IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 0123 OF 2016

BETWEEN:

SCOTIABANK & TRUST (CAYMAN) LTD.

Plaintiff

AND

GREGORY ANTHONY RICARDO WATT

Defendant

Appearances:	Mr. James Austin-Smith of Campbells for the Plaintiff Mr. Clyde Allen for the Defendant
Before:	Hon. Justice Richard Williams
Heard:	21, 28 & 29 December 2017
Draft transcript provided:	29 December 2017
Perfected transcript Circulated:	29 December 2017

HEADNOTE

Land Law – charges – power of sale - order for possession s.75(2)Registered Land Law (1995 Revision) - notice requirements under Registered Land Law (1995 Revision) – Relationship between s.72 notice and s.64(2).

TRANSCRIPT OF ORAL RULING

Application

1. This hearing has taken place in open court, with any members of the public and the media being free to attend and watch the proceedings. Due to the urgency for the Court to make a decision because of an overdue completion date for the sale of the relevant property, I feel it important to give the parties an urgent decision and the reasons for my decision. Accordingly, rather than providing a written ruling at a later date I now deliver this Judgment. I trust that the parties will understand why, with the hearing concluding at 6:00 p.m. last night, that it may not read as neatly as a formal written ruling. A perfected transcript of this oral ruling will be provided to the parties.

2. This is the hearing of the Plaintiff's Summons filed on 6 December 2017 in which the following relief is claimed:

(i) A variation of the provisions of s.75(2) of the Registered Land Law (2004 Revision) ("the Law") under the provisions of s.77 of the Law to allow the Plaintiff to recover possession of the property known as Registration Section Lower Valley, Block 38B, Parcel 544 ("the Property") in seven days from the date of this order;

(ii) An order that the Defendant and any other person occupying the Property do, within seven days of this order, vacate the Property and take all appropriate steps to give the Plaintiff vacant possession of the Property; and

An order that the Plaintiff do have leave to issue a Writ of Possession in relation to the Property at the expiry of the seven days referred to in paragraph (ii) above.

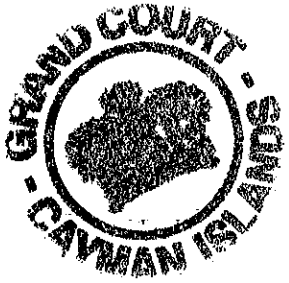
Although the Summons makes reference to s.77 of the Law, the operating section for this application is clearly the also therein mentioned s.75(2) of the Law. The Plaintiff has made clear that it is not requesting the Court to make orders pursuant to s.77 of the Law.

3. The evidence supporting the Plaintiff's Summons was taken from the Affidavits of Bridgette Bond sworn on 21 November 2016 and 19 December 2017 and the Affidavit of Tamara Siemens sworn on 8 December 2017. I have also read the Affidavit of James Pollard sworn on 30 November 2016 filed by the Plaintiff. I have read the Defendant's Affidavits sworn on 21 December 2017 and 27 December 2017. Oral evidence was received from the Defendant and Ms. Bond.

4. The initial hearing date for the Summons of 19 December 2017 was vacated and adjourned to 21 December 2017 due to the non-availability of a Judge. On the day before the hearing the Defendant belatedly instructed Mr. Allen. I note that as far back as his email to Mr. Rampersad at the Plaintiff's Trinidad and Tobago Office of 14 August 2017 the Defendant was stating that he was seeking "*legal council*" and that in an email to Ms. Carter at the Bank sent on 25 October 2017 the Defendant stated that he had "*already spoken with an attorney*" and copied her in

on his response to Ms. Carter. I note that on 21 August 2017 the Defendant made an application for Legal Aid to enable him to be represented by Ms. Ryan at Brady Attorneys-at-Law. That application was promptly considered and it was refused by the Director of Legal Aid on 23 August 2017 and a number of reasons for her refusal, including missing information that was required to support the application, were set out in correspondence from her dated 23 August 2017. It appears that the Defendant was thereafter dilatory in progressing any Legal Aid application, as he failed to make an application for reconsideration until 4 December 2017. That application was rather confusing because it also seemed to relate to a new application for legal aid relating to separate new proceedings brought by him filing a Writ of Summons in which he sought, amongst other orders, substantial financial compensation of $2,000,000 against the Bank in Cause No. 205 of 2017.[1] On 4 December 2017 the Director declined to consider the application for reconsideration of Legal Aid as the Defendant was out of time for making the application. The Director found that the application had not been made, as required by s.37(3) Legal Aid Law, within twenty working days after the notice being given of the 23 August 2017 refusal and it was not within three months of the notice being given, during which time the Director had discretion (pursuant to s.37(4) of the Legal Aid Law) to accept a late application if exceptional circumstances prevented the application being made within the above-mentioned twenty days. In the Refusal Certificate dated 4 December 2017

[1] There were issues about that Writ being properly filed and a new Writ has been filed by the Defendant which does not contain the $2,000,000 compensatory claim.



the Director notified the Defendant that he may want to consider whether he could appeal her decision to a Judge in Chambers pursuant to s.38 of the Legal Aid Law 2015. No such application has been properly made by the Defendant.

5. At the 19 December 2017 hearing Mr. Allen briefly outlined the basis of the Defendant's legal arguments against the orders sought and he applied for an adjournment to enable him to prepare. The application to adjourn was not consented to, but it was not opposed. Despite the Defendant having had ample time to instruct an attorney and him being aware for many months that the Bank was marketing the Property for sale, in the interest of justice, I granted an adjournment until 28 December 2017[2]. I warned the Defendant that, in light of the adjournment being caused by his regrettable inability to be properly prepared for the hearing and due to the risk to the Plaintiff of losing the sale of the Property due to the long overdue completion date, if he was unsuccessful in his defence of the Summons that an order requiring him to vacate the Property may give him less than seven days to do so. The Defendant filed Legal Submissions on Friday 22 December 2017 and his affidavits on 21 December 2017 and 27 December 2017.

6. Following the hearing on 21 December 2017, I provided the parties with a copy of the Unreported Judgment of Henderson J. dated 31 March 2004 in ***Bank of Butterfield International (Cayman) LTD v Elwood Levy & Arlene A. Levy***

[2] Mr. Allen had requested an adjournment to 27 December 2017.

Cause No. 633 of 2003[3]. Mr. Allen's outlined submissions on the issue of s.64(2) and s.72 notices were similar to those made by him for a defendant chargor in that case and I felt that both parties should be made aware of Henderson J.'s Ruling.

Background

7. To understand how the parties have arrived at the rather sad situation they now find themselves in, it is necessary to conduct a detailed review of their dealings from the inception of the Charge.

8. On 26 October 2012 a charge over the Property in favour of the Plaintiff was registered for the principal sum of CI$180,500 ("the Charge"). It was a provision of the Charge that:

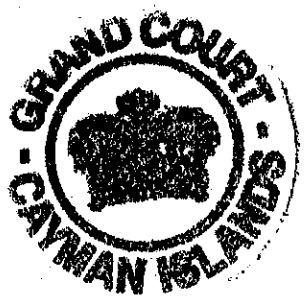
"1. Definitions

In this Schedule:

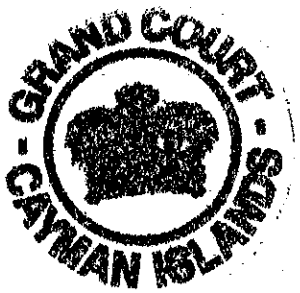
1.1 The following expressions shall, except where the context requires otherwise, have the following meanings:

	DEFINITION	*DESCRIPTION*
a)	*The Bank*	*Specified on the first page of this Charge (see "Chargee")*

[3] The case is reported as Note at [2004-05 CILR Note 14].



b) The Chargor	*GREGORY ANTHONY RICARDO WATT may also be referred to "the Borrower" of this Charge*
...	
f) the Secured Obligations	*All present and future obligations of the Chargor to the Bank under the Loan and otherwise howsoever incurred or arising and as more particularly described herein.*
g) Interest	*Means: 4.95% fixed for 3 years*
...	
i) Principal Sum	*CI$180,500.00 (One Hundred and Eighty Thousand Five Hundred Cayman Islands Dollars)*
j) Repayment Terms	*Payable on demand and prior to demand as follows:* *CI$1,479.99 representing principal and interest payable monthly, commencing 28th November 2012 and thereafter 239 equal instalments of CI$1,186.24 on the 28th day of each consecutive month.*



On the 28th day of October 2015, in addition to the schedule payment of CI$1,186.24 the then outstanding principal balance of CI$163,396.37 is due for payment in full.

