

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HON. MR. JUSTICE HULL
CIVIL CAUSE NO. 467/84

IN THE MATTER OF Section 77 of the Registered Land Law
AND IN THE MATTER OF several charges between Paradise Manor Ltd., as Chargor,
and The Bank of Nova Scotia as Chargee, pertaining to West Bay Beach South
Registration Section, Block 13B, Parcels 11, 12, 14, 124, 125H61 and 125H80
AND IN THE MATTER OF a Debenture created by Paradise Manor Ltd. in favour of
The Bank of Nova Scotia.

<u>Between:</u>	<u>THE BANK OF NOVA SCOTIA</u>	<u>Plaintiff</u>
<u>And:</u>	<u>PARADISE MANOR LTD.</u>	<u>First Defendant</u>
	(In Winding-Up)	
<u>And:</u>	<u>WILLIAM W. BECKER</u>	<u>Second Defendant</u>
<u>And:</u>	<u>MARGUERITE L. BECKER</u>	<u>Third Defendant</u>

Mr. Cohen Q.C. and Mr. Shea for the plaintiff.

Mr. Adams and Mr. Ritchie for the first defendant.

Mr. Ramon Alberga Q.C. and Mr. Foster for the second and third defendants.

REASONS FOR JUDGMENT

On 28 February 1984, I made the following orders in this matter:

- (a) That the variations of section 72 of the Registered Land Law contained in the registered charges which are the subject of the application of 11 December, 1984 may be acted upon by the bank (the plaintiff):
- (b) Further, an order in the terms of paragraphs 1 and 3 of that summons:
- (c) Further, that to the extent that the supplementary summons of 24 January, 1985 seeks relief additional to that sought in the summons of 11 December, 1984, such additional relief is refused, and that the additional costs occasioned by the supplementary summons shall in any event be costs of the defendants:
- (d) That the plaintiff is to have liberty to further apply, if it thinks fit on 10 days notice to the defendants.

I said I would subsequently give written reasons for my decision which I now do.

In 1980 and 1981, Paradise Manor Limited borrowed money from the Bank of Nova Scotia to build a hotel and apartments on land owned by the company in West Bay Beach South area. The money was advanced in several stages. The bank took securities in respect of the loan. For the purposes of this application, the relevant ones are -

- (a) a first debenture dated 21st January, 1980 by the company, including a provision charging "by way of legal charge" its land comprising Parcels 9 and 10 of Block 13A in the West Bay Beach South Registration Section and creating a first floating debenture over all its undertaking, goodwill and other property; and
- (b) registered first charges over lands comprising Parcels 11, 12, 14, 124, 125H61 and 125H80, Block 13B, West Bay Beach South Registration Section.

The charges in paragraph (b) are collateral charges. They are each expressed to be read in conjunction with the debenture.

Mr. Becker is the managing director of the company and he and his wife are the shareholders. On 8th September, 1981, when the principal sum under the loan had been increased to US\$11,300,000, Mr. and Mrs. Becker executed personal guarantees in respect of the company's liabilities to the bank. The guarantees are limited to that amount.

By December, 1981, the principal sum secured by the securities (apart from the guarantees) was US\$18,000,000. In May, 1982, the company defaulted in payment of interest under the loan. On 27th July, 1982, the bank demanded in writing from the company immediate payment of all money due. On 29th July, 1982, the bank appointed receivers in respect of the company's assets under the debenture and on 7th October, 1982, the bank made demands in writing against the guarantors for payment of the sum of US\$11,300,000. All of these moneys remain unpaid by the defendants. It is not disputed that they are in default at least in the payment of the interest.

On 25th March, 1983, the receivers attempted to sell at public auction the lands charged in the bank's favour. Before the auction, extensive advertising had been undertaken in leading publications in the Caribbean, North America and Europe. Brochures and information had been sent to at least 173 people who had responded to the advertisements or who might have an

interest in the auction. Unsuccessful attempts had also been made to interest leading hotel chains in the hotel site. On 23rd March, 1983, the receivers had also obtained from Bould Chartered Quantity Surveyors of Georgetown a report valuing (inter alia) the hotel site and the adjoining land at US\$14,420,000.

The auction was unsuccessful. Some 119 people, including Mr. Becker, attended. The auctioneer asked for opening bids for the hotel, the undeveloped adjoining lands, and equipment, at US\$4,000,000. He then reduced his request to US\$3,500,000 and US\$3,000,000 successively without result. No bids were in fact made for the hotel and its adjoining land. Mr. Becker bid unsuccessfully for some condominium units. Only 3 were sold.

Attempts were again made after the auction to attract interest in the hotel site, from leading operators and others, but these too were unsuccessful.

This court made a winding up order in respect of Paradise Manor Limited on 30 August, 1983.

In the latter half of 1984, the bank negotiated with Georgetown Associates for the sale of Parcels 11, 12, 14, 124, 125H61 and 125H80. In October, Bould provided the bank with a report valuing the hotel (which is incomplete) and the adjoining land at US\$6,989,000 and 2 of the condominiums at US\$290,000. While the bank was dealing with Georgetown Associates, it was approached by Mr. Becker. He sought to negotiate with it to complete or acquire the hotel. The bank agreed to allow him and the persons whom he represented 10 days in which to satisfy it that they had a genuine and viable proposal. In the event, the "Becker group" did not do so. On 27th November, 1984, the bank and Georgetown Associates entered into an agreement for the sale and purchase of the hotel, the adjoining land, and the two condominium units for US\$7,500,000 and also to purchase equipment, materials and inventory. This agreement is the subject of the present application.

