

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

3 **Cause No: G437/2010**  
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6 **IN THE MATTER OF THE REGISTERED LAND LAW (2004 REVISION)**  
7

8 **BETWEEN:**

9 **NATIONAL BUILDING SOCIETY OF**  
10 **CAYMAN**

11  
12 **PLAINTIFF**  
13

14 **AND:**

15 **ANGIE NATASHA CRANSTON**

16  
17 **DEFENDANT**  
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20 **Appearances:**

21 **Mr. Ross McDonough and Ms. Christina**  
22 **McTaggart of Campbells for the Plaintiff**

23  
24 **Ms. Angie Natasha Cranston, Defendant**  
25

26 **Before:**

**The Hon. Mr. Justice Charles Quin**

27 **Heard:**

**24<sup>th</sup> February and 3<sup>rd</sup> March 2011**  
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29 **JUDGMENT**  
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- 32 1. The Plaintiff, namely National Building Society of Cayman, issued an Originating  
33 Summons against the Defendant, Angie Natasha Cranston (“Ms. Cranston”) for the  
34 following relief:

35 “1. *This Honourable Court do sanction and permit the sale by*  
36 *private treaty of all that property registered in the Cayman*  
37 *Islands Land Register with absolute title and being particularly*  
38 *known as Registration Section Prospect, Block 43A, Parcel 210*  
39 *(“the Property”) by the Plaintiff as Chargee with a power of*  
40 *sale over the Property.*



1           6.       Clause 2(a) of the Schedule attached to the aforesaid variation agreed by the  
2                    Plaintiff and the Defendant reads:

3                               *“The Chargor shall repay to the Chargee on demand the Principal*  
4                               *Sum, or such portion thereof as shall have been advanced to the*  
5                               *Chargor, and remains due and owing, together with interest thereon at*  
6                               *the rate aforementioned.”*

7           7.       Clause 2(b) of the Schedule reads:

8                               *“The Chargor further hereby covenants with the Chargee that the*  
9                               *Chargor will, on demand, pay or discharge to the Chargee, all monies*  
10                              *and liabilities which shall for the time being (and whether on, or at any*  
11                              *time after such demand) be due owing or incurred to the Chargee by*  
12                              *the Chargor.”*

13          8.       Clause 3(a) of the Schedule reads:

14                              *“The mortgage facility will be granted as a construction loan initially*  
15                              *... During the construction period the Chargor will be required to*  
16                              *repay interest only. On completion of construction and pending such*  
17                              *demand for repayment as aforesaid, by the Chargee, the Chargor shall*  
18                              *pay to the Chargee principal and interest in monthly instalments in the*  
19                              *sum of CI\$1,950.00 on the first day of each month, commencing the*  
20                              *month immediately following disbursement, and will extend over a*  
21                              *period of THIRTY (30) years.”*

22          9.       Clause 11 of the Schedule reads:

23                              *“Section 72 and Sub-section (vi) of s. 73 of the above[Registered Land]*  
24                              *Law shall be varied in respect of this Charge, and if any instrument of*  
25                              *variation executed pursuant to this Charge, so as to entitle the Chargee*  
26                              *immediately upon default by the Chargor in payment of the principal*  
27                              *sum, or of any interest payable hereunder, or in the performance or*  
28                              *observance of any agreement express or implied herein, to serve on the*  
29                              *Chargor notice in writing to pay the money owing or to perform and*  
30                              *observe the agreement as the case may be, and further so as to provide*  
31                              *that if the Chargor does not comply within one month of the date of*  
32                              *service of such notice, the Chargee may thereupon without further*  
33                              *notice, either ... (a) .... ; (b) sell the property, the subject of this*  
34                              *security, by private treaty as well as by public auction; or (c) foreclose*  
35                              *or enter into possession of the charged property; or (d) ...; (e)...”*



1 property can be completed within 90 days, formerly known as a “forced sale value”,  
2 at CI\$212,000.00.

3 17. On the 20<sup>th</sup> January 2011 Mr. McFarlane swore and filed his affidavit which  
4 supports the Plaintiff’s Originating Summons.