The period of the loan is 240 months (20 years) with maturity date 30th October 2032.

2. *Covenant to Pay*

The Chargor hereby covenants to pay and discharge the Secured Obligations on demand and prior to demand in accordance with the Repayment Terms.

...

7. *Powers of the Bank*

7.1 At any time after the Bank shall have demanded payment of the Secured Obligations or any part thereof or if requested by the Chargor the Bank may exercise without further notice all the powers conferred on mortgagees by virtue of the Law as hereby varied or extended and all the powers and discretions hereby conferred either expressly or by reference on a receiver appointed hereunder and the date of such demand shall (without prejudice to the equitable right to redeem) be the redemption date. Nothing that shall be done by or on behalf of the Bank or a receiver appointed by it shall render it or him liable to account as a mortgagee in possession for any sums other than actual receipts.

7.2 In addition to the remedies provided by Section 72 of the Law the Bank shall, whether or not a receiver has been appointed, have the right to foreclose or enter into possession of the Charged Property or both in the same circumstances as would allow the Bank to exercise the power of sale or appoint a receiver.

7.3 Upon the exercise of its power of sale the Bank shall have the right to sell the Charged Property by private treaty as well as by public auction."

9. The Charge Form RL9 signed by the Defendant in the presence of the Bank's Officer dated 23 October 2012, conforms within the requirements under s.64(1) of the Law, as includes the wording:

> *"The principal sum shall be repaid on demand together with any interest or any other monies then due in accordance with the attached Schedule.*[4] *And I the above named Chargor(s) hereby acknowledge that I understand the effect of section 72 of the Registered Land Law, (2004 Revision)."* (My emphasis).

10. It is submitted that the Defendant did not recall signing the RL9 Charge document and that this supports a contention that he did not "*fully understand*" its contents. The Defendant states in his affidavit that:

> *"The bank had a lawyer but I never had a lawyer advising me about my rights."*

[4] See paragraph 8 above - The "Schedule, Revolving Charge" which contains the party's covenants" executed in the presence of Lisa Parsons an attorney at Campbell's.

The Defendant states that he was never advised by the Plaintiff to obtain independent legal advice. Despite signing the form he stated in his affidavit that:

"I now understand having looked at the Registered Land Law (2004R) (the "Law") that my document signed by me needed for me to acknowledge that I understood the importance of section 72 of the Law."

He then added that:

"I do not understand that section of the Law and until recently, I was not aware of the existence of the Law."

11. Despite signing the Schedule which sets out the powers of the Bank at paragraph 7 and signing the Charge Form which makes specific reference to understanding the effect of s.72, despite the reference in the first demand letter of 18 September 2013 (which was accompanied by a draft Summons) drawing attention to the arrears and the entitlement of the Plaintiff to exercise its rights under the Registered Land Law, despite the reference in the second demand letter which is dated 3 February 2015 drawing attention to the arrears and the Plaintiff's right of sale, despite the third demand letter which is dated 11 April 2016 drawing attention to the arrears and the Plaintiff's entitlement to exercise its right to sell under the Registered Land Law, despite the Affidavit of Bridgette Bond sworn on 21 November 2016 which rehearses paragraph 7 from the Charge Schedule and how it was being relied on due to the arrears accrued, despite the Summons dated 6 December 2017 which makes specific reference to ss.75(2) and 77 of the Law

the Defendant did not finally secure any legal presentation until after 19 December 2017 (the original date set for this hearing) and it is stated in the Defendant's Written Legal Submission that:

"*Until recently, he was not aware of the existence of the Law*" and that he only now "*understood the importance of Section 72*".

12. In his oral evidence the Defendant conceded that he did not read the Charge documents properly as he was so overjoyed about being given a mortgage and acquiring a property. He said that as he was given a "*flurry of documents*" that he did not take the time and he did not have the time to read everything. He added that as he trusted the Bank and as he was so happy, he "*signed away.*"

13. Unfortunately, only four months after signing the Charge Form and attached Schedule, in or around February 2013, the Defendant failed to fully adhere to the agreed repayment terms and his covenant to make payments as and when they fell due. Sadly, although he has over the years made considerable payments towards the mortgage[5] (often not by the due dates), the arrears issue has subsisted to date, just under four years later.

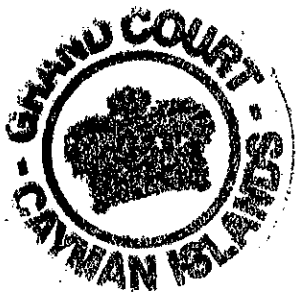
14. In February 2013, after the account had been delinquent for sixty four days, with the arrears standing at $2,530.65, the Plaintiff contacted the Defendant to address

[5] Schedule of payments provided by Defendant states that a total of $66,651.50 had been paid with total payments per annum totaling in 2012 – the full amount due of $2,600, in 2013 $11,037, in 2014 $15,400, in 2015 $17,620, in 2016 $12,519.50 and in 2017 $7,475.

the issue. The Defendant informed the Bank that the problem had arisen due to a reduction in his income and he then felt unable to tell them that he would be able to clear the arrears and to meet future payments as and when they fell due.

15. Arrears increased to $3,096.75 and, when the mortgage facility became over ninety days past due, the Plaintiff issued its first demand letter which was dated 18 September 2013 in which it gave notice that it required immediate payment of the arrears. The total amount outstanding under the Charge was $179,740.64 and interest accruing at a daily rate of $24.28 per day. In the letter the Plaintiff also demanded immediate payment of the total amount outstanding together with accrued interest to the date of payment, indicating that failure to comply would entitle the Plaintiff to exercise its rights under the Charge and the Law. The Defendant was provided with a draft Originating Summons and a Listing Form. He was informed that if the notice and demand were not complied with the same would be filed with the Court forthwith. Having regard to the content of the letter, the Defendant was made aware just under four years ago what his payment obligations were pursuant to the Charge and what the consequences could be in relation to the Property if the agreement was breached.

16. The Defendant contacted the Plaintiff in November 2013 and indicated that he would be able to recommence making the monthly payments. As a result of this



indication the Plaintiff did not proceed with the action set out in the demand letter.

17. Regrettably, the Defendant failed to clear the arrears and the account remained in the *"non-performing category"*. The Plaintiff again contacted the Defendant and the parties were able to reach an arrangement to address the state of affairs, after a $3,600 payment was made by the Defendant in January 2014, which was the first payment that he had made since September 2013. Under this arrangement, the Defendant agreed to make payments of $3,600 per month for three months commencing in February 2014, which would cover the mortgage payments as they fell due and clear the arrears. The Defendant told the Plaintiff that he was currently paid on commission but that he had found a second job which would commence in February 2014 and give him an additional salary of $2,400/month plus commission. The Plaintiff accepted this information and, relying upon the Defendant's promise that he would set up a standing order from his second job to make the monthly payments, reiterated its willingness to work with him. The Defendant commented in an email to the Plaintiff sent on 31 January 2014 that he was:

> *"really appreciative of the swift response and approval of his request"* and that he had *"every intention of honouring your trust."*

18. Regrettably, the Defendant immediately failed to fully comply with the terms of the newly agreed arrangement. He did not set up the standing order as promised.

The Defendant failed to make any payment in February or March. In April and May 2014 he only paid the normal monthly mortgage without any excess towards the arrears.

19. Despite the non-compliance with the agreement, in June 2014, the Plaintiff again showed a willingness to continue to work with the Defendant by proposing that, instead of $3,600, the amount of $2,400 should be paid for three consecutive months on 30th day of each month and that if this was done then it may be possible to restructure the loan. This was after the Defendant had told the Plaintiff that he had just rented out two of his rooms and as a consequence he was able to make two monthly payments of $2,400 from 30 June 2014 "*until the arrears are cleared up.*" The Defendant stated that although he understood the Plaintiff's position, in light of his indication about the payments he could make, he asked that they do not send an evaluator to the Property, adding "*please convey my deepest gratitude of their (the Bank's) kind patience with me.*"

20. Regrettably, this agreement was also not adhered to by the Defendant who failed to make the $2,400 monthly payments. Instead the Defendant paid $1,600 in July 2014 and $1,800 in August 2014. The Defendant made no payment in September 2014.

