to proceed by way of private treaty instead of, or in addition to, public auction in keeping with the terms of the charges.

14. Each charge expressly provides in clause 7 that section 75 of the Law shall apply, subject to the modifications set out in clauses 7(1) to 7(4). In particular, Clause 7 (3) of both charges state:

"(3) *[u]pon the exercise of the Chargee's power of sale the Chargee shall have the right and power to sell the charged property by private treaty or by public auction or part in one way and part the other;*"

This clause clearly indicates the parties' express intention and agreement to contract out of the provisions of section 75 that grants to the Plaintiff only the right to sell by public auction.

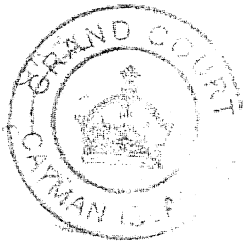


15. The legal basis for such contractual modification by the parties is to be found in the provisions of section 77 of the Law which reads:

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

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

16. As can be seen, Section 77 makes it abundantly clear that the parties were at liberty at the time of contract to add to, or to vary, the power of sale given under section 75, that being, sale by public auction. This they have done. They cannot, however, act on their agreed modification without the sanction of the Court given the proviso to section 77. It is primarily for that reason that the Plaintiff has brought action against the Defendants in the terms of the Originating Summons filed. Therefore, the core issue that now falls for consideration is whether the Plaintiff's application to permit the variation of section 75, to sell the property by way of private treaty, should be granted.



Relevant case law

17. Counsel for the Plaintiff, Ms. Spiegel, in her effort to persuade me to allow the Plaintiff to act upon the variation, has brought to my attention several authorities including, in particular, three recent decisions of this Court dealing with the issue. The first two are decisions of the Honourable Chief Justice in *Bank of Butterfield (Cayman) Ltd v. Jason Dalkeith Jervis & Jessica Natalia Jackson* Cause No. 468 of 2010 and *National Building Society of Cayman v. Wellington* Cause No. 459 of 2010 both delivered 11

February 2011. The third is the decision of the Honourable Quin, J in National Building Society of Cayman v Angie Natasha Cranston Cause No. G437 of 2010 delivered 4 March 2011.

18. I have considered it convenient to commence my deliberations on the application before me with a review of these recent decisions for the guidance they have provided to me in treating with the issue. I will commence with the learned Chief Justice's Reasons for Ruling in Bank of Butterfield (Cayman) Ltd v. Jervis & Jackson that he said should be applied *mutatis mutandis* to National Building Society of Cayman v. Wellington. For the sake of convenience, from now on any reference to the decision in Bank of Butterfield of Cayman v. Jervis & Jackson is, by implication, a reference to the decision in National Building Society of Cayman v. Wellington.

19. The Learned Chief Justice refused the application made by the Plaintiff chargee to allow a variation to sell charged property by private treaty. He concluded that no attempt having been made by the Plaintiff to obtain the market price by way of sale by public auction, the application would be adjourned generally to allow for sale by public auction before restoration of the application for leave to sell by private treaty. The primary grounds for his decision are comprehensively set out in paragraphs 7-10 of his written ruling.

20. The main planks of the learned Chief Justice's Reasons for Ruling are distilled and summarized as follows:

- (1) *It is the long settled practice of this Court that the variation of the Law by way of the grant of leave to sell by private treaty, instead of by public*

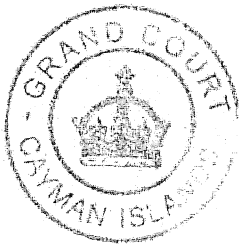
auction, will not be given until after a fair attempt by the chargee to sell by public auction. (para.7)

(2) *The obvious and important reason for this is that section 75 imposes on the chargee a duty to act in good faith when exercising the right to act by public auction and one aspect of that duty requires the chargee to seek to get the best price the market will yield (the market price). (para.8)*

(3) *In order to do so, the chargee will obtain an independent valuation and seek to market the property for sale by public auction at that valuation price or some other reserve price that the chargee might set pursuant to section 75, but being mindful at all times that such a reserve price can only be justified as being that which the market actually yield at the time. (para.8)*

(4) *Until that attempt to sell by public auction has been taken, the Court can have no way of knowing whether some other lower price to be fixed as the reserve price for sale by private treaty is a reasonable price. Yet the Court's official sanction is what is ultimately sought by the chargee to absolve it of its duty to obtain the best price when the Court approves a sale at a price less than that which the market, with persistent effort over time, might yield. (para. 9)*

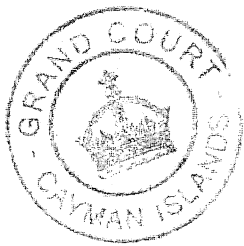
(5) *It follows that an application to the Court for which costs will be incurred which the chargee will seek to pass on to the chargor should not be brought until after the section 75 powers have been exercised and the*



appropriateness shown for variation of the Law to allow sale by private treaty. (para.10)

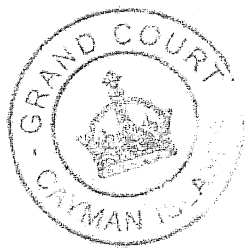
21. Later, Quin, J, faced with a similar application in *National Building Society of Cayman v. Cranston*, where there had been no prior attempt by the chargee to exercise the power of sale by public auction, saw it fit to allow the variation to be acted upon. Again, given the constraints of time and space, I will only seek to highlight some salient features of his reasoning in so far as they are immediately relevant.