5 18. On the 20<sup>th</sup> January 2011 the aforesaid Originating Summons, and Mr. McFarlane’s  
6 affidavit, together with an Acknowledgment of Service, were all served on the  
7 Defendant at the property in question.

8 19. In light of the foregoing facts, the Plaintiff seeks to sell the property by private  
9 treaty and therefore seeks Orders in the terms of the Originating Summons dated  
10 the 29<sup>th</sup> November 2010.

11 **Defendant’s Position**

12 20. At the first hearing on the 24<sup>th</sup> February 2011 the Defendant represented herself and  
13 confirmed that she did not challenge the facts as presented in Mr. McFarlane’s  
14 affidavit.

15 21. The Defendant, to her credit, has kept in communication with the Plaintiff’s  
16 representatives with respect to her circumstances. The Defendant worked for a local  
17 insurance company, and due to the economic recession, was made redundant in  
18 October 2010. The Defendant has three children – girls aged 16, 15 and 10 – to  
19 raise. Since being made redundant, the Defendant has made 30 separate job  
20 applications but to date has received no offers of employment.

21 22. The Defendant produced a letter dated the 17<sup>th</sup> January 2011 that she had written to  
22 the Plaintiff. In her letter the Defendant thanked the Plaintiff for trying to assist her

1 with the variations of the mortgage. Furthermore the Defendant informed the  
2 Plaintiff in an honest and straightforward manner that as a result of her present  
3 unemployment, she cannot make ends meet and therefore is unable to maintain the  
4 required payments due and owing to the Plaintiff.

5 23. At the second hearing on the 3<sup>rd</sup> March 2011 the Defendant informed the Court that  
6 as of the 21<sup>st</sup> February 2011 she was in gainful employment and, accordingly, asked  
7 for time to pay off the arrears and bring the payments owed to the Plaintiff up to  
8 date.

9 **The Law**

10 24. Counsel for the Plaintiff, Mr. McDonough, drew my attention to the recent decision  
11 of the learned Chief Justice dated the 10<sup>th</sup> February 2011 in ***Butterfield Bank***  
12 ***(Cayman) Ltd. v. Jervis & Jackson*** Cause Number 468 of 2010.

13 25. In ***Butterfield Bank v. Jervis & Jackson*** the Plaintiff Bank sought liberty to sell the  
14 property, the subject of the mortgage, by way of private treaty (or by public  
15 auction). As the Chief Justice noted, Court sanction is required for a sale by private  
16 treaty. The Chief Justice then went on to state at paragraph 7 in his Reasons for  
17 Ruling that:

18 *“It is the long settled practice of this Court that the variation of the*  
19 *Law by way of the grant of leave to sell by private treaty instead of by*  
20 *public auction will not be given until after a fair attempt by the chargee*  
21 *to sell by public auction.”*

22 The learned Chief Justice continued:

23 *“The reason for this is obvious and important ... s. 75 imposes a duty*  
24 *upon the chargee to act in good faith when exercising the right to sell*  
25 *by public auction”*

1           26.     At paragraph 9 of his Reasons for Ruling the learned Chief Justice stated:

2                                   *“Until that attempt to sell by public auction has been taken, the Court*  
3                                   *can have no way of knowing whether some other lower price to be fixed*  
4                                   *as the reserved price for sale by private treaty is a reasonable price.*  
5                                   *Yet, the imprimatur of the Court is what is ultimately sought by the*  
6                                   *chargee to absolve it of its duty to obtain the best price when the Court*  
7                                   *sanctions a sale at a price less than that which the market with*  
8                                   *persistent effort over time, might yield.”*

9           The Chief Justice continued at paragraph 10 that:

10                                   *“It follows, secondarily, that an application to the Court for which*  
11                                   *costs will be incurred which the chargee will seek to be passed to the*  
12                                   *chargor, should not be brought until after the section 75 powers have*  
13                                   *been exercised, and the appropriateness thus shown, for variation of*  
14                                   *the law, to allow sale by private treaty.”*

15           The Chief Justice noted in paragraph 11:

16                                   *“In this case no attempt has been made by the Plaintiff to obtain the*  
17                                   *market price by way of sale by public auction. It required no leave of*  
18                                   *the Court to attempt to do so. Section 75 makes that plain.”*

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20           27.     The learned Chief Justice refused to grant the chargee Bank’s application, in order  
21                                   to allow for the sale by public auction to take place before the chargee Bank could  
22                                   restore its application to sell by private treaty.