21. Despite his failure to adhere to the payment arrangements he had made with the Plaintiff, on 7 October 2014 the Defendant requested that his mortgage be restructured to include the arrears which had increased to $6,317.87. He told the Plaintiff that he had full employment and that he could afford to pay the monthly payment of CI$1,186.24. Due to the history of the Defendant failing to make the above agreed payments agreed due to his assertions about additional employment and income sources and the Plaintiff's concern that he also had a charged-off Mastercard credit card that was one hundred and sixty days past due, the Plaintiff felt it inappropriate to re-structure the loan. However, the Plaintiff felt able to still work with the Defendant and enter into another payment arrangement, whereby he would pay $1,800 per month for three months, and if he did this then, at that stage, further consideration could be given to restructuring the loan.

22. Regrettably, the Defendant again failed to fully honour the terms of an arrangement he had agreed with the Plaintiff. He made one payment in October 2014 of $1,186.24 towards the regular maintenance payment and not towards the arrears. The Defendant failed to make any payment in November 2014 and in December 2014 he made a payment of only $1,200.

23. Having regard to the Defendant's continued defaulting on the Charge Agreement which had been in arrears for over a year and his inability to fully adhere to at

least three subsequent repayment agreements made between him and the Plaintiff, a second demand letter was issued by the Plaintiff on 3 February 2015. The letter indicated that the amount past due was $6,276.59 and that the balance of the loan stood at $164,759.41. In the letter the Plaintiff demanded payment of the full amount owed within ten days. The Plaintiff also indicated in the letter that, if the demand was not complied with, legal proceedings would be commenced for the judicial seizure and sale of the Property or the account would be assigned to a collection agency. As with the first demand letter which had been sent on 18 September 2013, the Defendant had clear knowledge of his requirement to make payments and what the consequences would be if he failed to do so. He could have had little doubt that there was a risk of the Plaintiff seeking to sell the Property.

24. Despite the history of non-payment, and there being two demand letters, in February/March 2015, the Plaintiff was willing to enter a further repayment agreement with the Defendant under which he was to make the regular monthly payments and clear the arrears over the following 12 months. The Plaintiff was willing to enter this agreement and prepare a further forbearance agreement as the Defendant had indicated a willingness to pay the monthly mortgage plus extra to bring the account up to date. The Defendant also told them at the time that he had just been paid $2,062.45 and that he deposited $1,350 to his account and that he

would soon receive a payment from his second job from which he would make a further payment.

25. Later on in April 2015 the Defendant attended at the Plaintiff's offices and informed them that he had requested a salary advance to clear most of the arrears on the account and that he would then be looking into refinancing. He added that he and his wife had reconciled and that this would help financially.

26. When the Plaintiff reviewed the account in or around September 2015 they discovered that, although some monthly payments had been made, they covered only principal and some interest and that the Defendant had failed to address the arrears issue by making payments towards them. When they raised this with the Defendant he agreed that he would use his year-end bonus to settle all the outstanding arrears. The Defendant also agreed to make a payment of $3,500 by the end of November 2015 to clear approximately half of the arrears. Having heard this, the Plaintiff was willing to enter an interim arrangement, whereby the Defendant would pay 50% of the arrears by the end of November 2015, at which time the Plaintiff would consider the parties making another repayment plan.

27. In January 2016, as some payments had been made, the Plaintiff and the Defendant agreed a payment arrangement under which he would make payments of $2,000 to $2,500 per month for a three month period.

28. On 7 March 2016 the Plaintiff asked the Defendant for an update about the situation and reminded him about the arrangements that had been agreed in January 2016. The Defendant informed the Plaintiff that he had still not received some payments from his customers (something he been saying since October 2015), but he would be making a payment into the account on that Friday. The Defendant was reminded that the small payments that he was making meant that the account would continue to accrue late fees and charges. The Plaintiff told the Defendant that, in such circumstances, he was required to make a minimum payment of $2,000 before the end of March as he had indicated that his financial situation would allow that, or that he should bring his account current by that time.

29. Regrettably, by April 2016 it was evident that the Defendant had yet again failed to fully adhere to a repayment agreement he made with the Plaintiff. As a consequence, on 11 April 2016, a third demand letter was sent to the Defendant. The letter informed the Defendant that the arrears stood at $4,680.69 and the balance of the loan stood at $175,998.62 (an increase of $11,239.21 since the last demand letter which had been sent out on 3 February 2015). The letter contained

a notice for immediate payment of arrears and a demand for immediate payment of the total amount outstanding together with accrued interest at the date of payment. The Defendant was informed that a failure to comply with the terms of the notice and demand in the letter entitled the Plaintiff to exercise its rights under the law and that the Property would be advertised for sale on the Multiple Listing System and might be sold without further notice to him. As with the first two demand letters, the Defendant was made aware of his obligation to make payments and what the consequences of non-payment could mean.

30. The Defendant states in his affidavit that there is no specific reference to s.64 or s.72 of the Law in the notices/demand letter. He points out that if s.64 applies then he would have had three months after service of the demand notice in which to make payment of the entire sum. He states that if it is a s.72 notice, if he failed to make payment within three months of the date of service then the Plaintiff could sell the Property. He points out that the demand letter of 11 April 2016 stated he was being:

> *"put on notice that if full payment of the arrears is not received within seven days of the date of service of this letter, the property will be advertised for Sale on the Cayman Islands' Multiple Listing System and may be sold without further notice to you."*

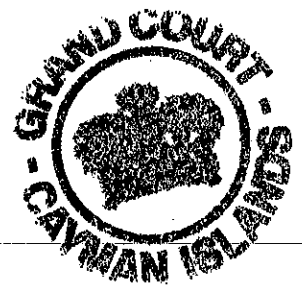
As a consequence, the Defendant submits that the Plaintiff's attorneys have got s.72 of the Law

"completely wrong" and that they *"completely misled me by suggesting that payment had to be made within 7 days."*

31. Mr. Allen contends in his Written Submissions that all three demand letters are *"irregular"* as there is no specific mention of s.64 or s.72 of the Law in the letters and there should be sequential service of the notices and s.64 demand and a s.72 notice cannot be set out in the same letter. At paragraph 4 of his Written Submissions Mr. Allen contends that, as a consequence, no s.72 Notice to sell the Property has been served. Mr. Allen argues that if it is a s.64 demand then the Defendant would have had three months after service of the demand notice within which to make payment of the entire sum and if it was a s.72 notice then the Defendant would have a further three months after service to make the entire payment before the Plaintiff could sell the Property. He submitted in Court that this is supported by the Court of Appeal in ***Paradise Manor Limited (in liquidation) & Others v Bank of Nova Scotia*** (1985) CILR 437 where Zacca P. stated on page 452 line 1:

> *"The time had passed between the serving of the demand on July 27th, 1982 and the hearing of the summons was far greater than the seven months required under the Law assuming that the proper notices under s.64(2) and s.72 had been served before the bank could have offered the land for sale."*

32. To his credit, it appears that the Defendant recognised the serious situation he was in, and by the end of August 2016 he had made payments that reduced his arrears



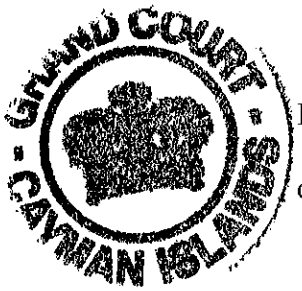
to forty one days past due which made him eligible for consideration for a refinanced mortgage option with the Plaintiff. The Defendant states in his affidavit that he began making payments from 25 April 2016 and that for the period between then and 30 May 2017 he paid a total of $16,975. He criticises the Plaintiff who he contends, by them exhibiting a document listing payments not from April 2016 but only from 14 July 2016 to 30 May 2017 which showed totaled payments of $11,625, was "*putting to the Court*" that after receipt of the April 2016 letter he did not start paying until July 2016. Alas, rather than maintaining this course of payments after August 2016, the Defendant failed to make a payment in September 2016 and thereafter only made inconsistent payments and not on the dates that the payments fell due.

33. Despite this and the failure to cooperate with the Bank's valuer, the Defendant contends that the Plaintiff orally indicated to him in September 2016 that it would be willing to restructure the loan, but they then failed to do so. There is no documentation from September 2016 exhibited that verifies or is consistent with any such oral representation being made. On the balance of probabilities, having regard to the prevailing problematic circumstances that existed in September 2016 and the non-cooperation concerning the valuer which I will shortly detail, I cannot find that such an offer was made in September 2016.

