CIRCULATE 31.3.2004
Civil.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 633 OF 2003

IN THE MATTER OF THE REGISTERED LAND LAW (1995 REVISION)

BETWEEN:

BANK OF BUTTERFIELD INTERNATIONAL (CAYMAN) LTD.

Plaintiff

AND

1. **ELWOOD LEVY**
2. **ARLANE A. LEVY**

Defendants

Appearances:

On behalf of the PLAINTIFF: **Mr. Ward Sykes, Hunter & Hunter**

On behalf of the DEFENDANT: **Mr. Clyde Allen, Woodward Terry & Company**

Before: Hon. Justice Henderson

Heard: March 2, 2004

JUDGMENT

Henderson J.

The Plaintiff Bank of Butterfield International (Cayman) Ltd. ("the Bank") seeks a declaration that the defendants are in default of payment under a charge they granted to the bank, an order granting it possession of the charged properties, and the right to sell by private treaty. In resisting the application, the defendants argue that it is defective

because two notices required by the *Registered Land Law (1995 Revision)* were served at the same time and not sequentially.

The charge in question is collateral to a debenture payable on demand. It provides:

> "the chargor shall repay to the chargee on demand the principal sum or such portion thereof as shall have been advanced to or be payable by the chargor or the principal debtor and remains due and owing together with interest thereon at the rate or rates aforementioned."

The debenture provides that the borrowers agree:

> "to repay the principal sum on demand together with such interest as is from time to time outstanding, at the rate provided for above and pending demand for the full amount, to make all payments in accordance with the lender's commitment letter dated November 4, 1998, the terms of which were accepted by the borrower November 8, 1998, or at such other times and in such other manner as the lender in its discretion requires ..."

The commitment letter referred to in the debenture was amended; the amendment provides the following with regard to repayment:

> "During the course of construction interest is to be covered on a monthly basis. Following the final drawdown of this facility, monthly repayments are to commence within 30 days at a rate of CI $8,415.00 per month with payments amortized over a 12 year term. Notwithstanding the forgoing, this facility will be repayable upon demand."

The defendant borrowers have not made any repayment at all.

The Bank sent two letters, each dated June 23, 2003, to each of the two defendants. The letters were served on August 2, 2003 upon Mrs. Levy and on August 11, 2003 upon Mr. Levy. For present purposes, I take the later of these two dates to be the operative one.

One letter ("the section 64 letter") is a demand for payment of the principal sum plus interest. The letter invokes section 64 (2) of the *Registered Land Law*, which reads:

> "64. (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument and, where no such date is specified or repayment is not demanded by the chargee on the date specified, the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee."

The second letter invokes section 72 of the *Registered Land Law* and is a demand for payment of the arrears owing plus interest. Section 72 provides as follows:

> "72. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.
>
> (2) If the chargor does not comply within three months of the date of service, with a notice served on him under subsection (1), the chargee may –
>
> (a) appoint a receiver of the income of the charged property; or
> (b) sell the charged property:
>
> Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under subsection (1).
>
> (3) The chargee shall be entitled to sue for the money secured by the charge only-
> (a) where the chargor is bound to repay the same;
> (b) where, by any cause other than the wrongful act of the chargor or chargee the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security; or
>
> (c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor:

Provided that-

(i) in the case specified in paragraph (a)-

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired; and

(ii) the court may, at its discretion, stay a suit brought under paragraph (a) or (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property.

The borrowers say that the two sections must be read together and, properly understood, provide for a sequential notice process which is mandatory before legal action may be initiated to enforce the security. Since this is a charge which does not specify a date for the repayment of the sums secured by it, the money, in the words of section 64 (2),

> "shall be deemed to be repayable three months after the service of a demand in writing by the chargee."

Since the section 64 letter was served August 11, 2003, the money secured by the charge is deemed to be repayable on November 11, 2003 and not earlier. The borrowers say that section 72 (1) of the *Registered Land Law* can only be invoked after a default has been made in payment and has continued unrectified for one month. At that point, but not earlier, a section 72 notice may be served. Mr. Allen argues that the earliest date for service of such a notice was December 11, 2003. Finally, the remedies available under section 72 (appointment of a receiver or sale of the charged property) only become available if the chargor has not complied with the section 72 notice within three months. That, says Mr. Allen, means these borrowers had until March 11, 2004 to make repayment. Finally, section 72 (3) (i) (b) provides that no action shall be commenced

until the time for compliance with the section 72 notice has expired. The originating summons was filed September 30, 2003. The ultimate result of all this, say the borrowers, is that this action was commenced prematurely and must be dismissed.

In support of his submission, Mr. Allen has cited *Paradise Manor Ltd. v. Bank of Nova Scotia* 1985 CILR 437 (Court of Appeal) and *British American Bank Limited v. Whittaker* 1997 CILR 480 (Grand Court).

The plain language of sections 64 and 72 suggests that they are designed to accomplish different and separate goals.