23           28.     In refusing Butterfield’s application in Cause Number 468 of 2010 the learned  
24                                   Chief Justice also ruled that his reasons were to apply in Cause Number 459 of  
25                                   2010, namely *National Building Society of Cayman v. Wellington* in which he  
26                                   refused a similar application on the 10<sup>th</sup> February 2011.

27           29.     The Plaintiff’s counsel submits that the factor which caused the learned Chief  
28                                   Justice to refuse the application was the Plaintiff’s failure to follow what the Chief  
29                                   Justice described as the long settled practice of the Court that the leave of the Court

1 to sell by private treaty instead of by public auction will not be given until after a  
2 fair attempt has been made by the chargee Bank to sell by public auction.

3 30. Counsel for the Plaintiff submits it is open to doubt that it is a long-settled practice  
4 and submits that Orders have been obtained in the past without applicants for the  
5 Order being required to demonstrate that applications have been preceded by an  
6 attempt to sell at public auction.

7 31. The Plaintiff submits that the “mischief” which the learned Chief Justice appears to  
8 have been concerned with was the Bank’s seeking leave to fix the reserve price at a  
9 “forced sale” price. The Plaintiff’s counsel respectfully submitted that the Chief  
10 Justice’s concern seemed to have brought about by a misapprehension that if the  
11 Court was asked to fix a reserve price lower than the open-market valuation, then  
12 this would absolve the Bank of its duty to obtain the best price reasonably  
13 obtainable for the property, or, as the learned Chief Justice stated:

14 *“The imprimatur of the Court is what is ultimately sought by the*  
15 *chargee to absolve it of its duty to obtain the best price when the Court*  
16 *sanctions the sale at a price less than that which the market, with*  
17 *persistent effort over time, might yield.”*

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19 32. However, the Plaintiff’s counsel in this matter argues with some force that the  
20 Chief Justice’s concern could, perhaps, have been misplaced because merely  
21 making an Order that the property not be sold below a certain reserve price does not  
22 necessarily have that effect. Furthermore, the Plaintiff argues that the chargee Bank  
23 remains under an obligation to use reasonable efforts to obtain the best price  
24 reasonably obtainable for the property, and this obligation remains on the Bank at  
25 all stages until the best possible price is obtained.

1           33.       Counsel for the Plaintiff has discovered from counsel for Butterfield Bank in Cause  
2                    Number 468 of 2010 that a number of authorities were not cited to assist the Court.  
3                    In particular at the hearing on the 8<sup>th</sup> February 2011 I understand that the learned  
4                    Chief Justice was not referred to *Bank of Nova Scotia Trust Co. (Cayman) Ltd. v.*  
5                    *Bodden* 1952-79 CILR Note 8 ("*BNS v. Bodden*").

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

13          35.       The Plaintiff's counsel submits that the mischief which is of concern to the Chief  
14                  Justice can be avoided by the Court not fixing a reserve price. The Plaintiff's  
15                  counsel submits that this does not create a license to the Bank to sell at any price  
16                  because, as counsel for the Plaintiff properly submits, the Plaintiff will always  
17                  remain under a duty to use all reasonable endeavours to get the best price for the  
18                  property. Furthermore, should the Bank fail in its duty to get the best price for the  
19                  property, the chargor will have a remedy against it.

20          36.       Henderson J. in *Scotia Bank (Cayman Islands) Limited v. Rankine* 2004-2005  
21                  CILR Note 26 set out the correct approach for ascertaining the true value of a  
22                  property when he stated:

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1 better protected if a public auction were held before the chargee Bank could restore  
2 its application for leave to sell the property by private treaty. In this case, the  
3 Defendant has appeared and, to her credit, has told the Court, that she understands  
4 the Plaintiff's position and its duty to obtain the best price reasonably obtainable for  
5 the property.