34. In light of the continuing default, the Plaintiff filed an Originating Summons on 17 November 2016. In that Summons the Plaintiff sought the following orders:

> *"1. Unless, within 7 days of service of the Order, the Defendant and any person occupying Registration Section Lower Valley, Block 38B, Parcel 544 ("the Property") provide the Plaintiff and its agents or representatives, with access to the Property at such times and upon such reasonable notice as the Plaintiff and their agents or representatives may require.*
>
> *1.1. the Plaintiff be given immediate vacant possession of the Property; and*
>
> *1.2. the Plaintiff have leave to issue a writ of possession for immediate execution."*

35. That Summons was supported by the Affidavit of James Pollard, a Senior Valuer with Bould Consulting Ltd. On 25 April 2016 he had been instructed by the Plaintiff to provide it with a valuation of the Property. In the affidavit Mr. Pollard sets out a detailed history of attempts to obtain access to the Property to enable a valuation to be conducted. Regrettably on 27 April 2016 and 28 April 2016 the Defendant cancelled appointments scheduled for those very same days. Regrettably, on 11 June 2016, 9 July 2016 and 12 November 2016 the Defendant failed to attend the Property for prearranged appointments for the valuer to see the Property. The Defendant does not deny that he acted in this uncooperative manner and in fact he forthrightly informed the Court in his oral evidence that he had done so to "*buy him some more time*" as he knew the Bank wanted to sell the

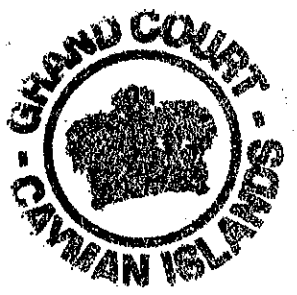


Property and that a valuation would be needed to enable that to be done. This can only be characterised as obstructive conduct by the Defendant.

36. When the Summons came on before Hall J. on 10 January 2017, she made unless orders in terms of the Summons.

37. On 12 January 2017 the Residential Full Appraisal Report ("the Report") was completed, setting the market value of the Property at $210,000, with a reasonable exposure time of 6 to 18 months. Although paragraph 1 of the Affidavit of Mr. Pollard sworn on 30 November 2016, prepared in support of the Plaintiff's application to compel access to the Property to enable the inspection to be carried out, refers to completely the wrong property, the Report does set out the accurate Property details.

38. Despite the non-adherence by the Defendant to agreed payment arrangements and the difficulties with the valuer being granted access to the Property at pre-agreed times, the Plaintiff was still willing to work with the Defendant. On 17 January 2017, in a further Forbearance Agreement, the Defendant was again given the opportunity to update his mortgage and have it re-instated to the current category. It was agreed that the Defendant would make repayments of $2,213 on the 30th day of each month from the end of January 2017 for the next four months and continuous lump sum payments. It was agreed that the Defendant's account



should be updated in full on or before 28 April 2017. It was also agreed that there would be six monthly reviews of the monthly payments. The Plaintiff made clear that the forbearance was conditional upon strict compliance with the agreement and that failure would result in the Plaintiff initiating action to have the debt fully settled. The Defendant acknowledged the agreement by signing it before a Notary Public on 31 January 2017. This was shortly after the hearing before Hall J. and at a time when the Defendant states that he was unemployed and looking for work. The Defendant states in his affidavit that he felt that he:

> *"had no option but to agree to the terms"* and that he *"felt, given my situation, coerced into making such payments even though I felt it was going to be difficult."*

As the matter had already been before the Grand Court in relation to the Plaintiff's exercising its right to sell, the Defendant again could have had little doubt about the serious position he would be in if he again failed to adhere to the payment terms in this latest agreement.

39. Regrettably, the Defendant was again unable to fully adhere to the terms of yet another payment arrangement. He failed to make the payments for March and April 2017, and by May 2017 his account was one hundred and thirty-nine days past due. As a consequence, the Plaintiff decided that the time had come to exercise its rights as mortgagee under the charge agreement, to sell the Property to meet the mortgage debt.

40. The Defendant also states in his affidavit that between 25 April 2016 and 24 February 2017 he paid $15,500 bringing his arrears down to CI$3,376.81. In his oral evidence the Defendant accepted the arrears figure he had given was inaccurate. He said in his Affidavits that thereafter the Plaintiff blocked him from making any further payments into his account and that if he had been allowed to make those payments he would have been able to clear up the arrears by now. I note that attached to his later Affidavit the Defendant exhibits an email sent on the evening of 31 May 2017 to Ms. Alissa Ali at Scotiabank in Trinidad and Tobago Office in which he references payments made to the account by him on 29 and 30 May 2017. In his oral evidence the Defendant accepts that his affidavits gave the wrong impression if they were read as him saying that there were no further payments after February. He stated that he meant to say after 30 May 2017.

41. He told the Court in his oral evidence that, when he went back into the Bank on 31 May 2017 to pay in $100, the teller told him that he had been instructed by Ms. Bond that the Bank would not allow him to make any further payments into the account. The Defendant said that he was told that Ms. Bond would provide him with the details of Ms. Ali at the headquarters in Trinidad and Tobago and he should communicate with her. Later that day Ms. Ali's contact details were emailed by Ms. Bond to the Defendant.

42. The Plaintiff denies blocking payments. Ms. Bond told the Court that she was aware of threats made by the Defendant on 29 and/or 30 May 2016 when he came into the Bank. She stated that he had made threats to involve the media and that his manner in the Bank was unsettling. Ms. Bond stated that the seasoned procedure for a delinquent account of this nature would be for the teller to consult with her or another supervisor. She stated that the teller did this as the Defendant had been asking him questions which he was not authorised to answer. Ms. Bond stated that she did not tell the teller to inform the Defendant that he could not make any further payments into his account, nor did she state that to the Defendant. She stated that the Bank would not decline to accept payment on a delinquent account. She says that the 19-21 year old teller would have been informed to tell the Defendant that he would need to contact a member of the Collections Unit Team in Trinidad and Tobago. She stated that the Defendant was pacing about, came over to her area and she informed him that he needed to talk to a member of the Collections Unit, which she stated was the established approach. She felt unable to talk to him due to the threats she had been informed that he had made. She denied the assertion that the Defendant had asked her why the Bank would not take his money. Ms. Bond indicated that the young teller was too scared of the Defendant to come to Court. Mr. Allen considered applying for a subpoena for his attendance, but indicated that on instructions from the Defendant it was not sought.

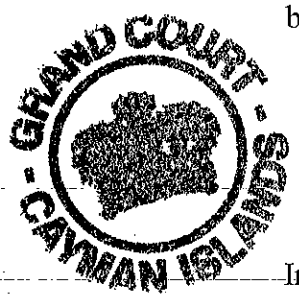
43. It is evident that the relationship and proper communication with the Plaintiff was breaking down. I am satisfied that the Defendant did make threats to involve the media, especially when one considers his actions since that date. It is understandable that tellers would be unable to speak to him and it is understandable why he would be advised to speak to the Collections Unit. The Defendant has made very serious, and possibly unfounded, allegations about Ms. Bond and other members of staff at the Bank in the public forum. The content of his emails were emotional, which is to a degree understandable in the circumstances. But it is an indicator of what his demeanor was like at the time in his dealings with the Bank and when he attended at the Bank. Even giving allowance for the fact that the multi-cultural Cayman Islands has a strong Christian leaning, the level of and nature of the content of Biblical extracts frequently used by the Defendant in his correspondence dealing with issues relating to his charge and the sale of his home were not appropriate and could cause concern to an individual. They show a lack of insight by the Defendant as to how his conduct and words may be perceived by and cause concern to others, including to whom they are directed. Phrases such as that contained in his email of 14 August at 1:24 p.m. to Mr. Rampersad concerning the "*Wrath of God*" and the "*giving a just payback*" could be concerning. Even more so are his words in his emails to Ms. Ali on 13 June 2013 when he states:

> "*As big a conglomerate as Scotiabank is, God can drown it in a Red Sea of destruction. All it takes is for one child of God to really cry out to Him. Moreover, He also punishes individuals.*"

There have been other similar threatening verses from the Bible directed by the Defendant at the Bank and its staff posted by him on social media. A part of written and published discourse at the time and recently could be characterised as being ranting. On occasion it amounted to ranting behind a veil of Christianity, the tenor of which could be regarded to be deliberately threatening to those at whom it is aimed. My decision does not of course turn on these words, but they do illustrate how greatly the relationship has broken down and also having regard to his threats about involving the media and his demeanor when in the Bank it is understandable why the Bank's staff were and remain concerned when dealing with him.