On 11th December, 1984, this court granted the bank leave under section 98 of the Companies Law "to seek an order under section 77 of the Registered Land Law permitting the sale by private treaty of certain properties owned by Paradise Manor Limited and charged to the Bank of Nova Scotia, such properties consisting of West Bay Beach South Registration, Block 13B, Parcels 11, 12, 14, 124, 125H61 and 125H80." Those proceedings were intituled (inter alia), as is the present application, "In the matter of several charges.... and in the matter of a debenture." These are the lands that it is proposed to sell to Georgetown Associates.

On the same day the bank applied to this court pursuant to that leave for an order in those terms and for such further or other order as the court might think fit. By a consent order made on 21st December, 1984, Mr. and Mrs. Becker were added as second and third defendants.

Four days before this hearing, the bank filed a further summons, described as a "supplementary" summons. This is intituled in the same way as the original summons. It is clearly intended, as Mr. Cohen reiterated in argument to be supplementary to the first summons. It appears to me to seek to supplement it in two respects:

- (a) by including building equipment and chattels:
- (b) by seeking an order under section 77 of the Registered Land Law in respect of powers of sale specifically pursuant to the debenture or collateral charges or to both of them.

In other words, in the second respect, it seeks to particularise the sources of the power of sale by including that under the debenture and those under the collateral charges.

I will refer to the terms of the securities in greater detail below, in dealing with the submissions made by counsel, but at this point I ought also to note that the debenture and the collateral charges do contain powers of sale either by public auction or private treaty.

For the bank, Mr. Cohen said at the outset that although this case involves some detail, the issue can be simply stated, namely the right of the bank to realise its securities for a loan 2½ years after the borrower had defaulted.

The case for the bank, also put simply, was that Paradise Manor Limited (and the guarantors) having defaulted, it had allowed them ample opportunity over a long period to remedy the default, and that it had itself made conscientious and thorough efforts to find a buyer at a suitable price by public

auction and by private inquiry but without success. After more than 2 years, the only written offer it had received was from Georgetown Associates. The hotel site was deteriorating. It had accepted the Georgetown offer for no improper purpose. It was in the circumstances a reasonable course of action for the bank to take. The Georgetown offer was the only realistic evidence of value of the property. The bank had candidly set out the history of the matter. The defendants had ample notice of the bank's intentions. The court ought therefore to grant the application to enable the transaction to proceed.

The defendants opposed the application on several grounds, but before considering these, I should deal with an objection taken by the bank to the standing of the second and third defendants. It said that they had no standing to be heard. I do not think this objection is well taken. Those defendants were joined by consent, but in any event I am satisfied that *Standard Chartered Bank Ltd. v. Walter and Another* [1982] 3 All E.R. a Court of Appeal decision, is clear authority that as guarantors they do have standing to be heard for the purposes of an application under section 77.

There is one other matter I want to deal with at the outset. In replying to the defendants, Mr. Cohen intimated that if judgment were to be given against the bank, it might have to reconsider its position in these Islands. This is neither a relevant nor an appropriate comment. Cayman law enables mortgagees to realise their securities. They are realised here. The procedure for doing so is not onerous. It is not novel; many jurisdictions have similar safeguards. If in the event the bank should have failed to comply with the requirements of notice under the law (which was the issue that occasioned the comment) the answer is simply that the responsibility for that failure would lie with the bank itself.

The defendants' grounds of opposition can be set out under the following heads:

Jurisdiction:

The first point on which the defendants joined issue related to the supplementary summonses. Mr. Alberga objected to this but at the hearing I abridged the time for its service and allowed it to be argued with the original summons, subject to the defendants' rights to argue that the court had no jurisdiction to grant the additional relief it sought.

He said that the original order granting leave under section 98 of the Companies Law was made for the purposes of an application under section 77 of the Registered Land Law. Section 77 only relates to land. To the extent that the summonses go beyond land, the court has no jurisdiction under the section. That is clearly correct.

He also objected that the order under section 98 of the Companies Law did not (or rather, I think, could not) encompass the alleged power of sale under the debenture. The land that is the subject of the present application is registered under the Registered Land Law, the floating debenture charge is neither registered nor registrable under that law, and the court therefore has no jurisdiction under section 77 to make an order in respect of such a charge. I agree with these submissions.

The debenture does not contain a specific clause charging the land to which this application relates but it does create a floating charge over all the company's property. Section 2 of the Registered Land Law defines "charge" to mean any interest in land securing (inter alia) the payment of money. Section 3 provides that the law is paramount in relation to land registered under it (subject to a proviso which I do not consider relevant to this case). Section 37 provides in subsection (1) that no registered land is capable of being disposed of except in accordance with the Law, and by section 2, "disposition" is defined to mean "any act inter vivos by a proprietor whereby his rights in or over his land are affected." The definition excludes "an agreement to transfer lease or charge."

That phrase is not punctuated but I take it to refer separately to agreements to transfer, agreements to lease, and agreements to charge. The intention is, I think, that where the Law refers to dispositions, it means dealings on the registered title, but not dealings which are only contractual in nature.

The charging of one's land as security is an act whereby one's rights are affected; the result to my mind is that a registered proprietor cannot charge his registered title except in accordance with the Law.

Section 64 (1) provides that a proprietor may charge his land by an instrument in the prescribed form. The Third Schedule to the Registered Land Rules prescribes a form of charge. The debenture does not follow this form. It is not a legal charge within the meaning of the Law, and it is not registered under the Law.

Mr. Cohen argued that the Law does not restrict the right of individuals to make contractual arrangements. From this premise he went on to contend that as the debenture is itself a good contractual agreement to charge the lands, and as it includes a power of sale, not only is the bank at liberty to sell the lands to Georgetown Associates under the debenture unrestricted by the requirements of the Registered Land Law, but also that in due course the purchaser will be entitled to be registered as the proprietor by presenting to the Registrar of Lands a conveyance from the bank reciting in full the events leading to the transaction. He argued that the intention of the Law

is simply to give priority to registered interests and that while purchasers may be at risk so long as interests are not registered, this does not invalidate the contractual rights that they have acquired.

