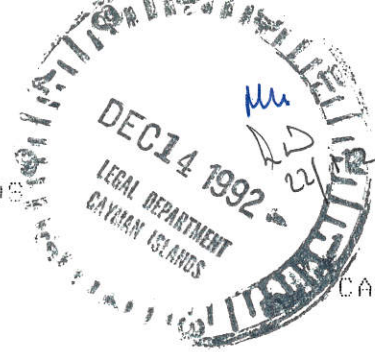


IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN



1992
CAUSE #257/92

IN THE MATTER OF SECTION 75 AND SECTION 77 OF THE
REGISTERED LAND LAW (REVISED)

AND

IN THE MATTER OF AN APPLICATION BY CAYMAN NATIONAL
BANK LTD. AS CHARGEES FOR AN ORDER GIVING LEAVE TO
EFFECT A SALE BY PRIVATE TREATY OF THE CHARGED
PROPERTY

BETWEEN: CAYMAN NATIONAL BANK LTD. PLAINTIFF
AND: GEORGE COLLENWORTH SMITH FIRST DEFENDANT
AND: SHARON PATRICIA PIERSON
(FORMERLY SMITH) SECOND DEFENDANT

Mr. Stafford for the Plaintiff
Mr. Herren for the Defendant

MALONE C.J.

RULING

The plaintiff's application seeks the permission of the court to sell by private treaty a property of which the first and second defendants are the registered joint owners and the plaintiff is the proprietor of a registered charge. The application is made under section 77 of the Registered Land Law (Revised) ("the Law") and is objected to by the defendants. That section is as follows:

"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."

It is conceded by the defendants that the right to sell has accrued. Indeed two attempts to sell the property by public auction have been made. One on the 13th October 1991 and the other on the 14th February 1992. No prospective purchaser appeared at either auction and no effective offer was made. Without imputing to the plaintiff failure to give any notice required under section 72 of the Law, the defendants submit that the court must decide whether the sale should be by private treaty. In this instance; the defendants submit, that before exercising its discretion under section 77 of the Law the court must know:

1. the reserve price for the property and the value of the property.
2. to what extent the property was advertised before the auctions were held.

The plaintiff on the other hand claims that being the proprietor of a registered charge with the right to sell it can set the conditions of sale without interference from the defendants as their only remedy for a breach by the plaintiff of its duty to them lies in damages. As regards the court, the plaintiff submits that the discretion conferred by the proviso to section 77 of the Law is confined to ensuring compliance with the statutory procedure relating to the giving of notice under section 72 of the Law.

The conflict between the parties, reflects the conflicting dicta as to the nature of the duty owed by a mortgagee to a mortgagor when the power of sale has accrued. The dicta was noted by Salmon L.J. in his judgement in *Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.* (1971) 2 A.E.R. 633 where at p643 he said:

' There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that, in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to attain

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whatever is the true market value of
the mortgaged property at the moment
he chooses to sell it"

In *Paradise Manor Ltd. v B.N.C.* (1985) C.I.L.R. 437 Kerr J.A.
reviewed the authorities and at p472 of his judgement concluded as
follows:

" In my view the weight of authority is
in favour of a duty to take such care in
realizing the true market value on the
sale of the charged property as a
reasonable man would in his own private
affairs."

In the same case Henry J.A. at p487 of his judgement summed
up his position on the matter as follows:

" In the final analysis the banks' obligation is
that imposed by section 75 of the Law to " act in
good faith and to have regard to the interests of
the charger." This, however, does not mean that the

bank is required to put the charger's interests before his own. The bank must take all steps reasonably necessary to ensure that it obtains the true value of the property to be sold. But the true value is essentially the price which the property will fetch at the particular time on the open market."

These passages from the judgements of Kerr J.A. and Henry J.A. accord in my view with the language of the proviso to section 77 of the Law which on a fair reading cannot be limited in the way in which the plaintiff would limit it. For the proviso ensures in the case of a variation, a measure of protection to an owner of property subject to a charge by withholding permission to vary.

In this instance, it may be, that the plaintiff has taken reasonable steps to ensure that it obtains the true value of the property when it decides to sell. I do not know as the plaintiff has, wrongly I think, refused to disclose material matter such as the value of the property or the price reserved or the extent of advertisement. As the merits of the application have not been examined and an adjournment was asked for by the defendants to reply to the plaintiff's affidavit in support of the application I shall order as follows. The defendants may within seven days of this day file and

serve on the plaintiff in reply to the plaintiff's affidavit filed the 15th July 1992 affidavits showing cause why the proposed sale by private treaty should not be permitted. And it is ordered that the plaintiff is entitled within 7 days thereafter to file and serve affidavits in reply to the defendants' affidavits.

Costs of this hearing of the application to be borne by the plaintiff.

The further hearing is adjourned to a day to be fixed.

Dennis E. Malone

Costs reserved.

1. 9. 92.

Dennis Malone