44. In the email of 31 May 2017 to Ms. Ali the Defendant states that, when he went into the Bank to make a payment on 31 May 2017, he was informed by the teller that the Plaintiff would no longer accept payments from him. In the letter he sets out his improved employment situation, his attempts to make payments and he asks the Plaintiff to work with him and *"not be so quick to sell the house."* The Defendant has failed to exhibit any document from the Plaintiff in which they state a refusal to allow any payment to be made into the account after May 2017 or in fact after any date in 2017.

45. The prompt email reply from Ms. Ali sent at 8:25 a.m. on 1 June 2017 gives a different impression about future payments by the Defendant than that preferred by him. Importantly, she writes:



"Kindly will you advise if you would be making a payment to fully update you(r) facilities today."

In the letter Ms. Ali makes reference to the terms of the Forbearance Letter and that due to the non–compliance with its terms the Plaintiff will be proceeding to exercise its rights in order to recover the debt. In her reply she stated that the arrears were now at $5,749.29, there were additional charges of $18,283.26 and the fact that the account was ninety two days past due. Ms. Ali also mentioned that the Defendant owed $4,991.32 on his Scotialine account and $3,733.94 on his Mastercard. The Defendant wrongly contended that the arrears stood at $3,376.81 on 1 June 2017, as he failed to recognise that, from the date of his printout dated 30 May 2017, a further payment had fallen due on the 31 May 2017.

46. On 1 June 2017 the Defendant replied to Ms. Ali by email in which he stated:

"I will not argue that you have every legal right to exercise your rights on the Bank's behalf at this time."

Although he did not directly answer Ms Ali's request for conformation that he would be making a payment to fully update all of his facilities, the Defendant requested more time for him to "*get out of this mess*" and told her that his

application for a business licence to carry on business to undertake immigration and passport processing had been granted and could result in lucrative work. He sent a chase up email to Ms. Ali on the following day and a further email in which he simply quoted from the Bible. On 13 June 2017 the Defendant sent a further email, again quoting extensively from the Bible, outlining the Bank's unwillingness to restructure his loans and again requesting a halt to the sale of the Property.

47. On 16 June 2017 he sent an email to Mr. Rampersad at the Plaintiff's Trinidad and Tobago Office. In the email he rehearsed some of the matters mentioned by him to Ms Ali. He also criticised Ms. Ali's handling of the matter. Rather than answering her request concerning full payment he stated:

> *"Initially she responded by detailing my mortgage arrears plus additional charges and asked if I could pay up today (which of course she knew was impossible to do). That was just her sarcastic way of telling me to get lost."*

He reiterated that the arrears figure should be $3,376.81 rather than $5,749.29 mentioned by Ms. Ali. The Defendant requested that there be a further agreement, which should be a fair one, and if at the end of the term of the agreement he had not regularised his mortgage, he would move out and *"surrender the keys to the Bank without fuss."*

48. Mr. Rampersad responded to the email on 21 June 2017. He stated that:

> *"I reviewed your account and found as follows.*
> *The bank has been working with you since 2013 to have your account updated and regularized.*
> *Despite this the arrears continue to escalate over the years.*
> *While the bank was well within its right to place your property for sale, you were afforded one last opportunity by way of a forbearance agreement on 17th January 2017. It is clearly stated in the agreement that failure to comply would result in the Bank taking action to recover its debts.*
> *In this regard we advise that the Bank has been more than patient and considerate with you as it applies to your financial obligation.*
> .....
> *Mr. Watt, while the Bank empathize with your situation we are unable to carry your account in its present state any longer."*

Having reviewed the evidence in this case, it is clear that Mr. Rampersad's analysis of the Plaintiff's dealing with the Defendant is an accurate one, although one might say that it is an exaggeration to say that arrears have escalated over the years.

49. The Defendant replied to Mr. Rampersad by email 21 June 2017 in which he stated:

> *"Your records of the time period of my default is quite accurate. It was in 2013 I began to have job issues and let me take the opportunity to say that I appreciate the Bank's patience since then. However, please note that*

from the on-set I had been literally begging the Bank to accommodate a re-structure until I got back on my feet but to no avail..... if under the present payment system and despite all my set-backs, I have, through sheer determination managed to stay on an average within the 90 day period, if I had been given that refinancing I would be in a very good stead with your bank instead of now being in default.

I did receive a forbearance letter, which again because of still prevailing issues against me, which was above me I defaulted. You have every legal right to take this property away from me now. No one can argue that. I am simply begging the bank once more, please consider my situation on its own merit."

50. When considering the above although the Defendant may have first, whether rightly or wrongly, interpreted the actions of the Bank on 31 May 2017 to amount to a refusal to allow him to make any future payments into the Plaintiff, I am satisfied that was not its intention. When considering the evidence as a whole I am satisfied that the Plaintiff acted appropriately on that occasion by stating to him that he needed to talk with the team in Trinidad and Tobago. However it should have been clear to him thereafter that the Bank was not blocking future payments and in fact it welcomed and sought an indication from him as to if he was going to make a payment fully settle the amounts outstanding. It is convenient for the Defendant to persist in wrongly construing the events at the Bank on 31 May 2017 as the Plaintiff placing an ongoing restriction on him, as he uses this as an excuse for him benefitting from the occupation of the Property whilst not making any payments from the end of May. Save for mentioning his

view to Ms. Ali in his email of 31 May 2017, the Defendant made no effort at all after leaving the Bank 31 May 2017 to make any payments into the account and there is no correspondence at all from the Bank indicating that no sums could be paid in by him. On the balance of probabilities, I find that the Plaintiff did not embargo the making of payments into the account by the Defendant.

51. Due to the non-adherence to the Forbearance Agreement the Property was listed for sale with RE/MAX Realtors on 6 June 2017, for a purchase price at the appraised price of $210,000. Ms. Tamara Siemens, the realtor, indicated in her affidavit that after it being on the market for three months, an offer was received on the Property on 25 September 2017 at the full listing price. Ms. Siemens stated that the Plaintiff approved and accepted the offer on 28 September 2017.

52. On 13 August 2017 the Defendant again emailed Mr. Rampersad with an update about his employment situation and to state that there was a lady interested in renting the property. On 14 August 2017 Mr. Rampersad emailed the Defendant informing him that no effort had been made to make a payment since the last correspondence and that the Defendant had stopped paying altogether, including towards his credit card and Scotia line facilities. Mr. Rampersad also informed him that the Plaintiff had entered into a contract for the sale of the Property at the full appraised amount. I note that the dates of offer and the dates of acceptance are

over a month sooner than the dates given by the realtor in her affidavit evidence. The Defendant replied on the same day stating that:

"I am pretty certain Sir, that pay back is coming, God has seen" adding *"I trust God to my dying breath to recompense for me but in the meantime I will do what I can, which is to seek legal council."*

53. On 25 October 2017 the Defendant was served with a Notice to Vacate the Property due to the pending sale, and he was given twenty eight days from the date of receipt of the letter to vacate. On 25 October 2017 the Defendant replied indicating his unhappiness with the actions taken by the Plaintiff and he indicated that he had spoken to an attorney and had shown that attorney the Plaintiff's communication. On 26 October 2017 the Defendant sent a further email, in which he requested *"a few more days"* to leave the property to enable him to 'sort himself out'. The Plaintiff responded informing him that there could be an extension with completion on 1 or 2 December and in an email sent later on 26 October 2017 the Defendant thanked the Bank's officer in this regard.

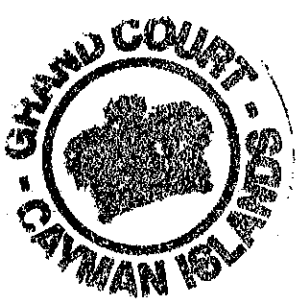
54. Since that date the Defendant has refused to vacate the Property, which has resulted in the current application being made before this Court.

55. The Plaintiff contends that the mortgage amount outstanding on the account as at 27 December 2017 is principal $128,644.91, add on charges $18,283.26, interest

(principal) $31,214.35, interest (Add-on Charges) $2,063.68, late fees $225. Payout is $180,431.20 with additional legal fees of US$21,000 which will increase due to this hearing. The Court was told that there were arrears standing at $11,680.49 as of 18 December 2017.