It is clear from section 37 (2) of the Law that the statute does not affect contractual rights but insofar as Mr. Cohen's submission is directed towards the proposition that the bank under its debenture may dispose of the registered title to the land without complying with Division 3 of the Law, I do not agree with it. Section 37 (1) is couched in absolute terms and nothing in the Law provides for the Registrar to recognise the interests of a purchaser from the bank by registering it as the proprietor in derogation of the registered title of the company.

Section 77 enables the parties to a charge to agree to vary provisions in sections 70, 72, 73, 74 and 75, subject to the requirement that the court must sanction the variation. These provisions in my view relate to registered charges. Accordingly, I consider to the extent that the summonses seek to obtain the sanction of the court to the exercise by the bank of powers conferred on it otherwise than by the registered collateral charges, ^{that} I have no jurisdiction under Section 77 to entertain the application.

The issue of notice:

The next objection taken by the defendants was that the bank has failed to comply with those sections of Division 3 of the Law that require notice to be given before a chargee can exercise his power of sale.

The defendants referred first to section 64 (2) of the Law. That subsection says that where no date for the repayment of the money secured by a charge is specified in the charge instrument, 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 collateral charges all refer to the debenture for the terms of repayment of the moneys secured. They say that the principal sum and interest and other moneys shall be repaid as provided in the charges and in the debenture. The charges themselves refer to the debenture for repayment of principal and payment of interest. The debenture provides in paragraph 2 (a) that the principal and interest is repayable on demand, and that pending such demand the principal is to be repaid by the payment to the Bank of 95 percent of the sale price of every apartment sold "provided that any balance of the Principal Sum then remaining unpaid shall be repaid to the Bank on the 31st day of May, 1981."

Paragraph 1 (iii) of the debenture also provides that "the rate of interest chargeable to and payable by the Borrower monthly shall be charged to the Borrower's loan account on a monthly basis."

It is common ground that no demand for repayment of the principal sum was made on 31st May, 1981.

The defendants say that before a chargee can make an application under section 77, it must first have acquired the right to exercise the power of sale under the Law. They say that the bank has not done so. No demand in writing has been made in compliance with the requirements of section 64(2) whereby the repayment of the moneys secured by the charge has become due and payable. The subsection applies both to principal and interest. The letter of 27th July 1982 did not constitute such a demand. It was in effect an immediate demand for repayment of the principal and the interest that had accrued; it only gave the company 24 hours in which to repay.

Mr. Alberga contended that to comply with section 64 (2), it is necessary to say in the notice that the money is to become due in three months. This was not done. Moreover on 29th July, 1982, the bank proceeded to put the company into receivership, thus denying it any opportunity during the statutory three month period to comply with the demand.

The defendants submitted that even if the letter of 27th July, 1982 did comply with section 64 (2) (which they denied, but which was the highest at which they said that the bank's case might be put), it is also under section 72 a condition precedent to the power of sale conferred by Division 3 of the Law that the chargor must have continued in default for one month, that the chargee must then have served on him notice in writing to remedy the default, and that the chargor must have failed for three months following the service of notice to do so.

So before the bank could exercise its power of sale under the Law, it was argued, a minimum period of seven months must have elapsed, and within that time these successive events must have taken place. (I do not consider this last point to be valid. The charges are security over land. The company's ability to carry on business is incidental).

The letter of 27th July, 1982 could not be a notice in compliance with section 72 (1) because the money secured by the charges had not then been made repayable. Hence there was no default. Notice under section 72 (2) could only be given after the company had been in default for one month. Further, the letter of 27th July did not stipulate for the purposes of section 72 (1), any more than it did for the purposes of section 64 (2), that the company had three months in which to pay.

There were no other letters or notices that could be said to fulfill the requirements of either section.

Mr. Becker had not become aware until 10th February, 1983 that the Bank intended to sell the property. He had consulted his lawyers and in an exchange of correspondence with the Bank's lawyers, the former had pointed out that no proper notices had been given and that they therefore objected to the proposed sale.

In consequence of these failures to comply with the procedural requirements of the Law, Mr. Alberga submitted, the present application before the court must fail in limine. Mr. Adams supported these submissions.

The bank's answer was that the requirements had been met, so far as it was necessary to do so. Mr. Cohen also argued that the defendants in any case had had very ample actual notice of the intended sale; and had waived their rights or were estopped from denying compliance with the requirements. In addition, he contended that the court had an inherent jurisdiction and an inherent equitable jurisdiction to relieve the bank from any adverse consequences of the defendants having raised technical objections as to notice.

Mr. Cohen also said that section 64 (2) relates to only principal moneys and that as the company had been in default in payment of interest, and under other covenants in the charges, for more than a month before 27th July, 1982, all that was then required was notice in accordance with section 72 (1) and that the letter constituted such a notice.

He also made the point, which I accept and which I understood the defendants not to pursue, that the bank had on 29th July, 1982 appointed its receivers under the powers contained in its debenture, and not under the statutory power confirmed by section 72 (2) (a) of the Law, so that no question of an additional three months notice under the proviso to that subsection arose.

Section 64, and sections 65 to 67, in my view are a group of sections which deal in one way or another with the form, content and effect of charges. Sections 72 to 76 are another group of sections which are concerned with the remedies of the chargee in case of default.