- (1) *Section 77 gives the Court a very wide discretion and does not state that a variation can only be acted upon if there had been a prior unsuccessful auction. The decision of the learned Chief Justice in Bank of Butterfield v Jervis & Jackson could unnecessarily restrict the Court's discretion and it is not what the Legislature intended. (paras. 38 & 39)*
- (2) *It appears that the decision of Moodie, J in Bank of Nova Scotia Trust Co. (Cayman) Ltd v Bodden 1952 -79 CILR, Note 8 was not brought to the attention of the learned Chief Justice. In that case, the same argument was put before the Court that the application for leave to sell by private treaty could only be brought after exhausting the power of sale by public auction. Moodie, J, however, rejected that argument in a written judgment dated 19 August 1977 and held that the mortgage gave the right to the Plaintiff to sell either by public auction or private contract. It was, therefore, not necessary to offer the property for sale by public auction. (para.40)*
- (3) *It appears from the learned Chief Justice's Reasons for Ruling that the Defendants in Bank of Butterfield v Jervis & Jackson were neither represented nor did they appear. It was open to the learned Chief Justice to exercise his discretion having regard to the proceedings and conduct of the parties, and to the circumstances of the case. Accordingly, the learned*



Chief Justice, in the absence of the Defendants at the hearing, may well have considered their interests would be better protected if a public auction were held before the application for leave to sell by private treaty is pursued. (para.39)

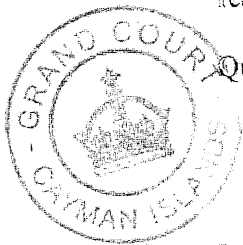
- (4) Unlike the case before the learned Chief Justice, in the case before him, the defendant had appeared before the Court and indicated her position. She indicated that she did not challenge the facts as presented by the Plaintiff and she had no problem with the manner in which the Plaintiff had conducted the proceedings. She had indicated to the Court that she understood the Plaintiff's position and its duty to obtain the best price reasonably obtainable for the property. She had kept in communication with the Plaintiff's representatives with respect to her circumstances. (paras. 39 & 48)
- (5) It was clear from both the conduct of the Plaintiff and from the submissions of its counsel that the Plaintiff was acutely aware of its duty to act in good faith and have regard for the interest of the Defendant. (para. 44)
- (6) Banks in the position of chargee understand that the most appropriate manner for them to demonstrate that they have fulfilled their duty to the chargor to obtain the best price reasonably obtainable for the property is by listing it in the Multiple Listing System and advertising it for a reasonable period of time: (Approach of Henderson J in Scotia Bank (Cayman Islands) Limited v. Rankine 2004-2005 CILR Note 26 adopted as the correct approach in ascertaining the true market value of a property). (Para. 36)
- (7) He is in agreement with the decisions and reasons given by Moodie, J in Bank of Nova Scotia Trust Co. (Cayman) Ltd. v. Bodden and Malone, CJ in Cayman National Bank Limited v. Smith and Pierson [1992-93] CILR 235. (para. 45)
- (8) He would also follow the Court of Appeal in Paradise Manor Limited (in liquidation) and others v. Bank of Nova Scotia [1985] CILR 437 where



the principle was laid down that where variation had been agreed between the parties at arm's length, where they had, or could have had, the benefit of legal advice in relation to the proposed variation, there would have to be some element of unfairness or unreasonableness for the Court not to exercise its discretion to allow the agreed variation to be acted upon. (para. 47)

(9) *After following the lead afforded by Paradise Manor Limited v. ENS, he found that on the facts of the case before him there were no elements of unfairness or unreasonableness and so it was a proper one for the exercise of his discretion to allow the agreed variation for sale by private treaty to be acted upon. (Paras. 46-48)*

22. Ms. Spiegel, after highlighting the principles distilled from the foregoing decisions, along with those from earlier cases on the subject submitted that the Court should find that on the facts of the instant case, the Plaintiff is not acting unfairly or unreasonably in applying for leave to sell by private treaty. Therefore, the approval should be granted for the variation to be acted upon. This, of course, would be in keeping with the line of reasoning of the Court of Appeal in Paradise Manor Limited v. ENS and as applied by Quin, J in National Building Society of Cayman v Cranston.



ANALYSIS OF THE RELEVANT LAW

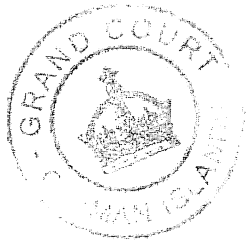
23. I must indicate from the outset that although in keeping with the doctrine of *stare decisis*, I am not bound by the earlier decisions emanating from this Court, I have, nevertheless, accorded the views of the learned judges the highest degree of respect and will not lightly act in variance with any views expressed by any of them unless the circumstances of the case before me so warrant. I am guided immensely by their exposition on the law and so I

have examined the circumstances of this case within the legal framework provided by their decisions.

24. I have recognised, nevertheless, that the primary objective of the Court is to do justice between the parties and so for that reason it is incumbent on me to examine the particular circumstances of this case to see whether the Plaintiff's application for the variation to be approved should be granted. It cannot be resolved, simply, by saying that the learned Chief Justice denied such an application in two cases or on the basis that Quin, J granted it in another. It has always been said that "circumstances do alter cases" and it is also for that reason that this application must be given separate attention and full consideration in its own rights. That is what I have undertaken to do.