The Law

56. Section 72 of the Law provides:



"(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) .....,

(b) sell the charged property:."

It is clear that by this self-help remedy under this section, a chargee has a right and power to sell charged property if the chargor defaults in payment of the secured loan after three months' notice to remedy the default.

57. Section 75 of the Law, marginal note, "Power of Sale", provides at sub-sections (1) and (2):

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

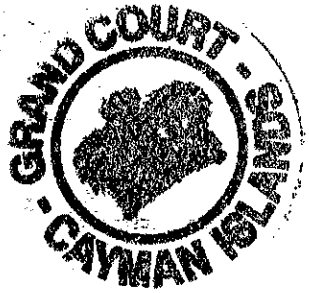
(2) Where the chargor is in possession of the charged land or the land comprised in the charged lease, the chargee shall become entitled to recover possession of the land upon a bid being accepted at the auction sale." (My emphasis).

The application before me is concerned with subsection (2) and the right of the Plaintiff to possession and it is not a matter in which the Plaintiff is required or actually seeks the Court's sanction of its sale of the Property.

58. This means that if there is a default in payment under a charge, the chargee (after serving the requisite notices) may proceed to sell the charged property. This is confirmed by paragraph j. of Practice Direction No. 5 of 2012, and it was held in ***Butterfield Bank v Jervis & Jackson*** 2011 (1) CILR 54 that there is no need for an application to the Court for placement of the roperty for sale by public auction (whether by way of a listing on the MLS or by formal auction) in the first instance by the chargee who, by virtue of the powers given under the charge and s.75 of

the Law, can sell by way of public auction without leave of the Court. As clearly stated by Mangatal J. at paragraph 86 in her Judgment in ***First Caribbean International Bank (Cayman) LTD v Green Thumb Nursery and Landscaping Limted*** Cause No. 75 of 2015 (26 June 2015) the sale of the property does not have to be completed before the chargee can apply for a Writ of Possession.

59. Section 77 of the Law provides:



> *"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 important to note that this provision does not confer upon the Court the power to alter the statute. It empowers the Court to give its sanction to the agreement between the parties overriding the statutory provisions. In other words, if the contract between the parties has been embodied in the charge, and that permits sale by some means other than public auction, then that can prevail over the statutory restriction, but only if the Court decrees that it may "*be acted upon.*"

However, in the case before me, having regard to the local case precedent and the Practice Directions, the sale is by public auction and the Plaintiff is not "*acting upon*" the variation.

60. Mr. Allen submits that if the Plaintiff wishes to act on the charge document that it must first obtain the Court's approval as it contains a variation. It is submitted that this is the case even if the sale is by public auction, which therefore covers a sale on the Multiple Listing System ("MLS"). The Defendant seeks a declaration that, until s.77 is approved, the land cannot be sold. I do not agree with Mr. Allen's novel contention and I find that it inconsistent with the approach followed by the Grand Court and with the approach advocated in the relevant Practice Directions drafted by the Chief Justice. I repeat that the Plaintiff is not "*acting upon*" the variation in this case.

61. Paragraph 2 of Practice Direction 4 of 2014 provides:

> *"Where the open market process yields an offer which the charge wishes to accept but is (for reason that the offer price is significantly below the reserve price or for some other good reason) to seek the sanction of the court pursuant to Section 77, such an application may be granted at the discretion of the court. The court will, however, always be mindful of the fact that the chargee is not obliged to seek the sanction of the court in the exercise of its power of sale granted by Section 75 and will reserve its discretion as to the appropriate order for costs that it might make upon any application."* (My emphasis).

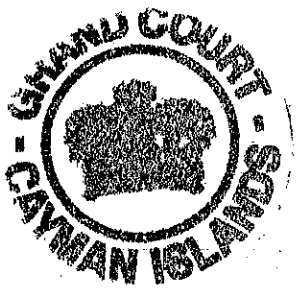
62. In ***Scotiabank & Trust (Cayman) Limited v Ebanks and Gordon*** [2012 (1) CILR 401] Henderson J. found that *"sale by public auction"* does not require a formal auction with the bidding process conducted by an appointed auctioneer but *"in*

substance, the sale of a property through the Multiple Listing Service (MLS) is a public auction." This is confirmed by paragraph h. in Practice Direction No. 5 of 2012 which refers to the decision of Henderson J. It is trite law in the Cayman Islands that the sale through the MLS is a sale by public auction.

63. At paragraph 6 in ***Butterfield Bank v Jervis & Jackson*** 2011 (1) CILR 54, Smellie C.J. reiterated that the duty upon the chargee to act in good faith requires a chargee to seek to get the best price that the market will yield ("the market price"). In order to do so, the chargee will obtain an independent valuation and market the property for sale by public auction at that valuation price or some other reserve price that the chargee might set pursuant to s.75 of the Law. In the matter before me the Plaintiff has acted appropriately, as it sought an independent valuation of the Property, then marketed the Property at the market price set by the valuer on the MLS using an established realtor and accepted an offer to purchase the Property at that market price.

64. The Privy Council in ***Tse Kwong Lam v Wong Chit Sen*** [1983] 3 All ER 54 considered the conditions upon which the mortgagor's power of sale should be exercised. The Court of Appeal did the same in ***in Cuckmere Brick Co. Ltd v Mutual Fin. Ltd*** [1971] 2 All ER 633 at 643 when Salmon L.J. stated:

> *"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power of sale has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so.*



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

65. Although this is not a case in which the Court has been asked to sanction the sale at a price, I remind myself of the contents of the Practice Direction No. 5 of 2012 and the cases referred to therein. I note the factors set out therein, namely:

a) that the Property must not be sold at undervalue;

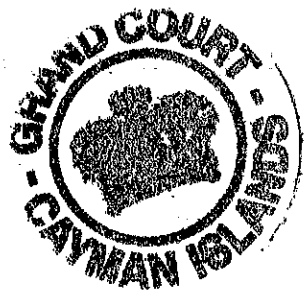
b) that the sale has to be in good faith;

c) that the best evidence of market value is the reaction to the market;

d) that the standard of care required of the Plaintiff Bank is that of a reasonable man in respect of the conduct of his own personal affairs; and

e) that leave to sell at a reserve price set by the Court will not usually be granted without previous attempts to market the Property.

66. The Court of Appeal in the Cayman Islands held in ***Paradise Manor Limited v Bank of Nova Scotia*** at 453 that a bank, to show that the sale was made in good faith, had taken all reasonable precautions to obtain the best price reasonably



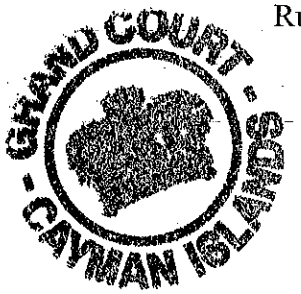
obtainable at the time. At page 472 the Court determined that the weight of authorities in favour of a duty to take such care and realising the true market value on the sale of the charge property as a reasonable man would in his own private affairs. The Court of Appeal also cited with approval in principle that a mortgagee has the right to exercise a power of sale whenever he chooses to. This case does not support the Defendant's contentions outlined above.

67. Turning now to Mr. Allen's submissions about the notices which I have already outlined.[6] Mr. Allen contends that there must be a sequential service of the s.64 and s.72 notices. He made similar submissions, when also again relying on ***Paradise Manor v Bank of Nova Scotia***, in the case of ***Bank of Butterfield v Levy & Levy*** where Henderson J. summarised Mr Allen's submissions as follows:

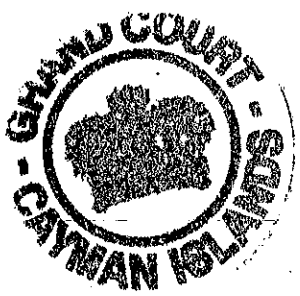
> *"The two sections must be read together and, properly understood, provide for a sequential notice process which is mandatory before legal action may be initiated to enforce its security.....*
> *.. that section 72(1) of the Registered Land Law can only be invoked after a default has been made in payment and has continued unrectified for one month. At that point, but not earlier, a section 72 notice may be served.... 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..... 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."*

[6] See paragraphs 30 and 31 herein.