I do not consider that section 64 (2) relates ^{to} the payment of interest. It is a provision to determine the date on which the principal sum under a charge is to become repayable. The parties may agree a date for repayment in the instrument, but if they do not, or the chargee fails to demand the money on that date, then he must set it by three months notice to the chargor. It is not possible to obtain a variation of this requirement under section 77. The chargee may stipulate the repayment date in the instrument but if he does not do so, or fails to make demand in that day, three months notice is mandatory to make the principal sum due and payable. I do not think it is in any way the intention of the subsection that in order to be able to exercise his remedies for the payment of interest under a charge, the chargee must

demand in writing the payment of each instalment of interest on the day on which it falls due.

I consider that as the company was in default of payment of interest to the bank, the submission that the letter of 27th July, 1982 does not amount to a demand under section 64 (2) itself is not a sufficient argument to defeat this application in limine.

Mr. Alberga also argued, as I understood him, that because the letter of 27th July clearly demanded principal as well as interest, the bank had taken on the burden of having to comply with section 64 (2). I cannot agree with this and I can see no reason why the inclusion of principal in the demand should prevent the bank from being at liberty to pursue its remedies in respect of the default in interest payments, although I will consider this point further in relation to the requirements of section 72.

In any event, although my finding on the point does not turn on it, I consider that the letter of 27th July could constitute a sufficient demand for the purposes of that subsection. The provision does not say that the chargee must in his demand in writing stipulate a date, being three months after service, on which the money will become due and payable. No authorities were cited to me in support of the contention that the subsection must be so interpreted. What it says is that there must be a demand in writing by the chargee. The letter of 27th July is such a demand for the principal. The subsection also says that the money is deemed to be repayable three months after the service of that demand. It seems to me that once demand is made, by operation of law the repayment date is immediately fixed at three months thereafter, that nothing the chargee may say in that notice can alter that consequence, and that if the chargee seeks immediate repayment, the chargor is simply entitled to wait until the period expires.

I also consider that the submission that the application fails in limine because of non-compliance with section 72 (2) is not well-founded.

There was default in payment of interest continuously from 31st May, 1981, and therefore, by reason of section 72 (1), the bank was at liberty on 27th July, 1982 to serve on the company "notice in writing to pay the money owing or to perform and observe the agreement as the case may be."

Mr. Cohen argued that the letter of 27th July amounted (inter alia) to a notice under that subsection to perform those covenants other than for payment of money. His purpose was to put forward an additional reason why noncompliance with section 64 (2) would not be fatal to the application.

I cannot agree that the letter is that kind of a notice. It is not a demand to fulfill such other covenants. But it is a demand for payment (inter alia) of the interest money due and payable, and it is in my view effective for the purposes of section 72 (1). I have quoted above the wording of the relevant part of that subsection. The requirement that three months must then elapse after service of the notice is in subsection (2). That says "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 (b) sell the charged property."

Subsection (1) does not stipulate that in the notice the chargee must specify that payment is to be made within three months. No authorities were cited to support this contention. The defendants' arguments, as I see it, depend on the words "does not comply within three months with a notice served under subsection (1)" meaning that the notice under subsection (1) must not only state what it is that is to be complied with, but also that such compliance must be within three months, so that if the notice does not spell that out, it is bad. I do not think such an interpretation is correct. Clearly, if the service of the notice creates on the part of the recipient an obligation to comply with it, then the notice ought to state what is to be complied with. But all I think that means is that it must either call for the payment of the money owing or the performance of the broken covenants. There is no need for the notice to specify the time limit for doing so; the law, in subsection (2), already does that itself. The chargor must be taken to know his legal rights; indeed by reason of section 64 (1), when he signs the instrument creating the charge he is required to sign a special acknowledgement that he understands the effect of section 72. The law protects the borrower, but I think that it is beyond the literal meaning and the spirit of subsections (1) and (2) of section 72 to require the lender to spell that out again in his notice, and that it would be very technical to defeat the efficacy of a notice on this ground. After all, section 72 (1) does not require the chargee to say in the notice that in the event of continuing default, the land may be sold. The chargor is evidently taken to know that as a matter of law that is a possible consequence. I can see no reason for supposing that it is important to specify in the notice the three month time limit for compliance, but not the equally important possibility of a sale thereafter.

The letter of 27 July, 1985 did not specify separately, as such, the principal moneys and interest then outstanding. It said, in the second paragraph :

"We hereby make formal demand for payment of the monies owing by way of non revolving demand loans US\$15,532,806.96 and operating overdrawn accounts of respectively US \$12,737.81 and CI\$90,469.72. Interest will continue to accrue on these accounts until payment is made in full."

So the amount that is principal and the amount that is interest is not apparent on the face of the letter, to an outsider. The point made by Mr. Alberga in relation to section 64(2), i.e. that the notice was (which is not in dispute) a demand for principal and interest needs to be considered also, I think, in the context of section 72.

In my view a notice under subsection (1) of that section should specify what it is that is demanded but in this case I do not consider that anything turns on the fact that it covers both principal and interest. I am satisfied that the defendants knew how much principal money had been advanced to the company and that they would also have known how much interest the notice related to. In those circumstances, I consider ^{that} the notice is not invalid by reason only that it includes both principal and interest.

Mr. Cohen also said that if the bank has not in fact complied with the requirements of section 72 as to notice, then he would seek an order under 77 that such notice should be dispensed with because the parties have already agreed in the collateral charges to do so, the application is wide enough to encompass such a request, the defendants cannot say they are taken by surprise, and it is appropriate that such an order should be made.

If I am wrong in holding that there has been compliance with section 72, then that request will still have point, and I therefore deal with it.

The original application under section 98 of the Companies Law sought an order for "leave to sell by private treaty" the properties in question "the proposed sale being a variation in accordance with section 77 of the Registered Land Law of a Chargee's remedies in respect of charged property."