25. The learned Chief Justice in *Bank of Butterfield v Jervis & Jackson* has indicated that it is a long settled practice in this Court that public auction should be attempted first. Although no authority has been brought to my attention confirming that there is such a practice of long standing and of widespread application, I am prepared to defer to the learned Chief Justice's knowledge and experience. I will say, however, that even if it is, in fact, a well settled practice that these applications must not be entertained until after a fair attempt made at sale by public auction, I deem it only apposite to commence any deliberation on the issue with the relevant statutory provisions that have given rise to such applications. This approach is only fitting, I believe, because statutory law would supersede any practice of long standing, even one that had been crystallized into custom.

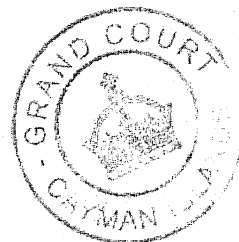
26. A reading of the Law reveals that notwithstanding that section 75 provides that the chargee should sell the property by public auction, the Law has stipulated in section 77



that the parties to the charge may vary or add to the provisions of the section, subject to the proviso that *"such variation or addition shall not be acted upon unless the court, having regard to the proceedings and conduct of the parties and to the circumstances of the case, so orders"*.

27. It is clear from the relevant provisions of the Law, taken as a whole, that the Legislature intended to allow the power of sale to be exercised other than by public auction or in addition to it. The parties are free to agree to such modification of the section. What the Legislature has done, however, is to leave it to the Court, and not to the parties, to determine whether such option should ultimately be pursued. The Court is, thus, given a supervisory role over the execution of the parties' contract in so far as sale by private treaty is concerned.

28. In granting the Court the power to allow the parties' agreed modification of the statutory provision, the Legislature has gone as far as to indicate the matters to which the Court ought to pay regard in the exercise of its discretion. These are (a) the proceedings, (b) the conduct of the parties and, (c) broadly, the circumstances of the case. Nowhere in the section is it stipulated, directly or inferentially, that an attempt to first sell the charged property by way of public auction is a pre-condition for the exercise of the Court's discretion to allow the variation. It is my humble view that a consideration of the matters specified in section 77 should be the starting point for the Court's deliberation on the question as to whether the variation to sell by private treaty should be allowed.



29. This is not to say, however, that there is no place in the Court's deliberation for a consideration of the failure of the chargee to first attempt sale by public auction before seeking to act on the contractual variation. I see it, however, as being a relevant factor to be considered during the course of examining the proceedings, the conduct of the parties and the circumstances of the case as prescribed by section 77. As such, it may be a relevant consideration but it cannot be, without more, the only consideration or the decisive one in determining whether an application ought to be heard or allowed for permission to sell by way of private treaty.

30. I find that I am comfortably placed in a position to share the views expressed by Quin, J in National Building Society v. Cranston that a strict adherence to the principle laid down by the learned Chief Justice in Bank of Butterfield v. Jervis & Jackson could have the effect of restricting the legislation. This would certainly be incompatible with the clear intention of Parliament to allow some latitude to the parties to contract out of the provision of section 75. I would, therefore, refuse to accept any suggestion that the learned Chief Justice in Bank of Butterfield v. Jervis & Jackson intended to lay down as an inflexible rule of general application that there must, in all cases, be an attempt to sell by public auction before an application may be brought or allowed for a variation of section 75 to be acted upon.

31. It must be, in keeping with the intention of Parliament, that each case should be examined on its own facts and a determination made on a case - by - case basis as to whether the approval for variation of the power of sale ought to be granted. It is in the light of this that I have no doubt that the Chief Justice would have weighed in on the failure to first

attempt sale by public auction based on the circumstances before him and made his ruling as he saw fit. As Quin, J opined in National Building Society v. Cranstoun (para.39) which is compatible with my own view:

"It was open to the learned Chief Justice to exercise his discretion, having regard to "the proceedings and conduct of the parties and to the "circumstances of the case." Accordingly, the learned Chief Justice, in the absence of the Defendants at the hearing, may well have considered their interests would be better protected if a public auction were held before the chargee Bank could restore its application for leave to sell the property by private treaty."

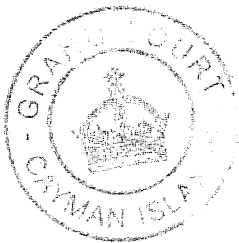
32. I think the Chief Justice's ruling in Bank of Butterfield v Jervis & Jackson ought to be properly viewed as a decision confined to the particular circumstances of the case he had before him in which he, apparently, formed the view that a fair attempt at sale by public auction would have served the interest of justice in all the circumstances. It is for that reason that I would not venture to, without more, adopt that ruling to summarily dispose of this application before me without a full examination of all the particular facts to see whether the application should be allowed. The provisions of section 77, to my mind, dictate such an approach.

33. In considering the right of the Plaintiff, as chargee, to exercise its power of sale, I have also paid due regard to some other useful principles derived from case law that I consider to be rather instructive in my deliberations. Within this context, I would start, as counsel for the Plaintiff has reminded, with the oft-cited dictum of Salmon, LJ in Cuckmere Brick Co. Ltd. v. Mutual Fire Ltd [1971] 2 All E.R. 633 at 643 that was cited with approval by Kerr, J.A. in Paradise Manor Limited v. BNS at page 470.