68. In ***Levy*** Henderson J. provided the following helpful and guiding comments starting at page 5 of his Judgment. Due to the time constraints flowing from the need for me to give an immediate ruling and due to the clarity of Henderson J.'s approach, I feel it expedient and meritorious to now repeat a large portion of his Ruling:



> *"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)).*



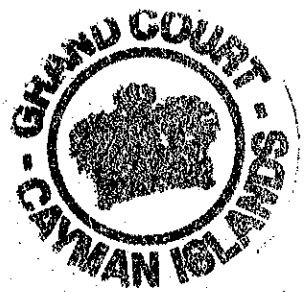
Section 72 applies only where there has been an act of default. There is nothing in the section which requires that the default be a default in making repayment pursuant to, or after, a demand made under section 64(2). The default may be a default on any obligation embodied in the security instruments.

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 now 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 then 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.

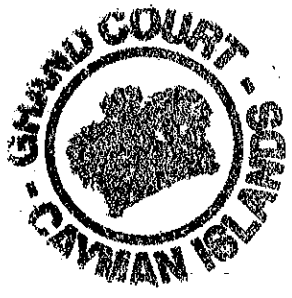
In my view, in appropriate cases, a section 64 notice and a section 72 notice may be served at the same time. That was what was done here. The effect of the two notices is different. The section 64 notice served on August 11, 2003 established a date - November 11, 2003 – for repayment of the principal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

69. The notice provision in s.64(2) of the Law is plainly a safety net or last resort. It is to deal with the case where the parties make no provision for when the principal is to become due, or where, having done so, the chargee has waived his right to payment on the due date by failing to require it on that date. In either case there has to be a mechanism for fixing a new due date, and that is what the notice provisions in s.64(2) are for. Those provisions have no application if there is a date for repayment and demand is made on that date. Nor does it apply where there is a fixed date for repayment which has not yet arrived. Nor is it concerned with default: s.64 is concerned with determining when money is due, while s.72 is concerned with the remedies for default.

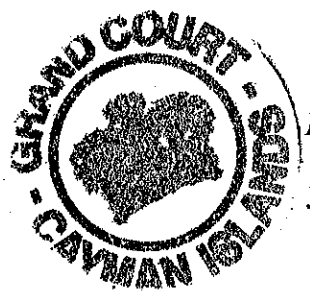
70. Section 64(2) does not apply to instalment payments due on fixed dates under a charge, so as to require a separate demand for each if it was not paid when it became due. If that were the case it would render such mortgages commercially



unworkable as in order to preserve its rights the mortgagee would have to serve a separate notice of demand for each instalment which missed its due date or find itself disqualified from collecting it for three months. Section 72, on the other hand, already provides adequate safeguards of the mortgagor's rights in such case by requiring notice of default after thirty days and a power of sale being then postponed for a further three months. To apply s.64(2) to instalment payments would bring it into conflict with s.72 which obviously contemplates an installment payment not being met, there being no further demand at the time, and then after the passage of thirty days, the mortgagee giving his notice.

71. There would need to be very clear words to demonstrate that the Legislature intended such an unworkable and unnecessary provision. There are no clear words to require it. The wording of s.64(2), when it refers to "*the money secured by a charge*" is consistent with the overall scheme of the section, which refers to the securing of an "*existing or a future or a contingent debt or other money's worth.*" It is markedly different from s.72 which refers to default in the payment of "*the principal sum or of any interest or any other periodical payment or of any part thereof.*" If the draftsman had wished to apply s.64(2) to periodical payments he could have done so by using the same clear wording as s.72, but he did not do so.

72. In light of the above, I do not accept Mr. Allen's submission that Henderson J.'s reasoning is flawed and that the Court of Appeal's decision and reasoning in



Paradise Manor v Bank of Nova Scotia, prevents me from following Henderson J.'s Ruling.

73. In the matter before me s.72 was applicable as there had clearly been default by the Defendant in payment of the principal sum and a portion of the interest. The notice in April 2016 was a notice for immediate payment of the then arrears and a demand for full payment of the amount due, which it particularised. I find that those arrears were then due and outstanding and there was no requirement that the Plaintiff first give notice under s.64(2) in order to make them due. The fact that some of the information seen in a s.64(2) demand was contained in the s.72 notice does not make that notice invalid. The Defendant had failed within one month to rectify that default and therefore the Plaintiff was entitled to serve notice upon him "*to pay the money owing.*" The Defendant had three months after the service of the Notice in which to rectify the default and if he failed to do so the Plaintiff could sell the charged property. In ***Levy***, as in the matter before me, Henderson J. noted that well over three months had passed since the s.72 notice was served and that the arrears were still owing. The Learned Judge was satisfied that the Bank was entitled to a declaration that the Defendants were in default of payment under the charge, to possession of the charged properties, and to exercise its right to sell by private treaty. Although the notice of 11 April 2016 required payment within seven days or the Property would be advertised for sale, over twenty months have passed since then, and over eleven months have passed since the written

Forbearance Agreement (the terms of which were not complied with) and as the last payment was made almost seven months ago. I find that the Plaintiff has complied with its obligations and has acted properly in executing the sale. I find that the April notice complied sufficiently with s.72 of the Law and that the power of sale had arisen at the time that the Property was marketed and at the time the contract of sale was entered into.

74. In the matter before me, having regard to all of the abovementioned sections from the Law, the abovementioned case law, and the Practice Directions, the Plaintiff contends that it has exercised its right of sale properly and seeks an order for possession under s.75(2) of the Law and is not seeking an order of the Court sanctioning its power of sale. The Plaintiff contends that in accepting the Offer to Purchase at the current market price, it has acted in good faith with due regard to the interests of the Defendant. In relation to the sale price that has been agreed with the purchaser of the Property, I note that the valuer instructed by the Plaintiff valued the Property at the same price at which the Property is to be sold. I note that the Property was listed at the price for one hundred and eighty three days and that only one offer, which is an accepted offer at the full listing price, was made after fifteen showings.

75. The Defendant seeks a declaration as to the meaning of s.78 of the Law which provides that:

"...it is hereby declared that the chargee shall not be entitled to foreclose, nor to enter into possession of the charged land .... by reason only that default has been made in the payment of the principal sum or of any interest or other periodical payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge."

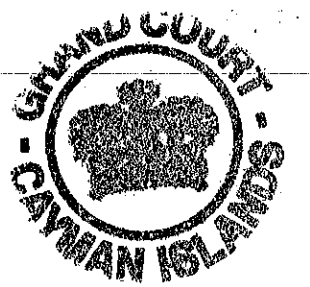
This declaration is sought as it is contended that the Defendant *"regularly made payment, some years paying more than the monthly and thus annual amount but was prevented from making payments in May 2017."*

76. It seems to be contended by Mr. Allen that default alone does not entitle a Bank to sell a property. This interpretation would be in stark contradiction to s.75 of the Law which has been consistently followed by the Courts in the Cayman Islands and endorsed in the clear Practice Directions. Mr. Allen did not address the Practice Directions in his submissions and this may be because the content is so inconsistent with the submissions made by him as to the approach this Court is able to and should take.

77. I note that this is not a case in which the Plaintiff would be restrained from exercising its power of sale on the basis that the Defendant has tendered to the Plaintiff or paid into Court the amount claimed to be due. No such payment has been made and it is now too late to do that as a contract for the sale of the Property has been entered into. The only way that the Court could interfere at this

stage to stop the sale is if the sale is improper. Mr. Allen contends that the Court should do this under its inherent jurisdiction. If the sale is not improper a dispute about the amount due would not restrain the sale.

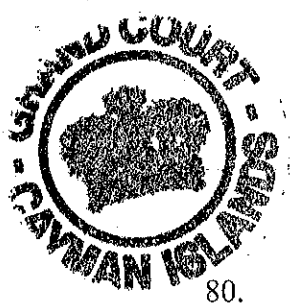
78. No application is before me for an injunction to restrain sale. I am aware that in separate proceedings Cause No. 205 of 2017, initiated by a Writ of Summons apparently filed on 23 November 2017 that one of the orders sought was for the immediate cessation of the sale of the property. That Writ was filed without any letter before action or other notice which would have shown a change of intention about his vacating the property as it was almost a month after he had asked the Bank for additional time for him to exit the property and him thanking them for acceding to his request.[7] If an application was made in the proceedings now before me the Defendant would have to establish an arguable case that the power of sale has not been properly exercised. This might include the conditions for it to be exercised including the notice requirements. If the Defendant is alleging that the power of sale has not arisen, he need not make a payment into Court of the amount due when applying for an injunction.