Section 64 (2) applies to a charge which contains no date for repayment or to one where, although a date for repayment is specified, no demand is made on the appropriate date. In these circumstances, a method for ascertaining a date for repayment is needed. The section satisfies this need by providing that the money shall be deemed to be repayable three months after the service of a demand in writing for payment. No act of default by the borrower is necessary to bring the section into play. The section may have application whether or not there has been an act of default.

Section 72 is intended for a different situation. It is triggered only where there has been a default in repaying the principal sum, or part of it, or any portion of the interest. The section guarantees to the chargor a period of one month within which he may rectify the default. If he does not do so, the chargee may serve notice in writing calling upon the

chargor "to pay the money owing." In its context, that phrase (found in section 72 (1)) refers only to the amount which is the subject of the default. The section also provides that the remedies of appointment of a receiver and sale of the charged property are available only if the chargor does not remedy the default within three months after the date of service of the section 72 notice. Moreover, if the chargee is suing for the money secured by the charge, he may not start the action until this three month period has expired (section 72 (3) (i) (b)).

Section 72 applies only where there has been an act of default. There is nothing in the section which requires that the default be a default in making repayment pursuant to, or after, a demand made under section 64 (2). The default may be a default on any obligation embodied in the security instruments.

Neither section 64 nor section 72 depends for its efficacy upon the other in any way. Each of the two sections functions independently; the language of the sections cannot be read in any other way.

In *Paradise Manor*, it was necessary for the lender to serve a section 64 notice. A demand letter was sent, and the court found that it did comply with section 64. The court also held that the same letter could not be viewed as a section 72 notice. In reaching this conclusion, Zacca, P. said (at page 449),

> "the bank, having complied with section 64 (2), was <u>now</u> required to serve a notice under section 72 of the *Registered Land Law* ..." (underlining added).

The bank had not served a section 72 notice, so the court then went on the consider in some detail if it should dispense with the section 72 notice requirement because the parties had agree to modify section 72 in that way. By using the word "now" in this context, I do not think that Zacca, P. was saying, or intended to say, that the section 72 notice obligation arises only after a section 64 notice is served and three months have passed. That point was not before him because there was no section 72 notice given at all.

In *British American Bank*, a section 64 notice was served on the borrower and then, over a year later, a section 72 notice was served. Objection was taken to the terms of the section 72 notice because it did not specify separately the amounts of principal and interest owing. There was also an argument about whether the court should exercise its discretion under section 77 to allow variation of the application of section 72 to the charge. The court was not called upon to decide whether these two notices had to be given sequentially. In reciting the facts, the court said (at page 483) that the section 64 notice was given in August, 1995 and, " the loan was therefore repayable in November 1995 and the plaintiff was <u>then</u> required to comply with the provisions of section 72 of the *Registered Land Law* ..." (underlining added). Again, the court was not deciding or purporting to decide that these two notices must be given sequentially.

In my view, in appropriate cases, a section 64 notice and a section 72 notice may be served at the same time. That was what was done here. The effect of the two notices is different. The section 64 notice served on August 11, 2003 established a date -

November 11, 2003 – for repayment of the principal sum and interest. That is all it accomplishes. The section 72 notice served at the same time refers to acts of default, ie, the existence of arrears, and demands " that you make immediate payment of the arrears plus interest further accruing from 18 June 2003." The letter also warns the borrowers that, if their default is not rectified, the chargee will take steps to exercise its power of sale. The default relied upon is the failure to make monthly payments as agreed. There has been no default in payment of the entire amount owing because the date for repayment of that, fixed by the section 64 notice, is November 11, 2003. It follows that the borrowers could have cured their default by paying the arrears plus interest demanded in the section 72 notice, and that the chargee would then have had no right to an order of sale or an order appointing a receiver.

The provision found in section 72 (3) (i) (b) prohibiting the commencement of an action until three months after the date of service of the section 72 notice applies only to an action by the chargee to recover the money secured by the charge. It has no application to an application for the sale of the charged property or the appointment of a receiver. That is the plain meaning of the opening words of section 72 (3); they refer to the chargee's entitlement "to sue for the money secured by the charge", and the constraints set out later in the section (including the constraint on the date of commencement of the action) apply only to such a suit for money. The bank has asked only for orders for sale and possession, so the limitation on the right to sue has no application here. The relevant limitation is found in section 72 (2), which provides that the bank may not sell the

charged property or appoint a receiver unless three months have passed from the date of service of the section 72 notice and the chargor has not rectified the default.

During argument, Mr. Allen suggested that the Defendants may not have understood the nature of the charge when they signed it. He said they had not taken legal advice. There is no evidence to support that assertion. Mr. Sykes, for the bank, has undertaken to file an affidavit exhibiting a letter signed by the Defendants before a notary in New York which confirms that they did seek legal advice and that they "understand the nature and legal effect of the said charge." I am satisfied there is no merit in this branch of the argument.

Well over three months have now passed since the section 72 notice was served. The arrears are still owing. The bank is therefore entitled to a declaration that the Defendants are in default of payment under the charge, to possession of the charged properties, and to exercise its right to sell by private treaty. The application is allowed, with costs to the bank.

Dated this 31st day of March, 2004

Henderson, J.

Henderson J.
Judge of the Grand Court