"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purpose whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Provided that none of these adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor."

34. The authorities have made it clear, however, that although the Plaintiff is not a trustee of the power of sale for the Defendants, it, nevertheless, owes a duty of care to the Defendants to act in good faith and to take reasonable care to obtain whatever is the true market value of the mortgaged property at the date he chooses to sell it. The true market value is sometimes referred to as the "best price" or the "proper price". See *Cuckmere Brick Co. Ltd. v. Mutual Fin. Ltd.* at page 646. In other words, the standard of duty of the Plaintiff, in exercising the power of sale, is to show that the sale is made in good faith and that it has taken all reasonable precautions to obtain the best price reasonably obtainable at the time of sale. See *Tse Kwong Lam v. Wong Chit Sen* [1983] 3 All ER 54 at 59 as applied in *Paradise Manor v BNS* at page 453.

35. It is the duty of the Plaintiff, in realizing its security, to behave as a reasonable man would behave in his own private affairs in the realization of his own property so that the Defendants may receive credit for the fair value of the property. That is the standard of



care and diligence that should be applied: per Kerr, J.A. in *Paradise Manor Limited v. BNS* at page 471 - 472 citing with approval Salmon LJ in *Cuckmere Brick Co. Ltd. v. Mutual Fin. Ltd.* at page 645. See too *McHugh v Union Bank of Canada* [1913] A.C. 299.

36. This duty owed by the Plaintiff to act in good faith and to have regard to the interests of the Defendants in exercising the power of sale, applies whether the Plaintiff is to sell the property by public auction or by private treaty: *CNB v Smith and Pierson.*

37. In the end, the pivotal question, in deciding whether to grant permission for the variation to be acted upon, should be whether the Plaintiff's exercise of the power of sale by private treaty would be unfair or unreasonable to the Defendants in the circumstances of the case. See: *Paradise Manor Limited v. BNS* and *National Building Society of Cayman v. Cranston.*

38. In determining the question as to whether it would be unfair or unreasonable to allow the variation to be acted upon in the circumstances of the case, I have formulated some further pertinent questions for consideration in the light of the Chief Justice's ruling in *Bank of Butterfield v Jervis & Jackson.* I have posed the questions in the following terms:

- (i) What is, or likely to be, the effect of the failure of the Plaintiff to first attempt sale by public auction under section 75?



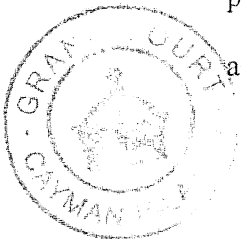
- (ii) Would the Defendants be more adversely affected, in terms of costs, if the Plaintiff were to be allowed to pursue sale by private treaty instead of sale by public auction?
- (iii) What is the reserve price, if any, proposed by the Plaintiff and what are the facts that have informed such a decision?
- (iv) What is the Defendants' position and understanding of the situation?
- (v) Is the Plaintiff, demonstrably, cognizant of its duty to act in good faith and to have regards to the interest of the Defendants in the exercise of its power of sale?
- (vi) Is the Court placed in a proper position, based on the evidence adduced, to conclude in all the circumstances of the case that the Defendant would not be prejudiced by the grant of the approval for sale of the property by private treaty?

39. It is against this background of my analysis and understanding of the applicable principles of law that I have embarked on a consideration of the facts before me to see whether the Plaintiff has discharged the onus placed upon it to satisfy me, on a preponderance of the probabilities, that the order being sought for the variation to be acted upon should be granted.

APPLICATION OF THE LAW TO THE FACTS

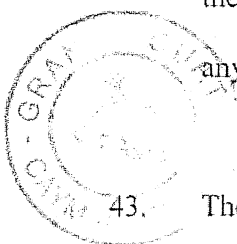
The proceedings

40. As I have indicated before, I believe that a determination of the issue as to whether the variation in question should be allowed should commence with a consideration of section 77 from which the Court derives the power to permit such a modification of the Law. So, in keeping with the letter of section 77, the first matter I have highlighted for consideration is the nature of the proceedings before me.



41. The evidence reveals that the Defendants have been in default for over a year and a half. Demand for payment of the outstanding sums has been made by the Plaintiff in accordance with the Law but to no avail. The Originating Summons, with the supporting evidence on which the Plaintiff intended to rely, was duly served on the Defendants. As part of the evidence served, was the valuation report that speaks for itself. The Plaintiff has also disclosed to the Defendants, as part of its case, the proposed price range at which it is seeking to sell the property by private treaty.

42. With all this brought to the Defendants' attention, the First Defendant has failed to acknowledge service while the Second Defendant, while acknowledging service, has indicated that she is not contesting the Plaintiff's application nor does she wish to be represented. The Defendants have been provided with ample opportunity to participate in the hearing but they have both elected not to attend and have put forward no challenge to any aspect of the Plaintiff's case.



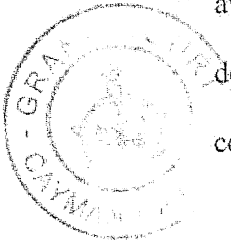
43. The fact that the Plaintiff's action is uncontested assumes particular significance, and gains some degree of prominence in my deliberation, in the light of the fact that the Second Defendant is a realtor and, as such, is taken to be *au fait* with the operations of the real estate industry and the mechanisms involved in the sale of real property. Her decision not to contest the Plaintiff's application is rather telling in my view. I will, however, return to that aspect of the case later when I examine in greater detail the conduct of the parties.