It also sought such further or other order as the Court might think fit. Mr. Berven's affidavit of 3 December, 1984 in support referred to the existence of the debenture and charges and the amount owing to the plaintiff. In paragraph 4 he refers to the plaintiff's having entered into the agreement "for the sale of inter alia" the lands to which the securities relate and goes on to say "which agreement, I am advised by my attorneys-at-law, involves a variation of a chargee's remedies under the Registered Land Law and cannot be put into effect unless this Honourable Court so orders under Section 77 of the Registered Land Law." The only other part of the affidavit that I think I need refer to is in its conclusion where it indicates that the application is for leave to commence proceedings "for approval of the said proposed sale."

On 11th December, 1984 the learned Chief Justice made an order granting leave "to commence proceedings to seek an Order under section 77 permitting the sale by private treaty" of the properties. There is nothing in the record to show that at that stage, the scope of that application had been wider or narrower than it appeared from the papers themselves.

The present application before me was drafted in the same terms. It also contained the usual prayer for such further or other order as the Court might think just, which prayer is in my view permissible as long as it does not widen the scope of the proceeding beyond that for which leave was given.

Mr. Shea's affidavit in support referred to the obtaining of leave under section 98 of the Companies Law. In paragraph 2, he referred to the fact that leave had been granted to commence proceedings to seek an order under section 77 "permitting the sale by private treaty" of the properties.

At the present hearing, in his submissions in chief, Mr. Cohen adverted to the possibility that I could make an order confirming the variation of section 72 already agreed by the parties but I did not understand him to ask me to do so at that point. My note is that having mentioned the possibility, he went on to say that he didn't have to go so far.

When Mr. Alberga was making his submissions in answer, on the question of notice under section 72, Mr. Cohen intervened to say that he would also ask for an order confirming the contractual variation of that section. I asked him to reserve any submissions for his reply.

When making his reply, he did seek such an order saying that it ought to be made and that no one could claim to be surprised by it as the application was wide enough to cover everything. I subsequently gave Mr. Adams and Mr. Alberga the opportunity to speak to the point.

Both objected strongly to Mr. Cohen's submission. Mr. Alberga said that no leave had been given to seek such an order. The plaintiff's summonses and affidavits did not specify or support such an order. No application for it was properly before the Court. It involved different principles, Mr. Becker had been advised on the basis of the proceedings as they had been brought, and it would be unfair and unreasonable for the defendants to have to contend with it at this stage.

Strictly I think that the original application for leave and the present application are wide enough to cover orders confirming variations of sections 72 and 77. They are simply applications for the approval of an agreement for sale and purchase, such a sale being a variation of a chargee's remedies. Although it is true that they refer to a sale by private treaty, they nevertheless do not themselves expressly specify the nature of the variation.

I must also say that so far as the issue of notice goes I am inclined towards Mr. Cohen's argument that the court should lean towards enabling the bank to realise the security. In all the circumstances of this case, the

objections taken by the defendants as to the alleged defects in notice are in my opinion technical. The legislature has laid down a requirement. Thus three months notice must be given before the power of sale may be exercised. But it has also provided that where the parties have agreed, the court may sanction a variation of this requirement. It has gone further than that. In considering whether to do so, the court may have regard to the proceedings and conduct of the parties and the circumstances of the case.

This was not a transaction between a commercial institution on the one hand and a layman on the other. All parties had commercial experience. That in itself would not be enough to persuade me of the merits of sanctioning a variation although I do think that the requirements for notice serve the most obvious purpose when the borrower lacks commercial expertise. But the facts of this case go beyond that. It involves a very substantial business transaction. The parties agreed to the modification of section 72 at the outset.

The parties have been taking legal advice for some considerable time. Two things were apparent from the exchanges of letters in March 1983. One was that the second defendant was objecting to the validity of the notice so far given of the bank's intention to sell the properties and that the receivers were aware of this. The second was that the bank, in the knowledge of this, intended to proceed, on the basis that there had been default in payment of interest and that the second defendant and the receivers knew this.

The bank has adduced evidence (which has not been challenged by evidence in rebuttal) that at the auction in April 1983, Mr. Becker intimated to the Georgetown manager of the bank that he would not object to the sale of the company's assets.

When leave was sought under section 98 of the Companies Law, no objection in limine was taken by the company on the ground of notice. It was not until 18 January, 1985 that the second and third defendants filed a notice to that effect.

For the reasons I have given, I think that the applications have been drafted in terms that strictly speaking are sufficiently wide to cover the possibility of an order under section 77 sanctioning both the agreed variations of the requirement for notice under section 72 and the requirement for sale at public auction. The sealed order granting leave under section 98 is an order "permitting the sale by private treaty and I think the truth is that this was at that stage the issue in the plaintiff's mind, but the original minute for the order was "Leave granted on terms sought."

The defendants having raised the objection in limine, and against the background I have described, the plaintiff was in my view entitled to address the demurrer, and as one of the limbs of his answer to submit that any defect in the notice could be remedied under Section 77.

I am not persuaded by the defendants' objection that it would be unreasonable and unfair for them to have to address this submission at that late stage of the proceedings. I think that the circumstances of this case are such that such a submission should be considered, and that the possibility that it might be made is something that was foreseeable.

I am also satisfied, having regard to the proceedings, and the conduct of the parties, and to the circumstances of the case, that such an order ought to be made.

Of the other submissions made for the bank, the argument that the defendants had waived their rights in my view had the most force, but I think that it fails because there is no evidence that the bank did in fact act on Mr. Becker's intimation at the auction that he would not object to the sale of the Cayman properties. I do not think the bank has made out a sufficient case either that the defendants are estopped from raising the objection to notice or that the court has an inherent equitable jurisdiction to override the objection, and I did not understand Mr. Cohen to pursue his argument of a general inherent jurisdiction with conviction - perhaps I should say that I am not persuaded of the existence of such a jurisdiction.

The merits:

I therefore now consider what is in my view the substantive issue in this application, namely whether or not the bank should have leave under section 77 to sell the properties to George Town Associates by private treaty pursuant to the agreement of 27th November, 1984.

The liquidator and the second and third defendants opposed this on the grounds that the sale is at an undervalue, that there is an undue degree of association between the bank and the purchaser, and that the sale is not in the best interests of the unsecured creditors.

The second and third defendants also opposed the sale on the ground that a group represented by Mr. Becker has made a better offer. The liquidators did not associate themselves with this argument, and I propose to deal with it first.

Mr. Becker has a company called Paradise Manor Resort Hotel Limited ("PMRH"). It is a Cayman Islands company. Mr. Becker is the sole beneficial owner of its issued shares and he is the sole director. On 18th January, 1985 this company's lawyers submitted to the bank's lawyers a bundle of documents (Exhibit W.W.B.9 of Mr. Becker's affidavit of that date) which he describes in that affidavit as an offer to purchase the hotel project and the adjoining undeveloped land for US\$12,000,000. So on its face, it is for a higher consideration than that in the Georgetown agreement. Moreover under this proposal, the bank is not liable to pay the three percent real estate commission that it has agreed to pay to Georgetown Associates, and PMRH will pay the bank what amounts to a commitment fee of US\$240,000 and interest at 14 percent per annum.

As these last two features indicate, the sum of US\$12,000,000 is not, however, to be paid at once. The amount which the bank will receive on acceptance is rather less than that. It is in fact a deposit of US\$100,000 and the "commitment" fee of US\$240,000. And the balance is to be deferred for two years.

During that period PMRH will pay the bank interest on the balance at 14 percent per annum payable monthly. It will also give the bank a registered first charge over the property to secure payment. It will not be an exclusive first charge however. Mr. Becker says that PMRH is also obtaining finance from the Savings Investment Service Corporation ("SISCORP") in Oklahoma by way of a construction loan and a take out loan which will enable PMRH to complete the hotel project within 12 to 14 months. So SISCORP would be a joint registered first chargee with the bank.

Nevertheless, the bank would be assigned the rights and interest of PMRH under its loan and commitment agreements with SISCORP and it was also said that SISCORP would pay the interest due to the bank under the deferred payment provisions.

Moreover, Mr. Becker will secure PMRH's performance of its obligations by his personal guarantee, and the bank's existing securities over other properties in respect of Paradise Manor Limited would remain unaffected.

There were other arguments put forward in favour of this proposal, one of which was that unsecured creditors would be offered a ten percent shareholding in the new company.

Mr. Cohen advanced a number of arguments against the work of the PMRH proposal, none of which to my mind were stronger than the bank's fundamental objection that it would not participate in such a transaction with Mr. Becker because it was against its commercial judgment to do so. That is in my view a sufficient argument by itself to meet the second and third defendants.

I will deal later with the duties of a chargee. All I will say at this stage is that what seems quite clear is that they do not extend to requiring it to become involved in this further transaction now proposed by Mr. Becker by having to deal again with him, the managing director of Paradise Manor Limited, and already a defaulting guarantor of its liabilities to the bank, nor do they extend to requiring it to provide two years financing of nearly the whole of the purchase price for his company PMRH.

Mr. Cohen also objected on other grounds to the merits of the proposal. He said that the bank was being asked to forego an exclusive first charge, and that the taking of a joint first charge with SISCORP would involve a substantial negotiating of such an arrangement with SISCORP. There was nothing in the offer by way of a proposal from SISCORP to cover this, nor any satisfactory proof that SISCORP would in fact ensure that the interest due from PMRH to the bank would be paid.

He also pointed out that the offer was not available at the time when the Georgetown agreement had been concluded on 27th November, 1984, that (as Mr. Alberga acknowledged to some extent) there were clearly points in the PMRH offer that would require further negotiation between it and the bank (quite apart from SISCORP) and that if the Georgetown sale was not sanctioned, the bank would at once lose bargaining power in relation to the PMRH proposal.

Mr. Alberga said that I should look at alternative offers that were before me, whether or not they had been made before the Georgetown Agreement. I am not persuaded that that is correct, but even if it is, I have considered the PMRH offer. I agree with the objections to it taken by Mr. Cohen and I find that it is not an offer by reason of the existence of which I should refuse to sanction the Georgetown agreement. Its terms are such that it is not an offer that the bank has any obligation to seriously consider or accept, it is not a better offer than the Georgetown offer, and it is not in my view bona fide evidence of the fact that the Georgetown sale is at an undervalue.

That is to my mind the real issue in this case, i.e. whether the Georgetown sale is for too low a price. All the defendants contend that it is.

At common law, a mortgagee owes a duty, to the mortgagor and the guarantors, to exercise his power of sale in good faith for the purpose of realising his security. He must exercise the power prudently, with due regard to their

interest in the surplus from the sale, and he must take reasonable precautions to secure a proper price. i.e. the true marked value at the time he chooses to sell. (See Cuckmere Brick Co. Limited and Another v. Mutual Fianance Ltd. [1971] 2 All E.R. 633.)

Section 75 (1) of the Registered Land Law, which deals with the responsibilities of a chargee in exercising the statutory power of sale under the Law, requires him to act in good faith and to have regard to the interests of the chargor. In my view this is, so far as it goes, a statement of the common law duties of a mortgagee, and I consider that so far as they are not excluded by statute, the other common law duties of a mortgagee apply to registered chargees - in short, that a chargee is to be equated to a mortgagee for that purpose.