6 40. It appears that the decision of Moody J. in **BNS v. Boddan** was not drawn to the  
7 Chief Justice's attention. I am indebted to the Consulting Editor of the Cayman  
8 Islands Law Reports, Mr. Ramon Alberga Q.C., for providing the Court with the  
9 full written Judgment of Moody J. dated the 19<sup>th</sup> August 1977. In this case the same  
10 argument was put before the Court, namely that "*the application for leave to sell by*  
11 *private treaty could only be brought after exhausting the power of sale by public*  
12 *auction.*"

13 The argument put forward by the chargor was that the "*statute [Registered Land*  
14 *Law] made no provision to bypass the auction and sell by private treaty.*" The  
15 chargor's counsel further submitted that "*the Plaintiff has no power to ask for sale*  
16 *by private treaty until the sale by auction has gone through*" and "*that the statute is*  
17 *emphatic as to the first step in sale is by public auction.*"

18 However, Moody J. held that the mortgage dated the 30<sup>th</sup> January 1968 and the  
19 amending deed dated the 13<sup>th</sup> March 1973 gave the right to the Plaintiff to sell  
20 "*either by public auction or by private contract.*"

21 41. The learned editors of the Cayman Islands Law Reports set out the ratio in 1952-79  
22 CILR Note 8 which reads:

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*“As the power of sale given by the mortgage itself is effectively one to sell either by public auction or private contract, it was not necessary to offer the property for sale by public auction first and the court would order that the mortgagee be at liberty to sell by private contract immediately.”*

In the original written Judgment Moody J. concluded by stating:

*“There will be an order that the Plaintiff be at liberty to exercise the power of sale by private contract acting in good faith and having regard to the interest of the chargor.”*

42. Counsel for the Plaintiff, Mr. McDonough, also drew this Court’s attention to further helpful assistance from the decision of Malone C.J. in **CNB v. Smith and Pierson**. In **CNB v. Smith and Pierson** the Plaintiff similarly sought leave to sell a charged property by private treaty. The First Defendant submitted to Malone C.J. that it was irrelevant whether s.75 and s.77 of the Law conferred a discretionary power on the Court to impose conditions on a sale by treaty, as the Court was given a general jurisdiction by s.18 of the Grand Court Law to attach to such orders any conditions, even refusing leave to sell the property by private treaty.

43. Malone C.J. held at page 236 of the first holding:

*“The proviso to s.77 of the Registered Land Law (Revised) conferred on the court the power to grant to a chargee leave to exercise a right he already had, i.e. the right to vary a charge on property so that he could sell it by private treaty instead of by public auction as permitted by s.75. Although s.77 did not in express terms empower the court to impose conditions when granting such leave, the court was not by this omission confined only to refusing or granting the order sought. By s.18 of the Grand Court Law, it had a general jurisdiction to impose such conditions as were just when making orders and this section applied to the exercise of the specific power conferred by the proviso.”*

And went on to add at page 237 of the second holding:

1                   *“The court would impose such conditions in granting the order for the Plaintiff*  
2                   *to proceed with the sale by private treaty as it considered just, having regard,*  
3                   *as specified in the proviso, to “the proceedings and conduct of the parties” and*  
4                   *“the circumstances of the case.”*

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6           44.     Although **BNS v. Bodden** was not cited before Malone C.J. in language very  
7           similar to Moody J, Malone C.J. held in **CNB v. Smith and Pierson** at page 237 of  
8           the second holding:

9                   *“It was clear that in so far as the Registered Land Law (Revised), s.75(1)*  
10                  *imposed on a chargee exercising a power of sale a duty to act in good faith and*  
11                  *have regard to the interests of the chargor, it applied both to a sale by private*  
12                  *treaty as well as to one by public auction.”*

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14           In the case before this Court it is clear from both the conduct of the Plaintiff, and  
15           from the submissions of its counsel that the Plaintiff, whilst exercising its power of  
16           sale, is acutely aware of its duty to act in good faith and have regard to the interests  
17           of the Defendant.

18           45.     I find myself in agreement with the decisions and reasons given by Moody J. in  
19           **BNS v. Bodden** and Malone C.J. in **CNB v. Smith and Pierson**.

20           46.     I am fortified in my view by the decision of the Court of Appeal in **Paradise Manor**  
21           **Ltd. v. BNS** 1985 CILR 437. In **Paradise Manor Ltd. v. BNS** the parties had  
22           agreed for the provisions of s. 72 to be varied as it relates to the registered charges.

23           As Zacca P. stated at page 452 line 10:

24                   *“The parties agreed to this modification of s.72 in their contractual*  
25                   *agreements. It cannot be said that it would be unfair or unreasonable,*  
26                   *having regard to all the circumstances, for the learned trial judge to*  
27                   *have considered a variation of s.72 under the summons before him. In*  
28                   *my view the learned trial judge correctly exercised his discretion in*  
29                   *allowing the variation of s. 72 and in dispensing with the notice*

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*requirement to be given under s.72. In the circumstances I would not interfere with the order made in this regard.”*

47. At page 465 in ***Paradise Manor Ltd. v. BNS*** Kerr J.A. stated at line 10:

*“Notwithstanding this, the pivotal point is, Was (sic) the exercise of the jurisdiction unfair to the appellants? I am constrained to answer in the negative. The reasons advanced by Hull J. are compelling. The defendants were aware of their default and demand was made for payment of the money due and owing some three years before and thereon no payments were made to date. The agreements were made between parties at arm’s length with legal advice at their beck and call. The applicant was asking for no more than was agreed. It could never be urged with reason and good sense that a party is taken by surprise, when the other party in whose favour stipulations are made, asks that effect be given to such stipulations. Nor have I been directed to any sort of consideration beyond the matters so fully aired at the hearing that could evoke a favourable affirmative response to that question.”*

48. When I look at the facts of this case, having read the affidavit of Mr. McFarlane, and having heard the Defendant in person, I cannot find any element of unfairness or unreasonableness. Unlike the aforesaid ***Butterfield Bank v. Jervis & Jackson*** case, the Defendant appeared before this Court on the 24<sup>th</sup> February and the 3<sup>rd</sup> March 2011. The Defendant entered into this agreement with a full understanding of the terms and conditions of the variation of the charge and, most importantly, with an understanding of her financial obligations to the Plaintiff. In fact, in a letter to the Plaintiff the Defendant expressly thanked the Plaintiff for its agreement to vary the mortgage. The Defendant was completely frank with the Court and understood the position in which she has now found herself. She was aware of her default and the Plaintiff’s demand for payment of the moneys due and owing. She

1 had no criticism of the Plaintiff or of the manner in which it has conducted these  
2 proceedings to date.

3 49. I find myself in agreement with the Plaintiff's counsel's submission and hold that I  
4 should follow the Court of Appeal in *Paradise Manor Ltd. v. BNS* when it laid  
5 down the principle that where variations had been agreed between the parties at  
6 arm's length, where they had, or could have had the benefit of legal advice in  
7 relation to the proposed variations, there would have to be some element of  
8 unfairness or unreasonableness for the Court not to exercise its discretion to allow  
9 the agreed variation to be acted upon. As the Court of Appeal concluded, the  
10 chargee Bank was asking for no more than what had been agreed between the  
11 parties.

12 50. I do not find in this particular case that the proposed variations to s.72 and s.75 to  
13 allow the Plaintiff to exercise its power of sale by private treaty after it had made an  
14 appropriate demand which had not been complied with, to be either unfair or  
15 unreasonable. In all the circumstances I find that this is a proper case in which to  
16 exercise my discretion and to allow the variation agreed between the parties.

17 51. The Plaintiff's counsel has assured this Court that the Plaintiff will continue to act  
18 in good faith and have regard to the interests of the Defendant. Accordingly, I find  
19 that this is an appropriate case to grant the Plaintiff leave to sell the property by  
20 way of private treaty and I so order. In addition, I make the consequential orders  
21 prayed for in the Plaintiff's Originating Summons.

22 52. As costs follow the event I grant the Plaintiff the costs of this application, to be  
23 taxed if not agreed.