[7] He had written to the Plaintiff on the day before he wrote asking for additional time to vacate setting out his grievances about the Plaintiff's decision and indicating that he had shown correspondence to an attorney.

Conclusions

79. The Plaintiff has followed the appropriate procedures as required by the Law. The Defendant being in possession of the charged Property, the Plaintiff became entitled to recover vacant possession of the Property upon accepting the Offer to Purchase.

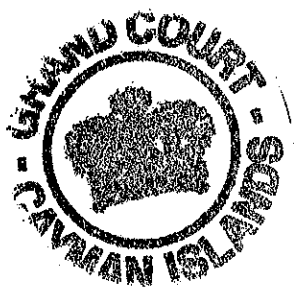


80. The Plaintiff is entitled to the relief sought. The account has been in arrears for a considerable period of time with a history of inconsistent payment spreading over a four-year period, a pattern which started only a few months after the charge agreement was made between the parties. On the evidence it appears that the Plaintiff, when exercising its power of sale, has done so in in good faith and with regard to the interests of the Defendant chargor. The Property appears to have been marketed properly by a real estate agent with an established real estate firm and the sale is at the market price recommended by a senior valuer with Bould Consulting Ltd.

81. I have considered the Defendant's claim that he was never advised by the Plaintiff to seek separate legal advice at the time he entered into the Charge Agreement and prior to him signing the charge document. There is no requirement in the Law for the Plaintiff to do that. The Defendant has stated in the exhibited correspondence on more than one occasion how important the home purchase using his pension funds was for him, it being his most substantial and important

lifetime investment. Despite this he felt there to be no need to instruct an attorney to assist him with the conveyancing as he felt able and to have enough understanding to do the conveyancing unaided. The Defendant is a bright and professional man who is able to understand and communicate the issues as can be seen by his recent campaign in the media and on social media about this case and his issues with the Plaintiff. His flyer for his immigration services business highlights his capability to handle large quantities of paperwork and his organisational skills. When he signed the charge agreement, the Defendant was working for an insurance company and therefore he would have been well aware of the need for customers to carefully read and understand any binding legal agreements, especially ones dealing with financial commitments, that they sign. I am afraid that even if he was not advised by the Plaintiff to seek independent legal advice the fault for not obtaining it and for failing to properly read the documents (which he readily concedes that he failed to do) lies squarely with him. There is no evidence that the Plaintiff in anyway misled him about the contents of and effect of the Charge Agreement.

82. Although I am sympathetic to the predicament of the Defendant, especially at this time of the year, I am satisfied that the Plaintiff Bank has taken all reasonable steps to comply with its obligations and is therefore entitled to seek the orders sought. Despite the warnings given by me last week that, due to the adjournment less time may be given to vacate if the Defendant was unsuccessful in opposing



the application, I feel it just that the Defendant and any other person occupying the Property will have 7 days, until noon on Friday 5th January 2018 to vacate the Property. The order made in relation to paragraph 2 of Summons should reflect the seven days.

83. I should add that in light of my findings today, if the separate proceedings initiated by the Defendant in which he seeks an injunction had been before me, which they are clearly not[8], it would have been unlikely that it would have been granted as I have found that the power of sale has been properly exercised. If the injunction proceedings had been pursued and an interim injunction granted it, in the light of my findings, and as the case is at a stage after contract and before completion, a payment into Court may have been required.

Footnote

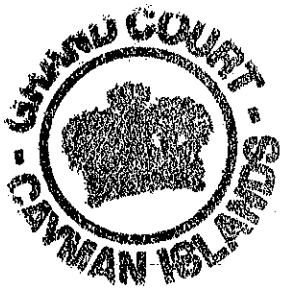
84. The Court recognises that the media, and sometimes social media, can play an important role in raising awareness on matters that affect the public, especially if issues are reported or commented upon accurately and in a balanced fashion. This case has received much public attention and therefore it is extremely important for the sake of all parties involved in this case and in other mortgage possession cases that there is an accurate representation in the public forum of the background

[8] The Defendant's counsel apparently only becoming aware of the existence of the Writ overnight after the close of each party's cases yesterday and simply mentioning its existence in an email to the Court sent at 9:45 a.m. this morning, 15 minutes before this oral ruling was due to be given.

history. This is one of the reasons that I have today felt it necessary to provide quite some detail about the background of this case. I should add that there is a responsibility, often ignored in this modern age by those who feel emboldened when writing on a computer screen on social media such as Facebook, to take care not to make defamatory remarks about individuals. Persons would be well advised to take great care to ensure that statements that may affect the good standing of individuals are known to be accurate before posting the same.

85. It is important that disputes in cases of the nature of the matter before me are dealt with promptly by the Court with both parties having been given the opportunity to present their cases. As I told the parties last week, when a matter is due to come before the Court it is not helpful to either party for the matter to be pre-tried in the media or on social media, as inevitably the full facts are not known and any conclusions reached may be misinformed. I must of course make my decision based not on what appears in the media, but only on the evidence that is before this Court.

86. The Court recognises the current genuinely held concern in the public domain about the security of homes which are subject to a mortgage arrangement with a lender, especially at a time when persons may be experiencing employment issues and a downturn in their income (for some in this jurisdiction that may be seasonal due to the nature of the employment). However, when a party enters such an



agreement that party must ensure that they very carefully read all of the terms of the charge agreement in order to fully understand what the consequences of any payment default may be. If they have any doubt about the effect of the agreement and what it means, then they should not sign the same without obtaining legal advice from their conveyancing attorney. The charge agreements that come before the Courts, although they may be from different lending institutions, are ordinarily worded in a similar fashion. Those who borrow sums secured against their property must recognise that, if they do not make payments as and when they fall due pursuant to their covenants in the agreement which they have entered into voluntarily with a lending institution, they place themselves at risk of repossession proceedings being brought and losing their home.

87. It is hoped that if individuals are experiencing short-term difficulties then the lending institution will work with them to assist them to get back on their feet and enable them to retain what are in most cases their and their family's home. In cases where the arrears are at a relatively low level with a previous history of full payments being made as and when they fall due, and if the arrears have accrued over a relatively short time with an adequate explanation for the shortfall being given, coupled with the prospect of future payments being made, the parties should strive to resolve the issue without the need to come to Court. If this cannot be achieved by the parties without outside assistance, the time may well have come for the active promotion of mediation at an early stage (definitely well

before an offer to buy is accepted by the bank) to try to resolve such disputes in a cost-effective and sensitive manner. From my experience of hearing a number of these unfortunate cases, what is absolutely vital is for there to be good communication between the parties from which an understanding of each party's position, circumstances and concerns can be gleaned at an early stage and throughout. If a borrower fails to communicate with the lender or fails to cooperate with the lender in compliance with the terms of the charge agreement, they make it more difficult for the lender to work with them in a manner that may be beneficial to the borrower. As I have already said, despite the content of some of his communications with the Plaintiff's employees, the Defendant cannot be criticised for the level of communications.

88. However, in a case such as the one before me, where the individual fails to adhere to the terms of a charging agreement over an extended period of time commencing only four to five months after the inception of that agreement, or to comply with a series of reasonable payment/forbearance agreements (many containing terms suggested by him and then accepted by the Plaintiff) recently made between himself and the lending institution aimed at bridging the difficulties and giving further opportunities to redress the default, the time will inevitably come when the lending institution can no longer work with that individual. The expectation that a bank will restructure a loan can only arise when a bank feels confident from the conduct of the borrower towards agreements made

that the restructured agreement will not place the bank at further risk and that the borrower has been forthright when setting out what their financial position is and how that enables him to make agreed payments. This is particularly so, as in the case before me, where due to the content of three demand letters a defaulting borrower could have had no doubt about what the consequences would be if a series of payment agreements continued to be breached. This is not simply a case involving arrears of just over $3,000 and it has hitherto been wrongly been characterised as being such in the public domain in the build up to this hearing. For the current arrears figure to be put in its proper context, when judging the reasonableness of the Plaintiff's approach in executing its right to sell, one must have regard to the history of non-payments and attempts by the Plaintiff to work with the Defendant over a four-year period evidenced by it entering into a series of agreements that were never fully adhered to by the Defendant. A failure to put this case into that context would misrepresent the facts of this sad and unfortunate case.

THE HONOURABLE MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT