

1 IN THE GRAND COURT OF THE CAYMAN ISLAND
2 BEFORE HON. JUSTICE MRS KIRSTY-ANN GUNN
3

4
5 CAUSE NO. 371 OF 2009
6

7 BETWEEN

8 BUTTERFIELD BANK (CAYMAN) LIMITED

9 Plaintiff

10 AND

11 ANDREA ALESEA MARTINEZ-CALDERON

12 1st Defendant

13 AND

14 RAUL ESTEVAN MARTINEZ

15 2nd Defendant
16
17
18

19 **Appearances:** Ms L DaCosta for the Plaintiff
20 The 1st and 2nd Defendant in person
21 **Hearing date:** 9th May 2018
22 **Ex-tempore Judgment:** 9th May 2018
23 **Ex-tempore Judgment**
24 **Distributed:** 18th May 2018
25
26



27 **HEADNOTE**
28

29 *REGISTERED LAND LAW - CHARGES - CHARGEES POWER OF SALE- MARKET VALUE*
30 *- RESERVE PRICE - INDEPENDENT VALUATIONS - CHARGEES ACTING IN GOOD*
31 *FAITH*
32
33
34

35 **EX-TEMPORE JUDGMENT**
36

- 37 1. This is the judgment in respect of the Defendants' summons dated 18th April
38 2018 and the Plaintiff's summons dated 25th April 2018.
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1 2. The Defendants summons can be summarised as follows –

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3 (i) a declaration that the two most recent valuations obtained by bank
4 are “unreliable”; and

5 (ii) a declaration that the Offer to Purchase (“the OTP”) has expired and
6 is now invalid;

7 (iii) an order prohibiting the bank from acting on the current OTP or
8 entering into another contract to sell the property;

9 (iv) a declaration that the Notice to Vacate is null and void and be set
10 aside.

11

12 3. The Plaintiff’s summons seeks

13 (i) An Order for vacant possession

14 (ii) Leave to issue a writ of Possession

15 (iii) Costs

16

17

18 **FACTUAL BACKGROUND**

19

20 4. The 2nd Defendant is the registered owner of Block 32C Parcel 160, a
21 residential dwelling in Lower Valley (“the Property”). He purchased the
22 property some 22 years ago and has undertaken considerable work on the
23 property. In 1997 the 2nd Defendant approached the Plaintiff Bank of
24 Butterfield (“the Bank”) for a loan of \$166,000 to complete renovation of the
25 house and pay off a Cayman Islands Credit Union loan. The 1st Defendant was
26 the co-signatory on the loan. The loan was secured by a charge on the 2nd
27 Defendant’s property which was registered on 19th December 1997. This
28 charge was varied 12 times between 1998 and 2006. As at September 2009,
29 the Charge secured the principle sum of CI\$296,000.

30



1 5. In 2004 the 2nd Defendant lost his employment and remained unemployed.
2 The reasons for his unemployment are not relevant to these proceedings.
3 During the course of the loan the 1st Defendant reached retirement age and
4 remains unemployed. Due to their unemployment, the Defendants fell into
5 arrears.

6
7 6. Notices under Section 64 and 72 of the Registered Law Land (“The Law”)
8 dated 21st January 2009 were served personally on the 1st Defendant on 13th
9 February 2009 and on the 2nd Defendant on 30th April 2009 (“the Notices”).
10 At that time the Principle and Interest owing was CI\$275,897.38 and the
11 arrears were CI\$57,621.78. Both notices complied with the requirements of
12 the Law and expressly referred to the variation of section 72 as set out in the
13 schedule, namely that the bank is permitted to sell the Property one month
14 following service of the Notices if the sums demanded are not paid.

15
16 7. In 2009 the Bank obtained a valuation from DDL. It concluded that the value
17 of the Property in 2009 was CI\$787,000.

18
19 8. On 6th August 2009 the Bank filed an Originating Summons seeking,

- 20
21 (i) a declaration that the Defendants are in default of payment
22 of the principle sum payable under the Charge;
23 (ii) an Order that the Defendants deliver possession of the
24 property to the Bank;
25 (iii) that the Charge be enforced by private treaty;
26 (iv) Settling of the terms and conditions of the sale by private
27 treaty,
28 (v) that leave be granted to issue a Writ of Possession,
29 (vi) any further relief as the court thinks fit; and
30 (vii) costs
31



1 9. On 13th April 2010 Henderson J made the following Orders and Directions -

2

3 (i) The Charge be enforced by the sale of the Property by private
4 treaty;

5 (ii) The Defendants are permitted to remain in possession of the
6 Property until there is an enforceable contract for sale of the
7 Property or further order of the Court;

8 (iii) The Defendants shall give the Bank and/or its agents reasonable
9 access to the property in connection with the sale;

10 (iv) The reserve price was set at CI\$725,000;

11 (v) The Defendants were to pay the Bank's costs; and

12 (vi) The Order did not preclude the Defendants from perusing the
13 sale of the Property themselves unless and until the Bank
14 entered into a contract for sale;

15

16 10. It is evident from the foregoing that the Bank's application for an Order for
17 Possession and leave to issue a Writ of Possession were not disposed of and
18 therefore remained live applications, albeit the Court ordered that the
19 Defendants were permitted to remain in possession of the Property until
20 there was an "enforceable contract for sale."

21

22 11. The property was first listed on the CIREBA Multiple Listing System ("the
23 MLS") on the 12th of October 2010 at the reserve price set by the Court.

24

25 12. On 29th July 2011 the Bank obtained a further order reducing the reserve
26 price to CI\$622,000 for 6 months and, thereafter, the Bank was to obtain a
27 new independent evaluation. The Court once more ordered that "the
28 Defendants are allowed to remain in possession of the Property until there is
29 an enforceable contract of sale or further Order of the Court".
30

31



1 13. In 2013 the Bank filed a summons seeking a declaration that the Property
2 may be sold by public auction and reducing the sale price to CI\$450,000.00.
3 The application was opposed. The court made directions in preparation for
4 a final hearing.

5
6 14. The Bank renewed its application for a reduction of the sale price in 2014. At
7 this point the Defendants had not made any payments towards the loan for
8 some two years. The Court's Minute of Order reveals that there were
9 extensive discussions before the parties reached an agreement on a way
10 forward. The Minute of Order records –

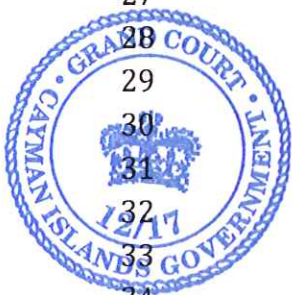
11
12 *"a. Mr Moses advised that the bank confirmed that, based on the*
13 *original mortgage sum of CI\$296,000.00 the monthly payment was in*
14 *fact CI\$2,295.00. However, from this point going for the new mortgage*
15 *sum, which would include the arrears, calculated on a new mortgage,*
16 *over 15 years, at an interest rate of 5.25%, would result in a monthly*
17 *payment of CI\$3,837.04 not including CI\$600 per month for insurance.*
18 *Therefore, the new monthly payment, including the insurance, would be*
19 *CI\$4,400.00.*

20
21 *b. Mrs Calderon immediate response was: "we will pay it. We have to*
22 *make it."*

23
24 *c. Mr Moses again expressed some concern about the defendants'*
25 *ability to make these monthly payments in light of the many years of*
26 *default, the defendants' earlier representations regarding their personal*
27 *circumstances and health, and the fact that Mr Martinez's wife had only*
28 *recommended full-time employment in January 2014....*

29
30 *d. In response, inter-alia, Mrs Calderon spoke of varying other sources*
31 *of income, including renting one of the rooms, which she would be*
32 *working on to ensure that the payments would be made, and even*
33 *expressed the hope of making lump-sum payments towards the*
34 *mortgage.*