44. It is sufficient for me to say at this juncture that the fact that one of the Defendants is a person with specialized knowledge and skill in real estate matters, and who has not seen it fit to challenge any material aspect of the Plaintiff's application, is a peculiar fact that cannot be ignored in determining whether the application should be allowed. The proceedings, when further matters are disclosed, will be seen to be tantamount to proceedings by consent. Therefore, I have taken due note, in arriving at my decision, that these are uncontested proceedings with special features in relation to the personalities involved.

The conduct of the parties

45. Now, I will examine the conduct of the parties in keeping with the provisions of section 77. The Defendants have, from all indication, freely entered into this contract with the Plaintiff and have agreed to all the terms set out in the charges. It was expressly agreed that in the case of any default in payment of principal or interest, one of the remedies available to the Plaintiff is sale of the property by private treaty. The Defendants defaulted on the loans and have been in default ever since August, 2009 in breach of contract.

46. The Defendants have been made aware by the Plaintiff of their indebtedness through the statutory notices and the initiation of court proceedings to pursue its remedies at law. All those have not been enough to compel compliance by the Defendants. Instead, they have indicated their inability to pay and are currently in arrears with not only the mortgage payments but also with regard to the the strata fee payable in respect of the property.



47. On top of this, prior to the Plaintiff's application, the Defendants themselves had made attempts to sell the property in order to discharge their indebtedness to the Plaintiff. There is undisputed evidence that the Second Defendant, being a real estate agent, had listed the property for sale at a price of CI\$270,000. No offer was obtained at that price and a reduction was made to CI\$260,000. With no offer forthcoming, the price was then reduced to CI \$249,000 and finally to CI\$234,000. The property was listed at CI\$234,000 for an extended period until the listing expired without any offer made for purchase of the property at that reduced value.

48. The evidence also reveals that the Defendants, having failed to procure a sale at the various prices listed, have indicated to the Plaintiff their willingness to co-operate with it in getting the property sold as they cannot afford the mortgage payments and the strata fees which are accumulating with each passing day. The Second Defendant has indicated to the Plaintiff her willingness to list the property for any price suggested by the Plaintiff and approved by the Court.

49. It can be seen in this case that although the Defendants have not attended the hearing to indicate their position, there is ample evidence from which it may be concluded that the Defendants have accepted their position that they are not able to live up to their obligations to the Plaintiff. No issue is taken with the valuation and the reserve price suggested by the Plaintiff or with any conduct on the part of the Plaintiff in seeking to dispose of the property by private treaty. The Defendants have raised no issue as to any unfairness or unreasonableness in the Plaintiff's decision to seek approval for variation of



the power of sale. From all indications, they are themselves desirous of having the property disposed of by private treaty and are acting in full co-operation with the Plaintiff. This explains more clearly the reason for the proceedings being uncontested.

50. The Plaintiff, for its part, is not in default in relation to anything concerning the charges. Its immediate concern is to realize its security through sale of the property which it has a right to do whenever it chooses to do so. By bringing this application for the variation of section 75 to be allowed, it has done everything expressly required by the Law to be done towards this end. The only thing it had not done before bringing the application was to attempt sale of the property by public auction. I have already established that this is not taken by me to be a pre-condition for the filing and/ or granting of the application but I am prepared to treat it as a relevant consideration in examining the circumstances of the case. So, I will make a determination as to the effect of the failure to first attempt sale by public auction upon an assessment of the whole circumstances of the case.

The overall circumstances of the case

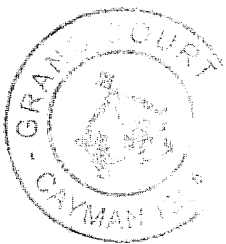
51. This is clearly a case in which the parties have negotiated at arm's length in the course of a commercial transaction. There is no allegation of the Defendants being deprived of the right to independent legal advice and that they have entered into the transaction without understanding of the legal ramifications. They are, therefore, taken to have entered into the transaction with the Plaintiff of their own free will and with sufficient understanding of the implications for them if they should fail to carry out their side of the bargain.

52. Furthermore, one of the defendants is a person *au fait* with matters concerning the use of real property as security and has specialised knowledge and experience as to the mechanisms of the real estate industry. We are, therefore, not dealing with chargors who are complete novices in relation to the sale of real property. The fact that they are not disputing the Plaintiff's case, and are actually co-operating with it to have the property disposed of, speaks volumes to their understanding and acceptance of their position. They are, clearly, not in opposition to the Court granting an order upholding the terms of their contract.

53. In relation to the Plaintiff's failure to first pursue sale by public auction, I am mindful of the learned Chief Justice's view point expressed in *Bank of Butterfield v. Jervis & Jackson* that until there is a fair attempt at sale by public auction, the Court can have no way of knowing whether some other lower price to be fixed as the reserve price for sale by private treaty is a reasonable price. While I do appreciate the views of the learned Chief Justice and do accept that there is justification for his concerns, I believe that his concerns could be addressed by adopting the approach of Henderson, J in *Scotiabank (Cayman Islands) Limited v. Rankine*, which was cited with approval by Quin, J in *Cayman Building Society v. Cranston*. Henderson, J opined:

"The best evidence of the true value of real estate is the reaction of potential purchasers and offers made by them, assuming that the property has been listed on the Multiple Listing Service with accurate particulars and advertised in a reasonable and competent fashion."