Despite these duties, a mortgagee is not a trustee. He is entitled to have regard to his own interests as well as those of the mortgagor and guarantors, and where there is a conflict, to prefer his own interest to theirs, particularly in relation to the timing of the sale. Cuckmere Brick Co. Ltd. and Another v. Mutual Finance Limited.

Mr. Cohen maintained that Mr. Alberga had stated the chargee's duties at too high a level. With respect I agree.

The defendants contended that an analysis of the plaintiff's own evidence, and expert evidence adduced by the second and third defendants, shows that the Georgetown sale was at an undervalue.

To state their cases briefly, the defendants pointed to the substantial discrepancy between the two valuations the bank had obtained from Bould Chartered Quantity Surveyors of Georgetown. The first of these was obtained in March, 1983, prior to the auction. It valued the existing hotel and land at US\$11,300,000 and the vacant adjoining land at US\$3,120,000. It also valued the 22 unsold condominiums that were listed for sale at US\$3,562,500 and the 16 unsold condominiums under negotiation at US\$2,821,250. The second valuation was obtained in October 1984. It valued the hotel site at US\$4,809,000, the adjacent lands at US\$2,180,000 and the two condominiums that are included in the Georgetown contract at US\$290,000. It also placed a valuation of US\$281,000 on materials, plant and equipment on site.

The defendants argued that the substantial difference in these two valuations made the second one suspect, and that it was a valuation to support the proposed sale price to Georgetown Associates.

They contrasted the second Bould valuation with the conclusion stated in paragraph 27 of the affidavit of Mr. S.G. Williams filed for the second and third defendants that the correct appraisal using the principles which Bould had applied in 1984, for the hotel site and vacant land, was US\$13,180,000.

Mr. Williams who is a chartered surveyor had in his affidavit critically examined the application by Bould of the principles adopted in their report and had concluded that they were incorrectly applied by Bould.

In paragraph 3 of his affidavit, he states that he had been requested by Mr. Becker to comment on the fair market value of the project. After defining the standard definition of that term he states in paragraph 5.2 that he has studied closely the two Bould valuations and in paragraph 5.3 that in his opinion the market value of the property as submitted in these valuations is unjustified and not in accordance with the proper application of the valuation methods of either the Royal Institute of Chartered Surveyors or the American Institute of Real Estate Appraisers. I should note that this paragraph, on its face, considers both valuations to be unjustified, and not merely the one made in October 1984.

In paragraph 6 he accepts in principle the three valuation methods adopted by Bould, i.e. the cost approach, the income approach and the market data approach, and he goes on to explain them.

His criticisms of the Bould valuation of October 1984 are as follows. First, although Bould correctly valued Parcel 124 (the hotel property) at US\$11,099,116 on a cost approach basis, the deduction that it made of 50 per cent was unjustified and inconsistent with the method. No factual or analytical basis was recorded for the discount. To the extent that it was intended to take into account physical deterioration, it duplicated an allowance that had already been made in ascertaining the "true value" by using the cost approach method. He also criticised other elements in the discount, and he criticised the valuation of the land on which the hotel stands by the purported use of the market data approach, noting that the number of comparable sales was very small and somewhat outdated, and that Bould had used lower rates of sales rather than a mid-range selection, and had in any case understated the correct area of the land.

Turning to Bould's income approach method, Mr. Williams notes that it took four possible uses in the absence of any supporting professional report as to uses other than for a hotel. He states, in paragraph 17, that the income approach method requires to be supported by a "highest and best study" and that the Bould conclusions are invalid. He also criticises Bould for not applying his own proposed capitalisation process to establish the income-producing capabilities on a user for condominium and condominium/timeshare units, and says in paragraph 18 that Bould's income approach method is also invalid for that reason. The only part of that method which Mr. Williams regards as being appropriate is the one which assumes a hotel use, and he criticises this for arbitrary selection of a capitalisation rate, lack of data, approximate estimates, and reliance only on a broad estimate of a

single year's income for the purposes of its capitalisation processes, i.e. without regard to projected increases in income in future years. The technique should, he says, take account of a period of years in which the operating results can stabilise.

In relation to the market data approach used, he criticises Bould for not in fact applying it but rather reverting to the cost approach method and applying the arbitrary 50 per cent discount. Accordingly, he concludes that this purported method is also insupportable.

In relation to the hotel site, Mr. Williams considers that the market data approach is in any case inappropriate because of the lack of evidence available of the market value of comparable properties.

In relation to the vacant land, for which he does consider ^{the} market data approach to be relevant, he points to the reduction in the Bould valuations between 1983 and 1984 in this respect as clear evidence that the true value is being discounted to accord with the appraiser's objective (although I should interpolate that I cannot find in the affidavit a statement as to what that objective is alleged to be).

Mr. Williams sets out his own conclusions as to what the correct application of the principles professed by the Bould report should produce, and ends by saying -

"In final summation the inconsistencies of the Bould total valuations of the hotel and vacant land are shown as follows:

Bould 1984 Report	US\$6,989,000
Bould 1983 Report	US\$14,420,000
Correct value by correct application of Bould estimates 1984	US\$13,180,000

The second and third defendants also relied on a report by Marshall F. Graham and Associates of Louisiana which values the hotel site land and the adjoining land at US\$8,000,000 and the completed hotel at US\$44,000,000, and the offer from PMRH, as evidence of the undervaluing of the sale price to Georgetown. They also relied on the affidavit of Mr. A.V. Joseph, exhibiting a report by his firm Chalmers, Gibb, Martin, Joseph, Architects as evidence that deterioration of the hotel site was less than alleged.

For the liquidator, Mr. Adams supported in this respect by Mr. Alberga, also submitted that there was evidence of a undue degree of association between

the bank and Georgetown Associates, which was to be found in the terms of the transaction, and particularly those whereby after 50 percent of the finance being provided by the bank was repaid, the bank would participate with Georgetown in a form of profit sharing. He said that this aspect of the arrangement was in the nature of a partnership or joint venture or financing arrangement, that the courts look with disfavour on a mortgagee's association with a purchaser, and that the terms the bank is offering Georgetown are very generous. He also submitted that the bank's assistance on the construction loan was very high, resulting in an abnormally high/low ratio to the security.

Mr. Adams said that he was not suggesting that the bank had an improper motive, but that the degree of association, coupled, as I understood the thrust of his argument, with the criticisms of the Bould valuation, indicated an unconscious inclination by the bank to sell the properties to Georgetown Associates for a price which was undervalued and was not in the best interests of the unsecured creditors.

I do not think any of these objections is sufficient to show that the amount of the purchase price agreed in the Georgetown contract is an under-value.

Mr. Cohen made the point that the Georgetown offer is a real one, and that it is the only real offer the bank has received after more than two years effort by it to attract buyers. The appraisals, he said, are no more than that. They are theoretical. The only real evidence of the properties' worth is the Georgetown offer.

I think that there is great force in that argument. A considerable period of time has passed since the initial default. This is not a case

in which a mortgagee has sought to realise its security in haste, and in order to do so, has held a public auction in unfavourable conditions. There is unrefuted evidence that, quite apart from the degree of forbearance it had shown to the defendants, the bank went to considerable lengths to obtain an attractive offer. The availability of the properties and the holding of the auction were made known to a substantial number of people, including many leading hotel operators, by extensive publicity. A large number of people actually attended the auction. There is no evidence that it was held at an adverse time.

It is true that there is a substantial difference between the first and second Bould valuations. In the meantime, the abortive auction had been held. Valuations are at the end of the day, for all the reasoning that they may contain, appraisals. They involve judgment. There are likely to be variations in judgment amongst values, depending on their terms of reference and the parties they represent. Those variations are likely to be greater, and the margins of

error in successive valuations by the same individual are likely to be the greater, where the market is small or the property is nearly unique.

To say that a valuation may be affected by the point of view of the person for whom it is obtained is not a reflection on the professional standing of the valuer concerned. It is a fact of life, demonstrated every day in the courts when valuations have to be settled between opposing parties. It means no more than that the terms of reference and the presentation of the report from the most favourable point of view of the client are factors.

In this case, it might be that Bould's initial valuation was made with an optimistic view of the forthcoming auction, and it might also be that the second report was with knowledge that a proposed sale was in the offering, though there is no evidence that this was so. With the benefit of hindsight the valuer must in any case have placed a good deal of weight on the failure of the auction, and of subsequent efforts to sell, when preparing his second report.

The kind of argument that the defendants have advanced cuts both ways. The Williams report was obtained for Mr. Becker. The valuer's terms of reference were not to ascertain the fair market value of the properties; they were to "comment" on the fair market value "with particular reference to the two reports by Bould Chartered Quantity Surveyors." Notwithstanding the conclusions in paragraphs 25 to 27 of Mr. Williams' affidavit, I agree with Mr. Cohen that it is a critique of the Bould reports and not a valuation itself. Mr. Williams was not asked to say and he does not say what in his opinion the properties would fetch if put on the market. More specifically, he was not in the position of being asked by an intending purchaser, or a mortgagee, intending to put his own money into them, what the properties are worth on the market. He was only asked to comment on the Bould reports and his conclusion does not go beyond saying that if the principles that Bould had sought to use were correctly applied, the value would be US\$13,180,000.

I agree with Mr. Cohen that the valuations are theoretical. The only evidence is that in March 1983, none of the 119 people attending the well-publicised auction were prepared to offer even \$3,000,000 for the venture, and that the only offer that has ever been made since the default is for less than US\$8,000,000. In these circumstances, I must confess that I find it difficult to see how anyone could say with confidence that the project will fetch US\$12,000,000 and still less, in the context of a chargee's sale, that the Georgetown price is demonstrably an undervalue. As I understood the arguments, it was submitted that the uncompleted state of the buildings and the degree of deterioration that has occurred are not adverse factors, but with great respect to the valuers and assuming that the deterioration may not be as bad as alleged by the plaintiff, I think it is quite clear that they are factors

that make it more difficult to attract buyers and to that extent impediments to a sale.

Mr. Cohen denied that the bank is being unconsciously influenced. I accept this. There is no evidence to show that this is so. The bank has been candid. Mr. Adams acknowledged its good repute. I accept that it is a difficult position and that it may have been necessary, in order to obtain a sale, to provide finance. The element of future equity participation is not in my view sufficient to prove that this is a partnership or venture lacking in a suitable degree of detachment on the part of the bank. It is in my view an unobjectionable condition of the sale whereby the bank may secure some future benefit to offset the fact that it has had to provide some finance.

I have therefore ordered that the bank shall have leave to proceed with the proposed sale by way of private treaty.

It is a condition of the sale, set out in paragraph 1 of the section headed 'Court Order' that all appeal rights shall have expired by 31 st March, 1985. If that condition is not fulfilled the agreement will terminate. It had occurred to me that the bank and Georgetown Associates might agree to an extension or waiver of this time limit and that the bank might for that reason wish to apply further to have the terms of sale, as so varied, approved by the court. For that reason, I have also granted liberty to apply, though out of an excess of caution I think, as the sanctions required by section 77 only go to the matters of notice under section 72 and sale by private treaty under section 75.



Judge
1st March, 1985