54. What is imperative is that the true market value is obtained. Towards this end, the Plaintiff is required to take all reasonable precautions, at the time he wishes to sell, to



obtain the true market value, which is the best price reasonably obtainable. It seems to me that the approach of multiple listing in a manner contemplated by Henderson, J could prove rather useful in ensuring that, in the end, the true market value of the property is realized.

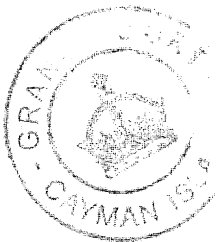
55. Zacca, P, in addressing the Appellant's contention in *Paradise Manor Ltd. v. BNS* that the chargee bank was seeking to sell the property at an under-value, after a public auction failed to secure any bid for the property, stated the relevant consideration thus (page 453):

"What was the duty of the bank and the standard of duty in exercising the 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."

56. The learned President then proceeded to ask: *What steps did the Bank take in securing the best price reasonably obtainable?*" In considering that question, he examined all the evidence and evaluated the circumstances of the case, including the attempt to sell by public auction, and having done so then stated:

"I held that the bank made every reasonable effort and took all the necessary steps to obtain a sale of the property. In my view the bank took reasonable precautions to obtain the best price reasonably obtainable at the time of the sale. It cannot therefore be said that the sale to George Town Associates was at an under-value."

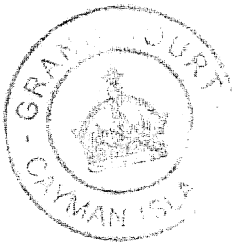
57. It seems to me that once the Court is satisfied, on the evidence, that the Plaintiff is mindful of its duty to take all necessary precautions to obtain the best price reasonably



obtainable and is, demonstrably, acting in accordance with that duty and can be ordered by the Court to act consistently with such duty, then, it should not matter that there was not a first attempt at a sale by public auction. A properly conducted sale by private treaty, geared towards obtaining the best price reasonably obtainable at the time of sale, can achieve the same results as a properly conducted public auction. The relevant consideration seems to me to be what steps have been taken, are being taken, and/or can be taken by the Plaintiff to abide by its duty to secure the best price reasonably obtainable at the time it decides to sell.

58. It means, then, that where there had been no prior attempt to sell by public auction, the Court could, nevertheless, seek to safeguard the interest of the chargor. This can be done by the Court ensuring that the sale by private treaty should only be carried out at a lower value than that assessed only after a fair effort is made to widely offer the property for sale on the open market, preferably through the Multiple Listing Service. This, I think, could go a far way in addressing the concerns entertained by the learned Chief Justice in Bank of Butterfield v. Jervis.

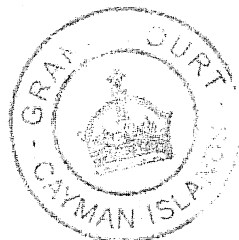
59. With all this in mind, I now turn to an examination of the instant case. It is seen that although no prior attempt had been made for sale by public auction, the reaction of potential buyers had been tested by the listing of the property by the Defendants themselves at various prices on the open market. Although it was not the Plaintiff's effort to sell by private treaty, it was done with its concurrence and the reaction of the public to the property can, nevertheless, be gleaned from that exercise conducted by the



Defendants. What is seen from the Defendants' attempts is that offers received were below the value at which the property was advertised by the Defendants and also below the assessed value.

60. In the instant case, perhaps, unlike in the cases before the learned Chief Justice and Quin, J, there is unrefuted evidence that the property was advertised for a reasonable time at values both above and below the assessed market value. Offers have been made for purchase at a lower value than that presented by the defendants with the highest being CI\$220,000. There is nothing to suggest that the property, when listed then, was inaccurately or insufficiently described. In fact, the Defendants, who, I am sure, would have hoped to gain an advantage from the sale, would have had a vested interest to ensure that the property was accurately presented to secure the best price that could relieve them of their obligations. I would take the offers made to have been based on an accurate description of the property thereby producing a useful guide of the reaction of potential purchasers to it.

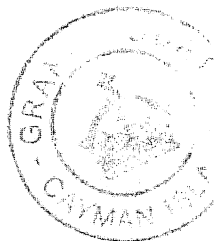
61. The only concern I entertain with regard to the listing relates to the magnitude of the advertisement, that is, how widespread it had been, because it does not appear that it was offered for sale through the Multiple Listing Service. If the application were to be allowed, this concern could be addressed by the Court taking the necessary steps to ensure more widespread exposure of the property before any sale by private treaty is pursued.



62. The next related issue concerns whether the absence of an auction affects the Court in forming a view as to a reasonable reserve price for sale by private treaty. The Plaintiff is seeking the Court's approval to sell the property at a reserve price of either CI\$215,000 or CI\$220,000. I have found it necessary to conduct an enquiry into the basis for this proposal. In so doing, it is seen that the suggested reserve price is informed by the response to the Defendants' listing of the property for sale. The realtor, who last had the property listed, had reported that interested persons were offering between CI\$215,000 and CI\$220,000 for it. This is what has informed the Plaintiff's proposed reserve price.

63. An important point, I think, should be noted as flowing from this is that if the Plaintiff were to sell by public auction, it would be at liberty to set the reserve price. It would be expected to act on the advice of realtors or other specialists in the field as to the setting of a reserve price and the conduct of the auction. In the same way, then, that the Plaintiff can obtain guidance from a realtor for the purposes of a public auction so too it may be guided in setting a reserve price for the purpose of sale by private treaty. Whatever the mode of sale being pursued, the duty of the Plaintiff is the same, that is, to secure the best price reasonably obtainable at the time of sale (the true market value). I do not see then that the Court is disadvantaged in the circumstances of this case by the absence of a guide from an attempted auction as to what would be a reasonable reserve price. The potential market has already been tested, to an extent, and a guide may be derived from that.

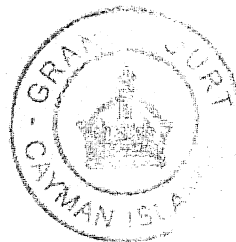
64. Moreover, I have taken into account, not at all, as an insignificant fact, that the proposed reserve price is within the knowledge of the Defendants and that they have taken no issue



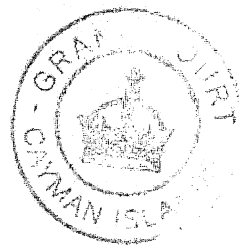
with it. The unrefuted evidence also shows that the Second Defendant has expressed her willingness to assist the Plaintiff in listing the property at any price suggested by the Plaintiff and approved by the Court.

65. The Second Defendant's conduct in co-operating with the Plaintiff, again, assumes some degree of prominence in my contemplation in light of the fact that the consent to sell at the proposed value is coming from a chargor who is an active realtor who, herself, had listed the property for sale by private treaty. She is placed in a unique position to oppose a sale at such a reserve price being proposed but she is not doing so. I am moved to conclude that she has recognized that the stated value in the valuation report of CI\$240,000 may be more than a little optimistic. This cannot be overlooked as a consideration favourable to the Plaintiff's application.

66. The position in this case is that I have undisputed evidence as to the reaction of the market, or at least a section of it, to the offer of the property for sale even though there was no attempt to sell it by public auction. This has produced a fair guide as to the price range at which the property could be sold. I do believe, however, that further exposure of the property through, for instance, the Multiple Listing Service could provide an added safeguard against the property being sold at an under-value. This precautionary step could be further augmented by the Court setting a reserve price that is seen as realistic, fair and reasonable in the circumstances.



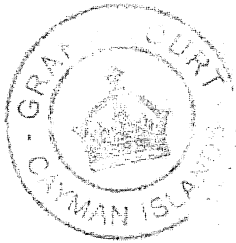
67. If the Court were to so order, it would still be carrying out its oversight responsibility under section 77 to ensure that, at the end of the day, the Plaintiff would have acted fairly and in good faith having regard to the interests of the Defendants to secure the best price reasonably obtainable for the property. Once the Court is placed in a position to do that, on the evidence before it, it should not matter whether sale is by public auction or private treaty, particularly, when that was what the parties themselves have agreed. I conclude, therefore, that the failure of the Plaintiff to first sell by public auction is not a factor that I would use to militate against the application in all the circumstances of the case.
68. I have also addressed my mind to the question as to whether any greater prejudice could be caused to the Defendants, in terms of costs, if the application were to be allowed. I find that a successful application would mean the costs of the proceedings would have to pass to the Defendants. The Law, however, provides that when the chargor is in default, sale of the property is a remedy to be pursued by the chargee and where the parties agreed to a variation in the power of sale, then, the Court's permission is required for it to be acted upon. The Plaintiff, by approaching the Court in the face of the continuing default of the Defendants, is doing nothing that it is not entitled by law to do. It has been placed in this position by the Defendants, through no fault of its own, and the Defendants have not seen it necessary to contest the action. The Plaintiff has been showing forbearance since August 2009 even though it has a right to realise its security when it sees fit. The costs attendant on realizing its security should not be placed at its feet without good and sufficient cause shown.



69. Again, there is nothing to say to me that the Defendants would not incur costs for the conduct of a public auction or that the Court costs, if awarded, and those associated with sale by private treaty, would unreasonably exceed those attendant on conducting a sale by public auction. The Defendants have not disputed the case on the ground that they would be unduly prejudiced in terms of the incurrence of incidental costs associated with sale by private treaty.

70. On this question of costs, I find I am drawn to the views expressed by Quin, J in National Building Society of Cayman v. Cranston at paragraph 34 of his judgment when he said:

"Directing a chargee to instruct and pay attorneys to fix an auction, to draft terms and conditions of sale, and to advertise and hold an auction, will involve considerable professional fees and significant time. This could well act to the detriment of the chargee Bank, but more importantly will inevitably act to the detriment of the chargor, who will be saddled with the professionals' costs for the public auction, and further disadvantaged by delay and interest which will keep accruing."



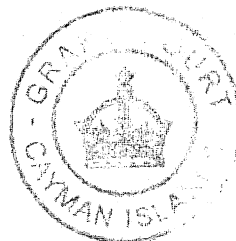
71. I have concluded that there is nothing in all the circumstances of the case that would tend to suggest that the Defendants would be more prejudiced, in terms of costs, if permission is granted to the Plaintiff to sell the property by private treaty instead of by public auction.

72. The final question I would seek to address is whether I am placed in a position, by the evidence, to be able to conclude that the Defendants would not be prejudiced by the grant of the approval for the variation to take effect. In considering this question, I have duly

recognized that the parties have agreed to the modification to section 75 by the express terms of the charges. The evidence also reveals that they are consensus *ad idem* on all issues concerning the proposed variation to allow sale of the property by private treaty. This, indeed, is in keeping with their agreement. Accordingly, the Plaintiff is doing no more than seeking to do that which was agreed between them. The Defendants are not resisting. There is nothing on the evidence to show why they ought not to be allowed to stick to their bargain. As such, I see no basis to go against the parties' wishes.

73. Whichever method of sale is employed, the Plaintiff has a duty to act in good faith in the interest of the Defendants to take reasonable steps to secure the best price reasonably obtainable at the time it chooses to sell. If the Plaintiff should fail to act in accordance with its duty owed, the Defendants would still have a remedy at law to obtain redress. The granting of the order permitting variation would not relieve the Plaintiff of its responsibility or deprive the Defendants of their right to redress. I am satisfied that the Plaintiff is mindful of its duty and is acting accordingly and can, in any event, be ordered by the Court to act in a manner consistent with its duty at law.

74. I see nothing in all the circumstances that would render it unfair, unreasonable, or, otherwise, unjust to allow the Plaintiff to act upon the variation. Therefore, I would allow the variation for sale by private treaty to be acted upon by the Plaintiff, albeit on such terms as I see fit to impose in keeping with one of the orders being sought in the Originating Summons.

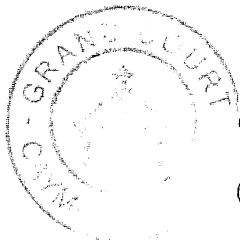


75. I am prepared to include, as a term, that the property be more widely advertised for sale by the Plaintiff, particularly, on the Multiple Listing Service. This more widespread exposure of the property on the open market should translate into a greater effort on the part of the Plaintiff in seeking to obtain the true market value. Given what I expect to be further exposure of the property through this medium, I would not approve the Plaintiff's proposed reserve price at this time. I would set as a reasonable reserve price the sum of C\$236,000 which is higher than that proposed by the Plaintiff and also higher than the value at which the property was last listed for sale by the Defendants. This sum would allow for the Defendants to be placed in a better position to discharge their liability.

THE RIGHT TO POSSESSION

76. The Plaintiff has applied for, *inter alia*, access to the property for matters connected to the sale of it as well as for vacant possession. This application for possession, is, again, not challenged in any way by the Defendants. In so far as is relevant, the Law expressly declares in section 78 that the chargee shall not be allowed to enter into possession of the charged land by reason only of default in payment of the principal or interest. Section 75 (2) does provide for the chargee's right to possession only in the context of sale by public auction which does not apply in this case.

77. It is noted, however, that by the express provisions of the charges, it was agreed between the parties that the Plaintiff would have the right to possession of the property in the event of default by the Defendants. This trigger event for possession by the Plaintiff has arisen under the parties' contractual terms. There is no question or dispute about that. The

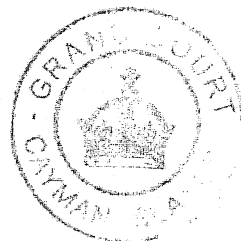


question now is whether the Plaintiff should be allowed by the Court to exercise this right given under the specific terms of the charges.

78. An examination of the evidence in this regard has revealed that there is no one in occupation of the premises at this time. The arrears in strata fees and mortgage payments are mounting and the Defendants are anxious to rid themselves of those obligations. Given that the Defendants have no stated objection to the application for possession and the fact that the property is already vacant, I see no unfairness resulting if the Plaintiff were to be allowed permission to enter the property for viewing in connection with the sale and, ultimately, to take possession for those purposes. I would, however, allow reasonable time for the Defendants to be notified and be prepared before the Plaintiff takes vacant possession. I will so order.

ORDER

79. In the premises, I have concluded that the Plaintiff is entitled to the following orders on its Originating Summons.
1. The Plaintiff is entitled to the Declarations in the terms sought in paragraphs 1 and 2 of the Originating Summons, in that, the Defendants are in default of payment of the principal sum payable under the Charge registered on 5 July 2005 and the Variation of Second Charge registered on 9 August 2006.



2. The Plaintiff is granted leave to sell the Property by private treaty acting in good faith and having regard to the interests of the Defendants.
3. The Plaintiff is at liberty to sell the Property by private treaty at a gross reserve price of C\$236,000.
4. The Property is to be listed on the Multiple Listing Service with accurate particulars in the course of marketing it for sale.
5. If after 90 days the Property has not been sold at the gross reserve price of C\$236,000, there be liberty to the Plaintiff to apply for a lower reserve price.
6. The Plaintiff is granted the right to vacant possession of the Property within thirty (30) days of the date of the service of this order on the Defendants.
7. Leave to the Plaintiff for reasonable access to the property for the purpose of viewing or for any other purpose in connection with the Plaintiff's effort to sell the said property.
8. Leave to the Plaintiff to issue a Writ of Possession.
9. Costs to the Plaintiff in these proceedings.
10. There be liberty to apply.

~~HANCJ~~
MARVA McDONALD-BISHOP
ACTING JUDGE OF THE GRAND COURT

March 29, 2011