35
36 *e. ...*



1 *f. The court emphasised to the defendants that the focus must be on*
2 *making the monthly payments as the bank will not force the sale once*
3 *the monthly payments of CI\$4,400.00 are being made in timely fashion*
4 *on a monthly basis.*

5
6 *g. Mr Moses told the court that the bank would only agree to these new*
7 *terms if the court orders that, should there be any default on payments,*
8 *the bank will be at liberty to exercise its power of sale under the charge*
9 *without any further recourse to the court, and that the reserve price be*
10 *set aside."*

11
12 15. As a result of these discussions the Court ordered that the Defendants must
13 pay CI\$4,400.00 on a monthly basis to the Bank in respect of this loan and
14 that, should the Defendants default on the monthly payment, the Bank is at
15 liberty to exercise its power of sale under the Charge, and list the property
16 for sale, and without further recourse to the court, at the best price the Bank
17 can, with its best efforts, obtain.

18
19 16. The Defendants made the required payments in February, March and April
20 2014, and thereafter they defaulted once more, making no further payments.
21 In August 2014 the Bank notified the Defendants that the property would be
22 re-listed for sale as a result of their breach of the court order.

23
24 17. In February 2016 the Property remained unsold. The Bank continued its
25 efforts to work with the Defendants and made a concession to accept
26 CI\$1,600.00 per month towards the mortgage account on a temporary basis.



1 18. The terms of this agreement were set out in a letter from HSM to the
2 Defendants –

3
4 *“Our client is prepared to enter into one final payment arrangement*
5 *in order to repay the outstanding debt of CI\$525,950.13 consisting*
6 *of principle of CI\$305,351.01 interest of CI\$219,199.12 and late*
7 *payments of \$1,400.00. As such we confirm that our client agrees not*
8 *to enforce its right of sale over the property on condition that you: –*
9

- 10 1. *Pay \$1,600.00 per calendar month towards the principal which*
11 *currently stands at \$305,351.01. The 1st payment shall be made*
12 *on or before 28th February 2016 and by the end of each*
13 *successive calendar month thereafter;*
14 2. *Pay the “Butterfield Heritage Home Insurance” renewal fee of*
15 *CI\$4,819.26 on or before the 24th February 2016 and keep the*
16 *property adequately insured each successive year thereafter.*

17
18 *We confirm that once the first payment is made in relation to*
19 *paragraphs 1 – 3 [sic] above the property will be removed from the*
20 *multiple listing system.*

21
22 *However, should you default upon the terms of this arrangement the*
23 *Bank reserves the right to continue to enforce its power of sale by re-*
24 *listing the property without further reference to you. This agreement*
25 *will be set for a review every 12 months with a view to having*
26 *payments increased to reduce the outstanding interest.” (emphasis*
27 *mine)*

28
29 19. Having accepted the new agreement, the Property was taken off the market.
30 Unfortunately, the Defendants defaulted after two months and they were
31 advised that the property would be relisted for sale.

32
33 20. The Property had been listed on the MLS from 2009 until 2018 with little
34 interest. The list price was repeatedly reduced during this period. On 18th
35 January 2018 the Bank accept an offer for CI\$285,000.00. This was the first
36 offer the Bank had received in the 8 years the property had been marketed.



1 21. The Defendants were verbally notified of the OPT around 1st March 2018
2 when the 2nd Defendant approached the Bank about adding his fiancée to the
3 loan in place of the 1st Defendant. The Bank rejected this and another
4 proposal made by the 1st Defendant due to the poor credit history on the
5 mortgage, the lack of evidence of the Defendants' commitment to rehabilitate
6 the mortgage account and because the Bank had already accepted the OTP.

7
8 22. The conditions of the purchase were met and/or waived on 16th March 2018.

9
10 23. On 20th March 2018 the Defendants were served with a Notice to Vacate the
11 Property by 20th April 2018.

12
13 24. On 18th April 2018 the 1st and 2nd Defendant filed the ex-parte summons now
14 being considered.

15
16 25. That summons came before me for hearing the following day. Having heard
17 the Defendants, I invited counsel for the Bank to attend to respond to the
18 application. During the course of the proceedings the Defendants accepted
19 that they were in default and that the Bank had a right to sell the property,
20 however, they asserted that –

- 21
22 (a) the Bank was not acting in good faith as they were intending to
23 sell the property far below market value; and
24 (b) The Bank had failed to meet the conditions set out in Practice
25 Directions No. 5 of 2012 and No. 4 of 2014.

26
27 26. The Defendants also advised the Court that they would not voluntarily
28 vacate the Property.

29
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1 27. At the end of the hearing I granted the interim injunction and directed that
2 the Defendants' summons as well as the Bank's summons for vacant
3 possession and leave to issue a Writ of Possession be heard together. The
4 Bank filed its summons on the 25th of April 2018 together with the affidavit
5 of Adita Deonarine in support of the application.

6
7 28. The Defendants have filed several affidavits and both parties have submitted
8 new valuations.

9
10 29. The closing date for the sale of the Property has now been extended to 4 PM
11 on the 16th of May 2018 to allow these proceedings to conclude.

12
13 30. The Defendants accept that they are indebted to the Bank in excess of
14 CI\$500,000.00, although they emphasised that they have paid significant
15 amounts towards the loan over the years. I accepted the evidence of Adita
16 Deonarine on behalf of the Bank that as at 24th April 2018 the payout balance
17 on the loan was CI\$593,008.18, consisting of

18

19	Outstanding principal	CI\$319,263.25
20	Penalty Interest on overdue principle	CI\$30,030.13
21	Past-due interest	CI\$241,639.80
22	Late Fee	CI\$2,075.00

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1 **ADDITIONAL APPLICATIONS**

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3 31. In addition to the matters set out in their summons, the Defendants, through
4 their affidavits, seek orders -

- 5
6 (i) mandating the Bank to disclose details of the OTP;
7 (ii) mandating the Bank to prove that the Defendants are still indebted
8 to the Bank;
9 (iii) mandating the Bank to disclose how the funds raised from the sale
10 of the property will be applied to their loan,
11 (iv) mandating the Bank to refinance the loan allowing the 2nd
12 Defendant's partner to take the place of the 1st Defendant in the
13 financing arrangements; and
14 (v) a declaration that the requirement of "two independent
15 valuations" in Practice Direction 4 of 2014 means each party
16 obtains their own valuation and proceed on the mean value.

17
18 32. Item (i) was satisfied in course of the preparations for today's hearing. As the
19 Defendants concede that they owed the Bank over CI\$500,000.00 in principle
20 sum and interest and the evidence of Adita Deonarine item (ii) has been
21 addressed.



1 33. The Defendants also argue that the Bank's actions to obtain vacant
2 possession violates their children's constitutional right to "parental care,
3 basic nutrition, shelter where they can be protected from maltreatment,
4 neglect, abuse or degradation; protection from exploitative labour practices,
5 protected from performing work or provide services that are inappropriate for
6 a child or young person under the age of eighteen, or be placed at risk of the
7 child's well-being, education, physical or mental health or spiritual, moral or
8 social development, all of which the [Defendants] claim the minor children
9 could be exposed to if they are removed from their secure environment of their
10 present home...together with the trauma of being uprooted from their familiar
11 secure environment and placed in a less secure one..."
12

13 34. The words are lifted from Article 17 of the Bill of Rights. I can deal with this
14 last point swiftly: The Constitution lays down the fundamental rights of an
15 individual enforceable against the Government, not private individuals. If the
16 Defendants wish to challenge the constitutionality of the Law that gives rise
17 to the power of sale then then they must do so in the appropriate manner.
18
19

20 *The Charge*
21

22 35. It is agreed that the parties entered into an agreement whereby a Charge
23 would be made against the 2nd Defendant's property and that the Defendants
24 were jointly responsible for the repayment of the loan. It is also agreed that
25 the Defendants repeatedly failed to make repayments as required by the
26 various agreements between them and the Bank, frequently over prolonged
27 periods.
28
29
30



1 36. In 2003 the Defendants signed the most recent Charge and initialled every
2 page of the schedule. Section 12 provides –

3
4 *“Sections 72 and 75 of the above law shall be varied in their application*
5 *to this Charge and any instrument a variation executed pursuant to this*
6 *Charge so as to entitle the Chargee immediately upon default by the*
7 *Chargor in payment of the Principal Sum or of any interest payable*
8 *hereunder or in the performance or observance of any agreement*
9 *expressed or implied herein to serve on the Chargor notice in writing to*
10 *pay the moneys owing or due or to perform or observe the agreement as*
11 *the case may be and further so as to provide that if the Chargor does not*
12 *comply within one month of the date of service of such notice the*
13 *Chargee may thereupon either appoint a receiver of the income of the*
14 *charged property or sell the charge property by private treaty as well as*
15 *by public auction or by tender all to foreclose on the charged property.”*
16 (emphasis mine)
17

18 37. It is now trite law that there is no need to obtain the Court’s leave to place
19 the property for sale by public auction where a power of sale arises under
20 the Law, and the requirements to giving notice have been complied with
21 (**Bank of Butterfield v Jervis and Jackson 2011(1) CILR 54**). Listing a
22 property through MLS is a public auction (**Scotiabank & Trust (Cayman)**
23 **Limited v Cecilia Ebanks (as administratrix of estate of Allan Ebanks)**
24 **and Rudolph Gordon (as administrator of estate of Allan Ebanks GC**
25 **Cause No. 298 of 2010, Judgment delivered January 12th 2012**). The
26 Court’s intervention is only necessary if the charge is varied to require a sale
27 by private treaty which does not apply here.
28

29 38. Consequently, as long as the Bank has complied with the requirement to give
30 notice as required by Section 65 and 72 of the Law, which the Defendants
31 accept the Bank has, the Bank does not need the Court’s consent to list the
32 property for sale or before they can accept an offer to purchase.
33



1 39. The Bank's right to sell the Property without necessitating further Court
2 intervention was reiterated to the Defendants by the Order made on 29th
3 January 2014 (see paragraph 15 above). It was made abundantly clear that if
4 the Defendants defaulted again the Bank was at liberty to sell the house at
5 the best price that they could achieve.

6
7 40. The Defendants have sought to go behind that Consent Order, arguing that
8 the Bank 'set them up' to fail as it was evident that they would never be able
9 to maintain the repayments given their financial circumstances. It is
10 important to reiterate that the Defendants were cautioned by counsel for the
11 Bank and the Court about the proposed course and nevertheless freely
12 consented the proposal (see paragraph 14 above). The Defendants cannot
13 abrogate responsibility for that decision, or the fact that they quickly
14 defaulted again.

15
16 41. The agreement reached between the Banks and the Defendants in 2016 (see
17 paragraph 18 above) once again offered the Defendants an opportunity to
18 avoid a forced sale. The terms very clearly state that in the event that the
19 Defendants breached the terms of the agreement the Bank had the right to
20 continue to enforce its power of sale by re-listing the property without
21 further reference to the Defendants.

22
23 42. Consequently, from the initial written notice right up to 2016, the Defendants
24 have been on notice that the Bank had and maintained its right to sell the
25 property, obviating any need for further RLL notices to be served.



1 *Right of Redemption*

2

3 43. Section 70(1) of the Law provides that -

4 *Subject to this section, a Chargor, on payment of all money due and*
5 *owing under the charge at the time of payment on fulfilment of any*
6 *condition secured thereby and on payment of any costs or expenses*
7 *properly incurred by the charge in exercising any power conferred on*
8 *him by section 72, may redeem the charged land, lease or charge at any*
9 *time before it has been sold under section 75, and any agreement or*
10 *provision which purports to deprive the chargor of this right of*
11 *redemption shall be void; and, for the purposes of this subsection land, a*
12 *lease or charge shall be deemed to be sold when a bid has been accepted*
13 *at the auction sale."*

14

15 44. Section 75(2) of the Law provides that

16 *"where the chargor is in possession of the charged land or the land*
17 *comprised in the charged lease, the chargee shall become entitled to*
18 *recover possession of the land upon a bid being accepted."*

19

20 45. The consequences of these two sections is that the Property is deemed sold
21 upon the Bank accepting a bid/offer to purchase and the Bank is then
22 entitled to recover possession (**Scotiabank & Trust (Cayman) Ltd v Barnes**
23 **(aka Christian) (Judgment delivered on 21st December 2016 and**
24 **reported at 2016(2) CILR Note 7)**

25

26

27 *Good Faith/Valuations*

28

29 46. The Defendants submit that the purchase price agreed between the Bank and
30 purchaser is significantly under the true market value of the property. They
31 argue that Appraisers and Realtors are part of a wide-ranging conspiracy to
32 artificially decrease property valuations to enable banks to sell properties
33 significantly under value and to secure their fees. The Defendants believe
34 that this is what is occurring in this instance.



1 47. Practice Direction 5 of 2012 provides that

2
3 *"The sanction of the Court of a price obtained whether by public auction (by*
4 *listing on the MLS or otherwise) or by private treaty, is more likely to be*
5 *granted where the original asking price has been set by the chargee by*
6 *reference to an independent valuation. In this way the Court will be able more*
7 *likely to conclude that the chargee has acted in good faith in exercise of its*
8 *rights under the charge."*

9
10 48. Practice Direction 4 of 2014 provides –

11
12 *"Practice Direction No.5 of 2012 directs that the objective of a public auction as*
13 *contemplated by Section 75 can be achieved by way of listing on the Multiple*
14 *Listing System by reference to a reserve sale price that reflects the fair market*
15 *value of the property. This will usually be achieved by using two independent*
16 *valuations (taking the median of the values where the valuers disagree).*
17 *Where the reserve price is not met within a reasonable time, the discretion in*
18 *the chargee to instruct its agent gradually to lower the reserve until the true*
19 *market price is realized, must also be recognized."*



1 49. The Defendants' argue that each party, that is the Chargor and Chargee must
2 independently obtain one valuation each before a reserve price can be fixed:
3 that this is the intention of Practice Direction No. 4 of 2014. This argument
4 fails for several reasons -

5
6 (a) If the intention of the Practice Direction was to place a burden on the
7 Chargor to obtain a valuation I would expect the Practice Directions to
8 expressly provide for this.

9 (b) If the requirement was for each party to obtain one valuation, then the
10 process could be frustrated by the Chargor simply not obtaining a
11 valuation, as occurred in this instance¹. This could not have been the
12 intention.

13 (c) Practice Direction No. 4 of 2014 provides that a reserve price reflecting
14 the fair market value will *usually be achieved* by using two independent
15 reports - it does not expressly mandate reports; and

16 (d) Practice Direction No. 5 of 2012, does not mandate that valuations be
17 obtained, rather that the Court is more likely to conclude that the chargee
18 has acted in good faith if such a report is obtained.

19 (e) The Courts have found that "[the] best evidence of market value is the
20 reaction of the market" (see **Scotiabank (Cayman Islands) Limited v**
21 **Rankin 2004-05 CILR Note 26 and Bank of Butterfield v Thornton &**
22 **Thornton Cause No. 307 of 2010, written decision given on 29th**
23 **March 2011)** which I equate to mean the property's achievable price.
24 The valuation is an estimate only. This is reflected in Practice Direction
25 No. 4 of 2014-



26
27 *"Where the reserve price is not met within a reasonable time, the*
28 *discretion in the chargee to instruct its agent gradually to lower*
29 *the reserve until the true market price is realized, must also be*
30 *recognised."*
31

¹ At the ex parte hearing the Defendants relied on reports prepared in 2008 and 2009 to establish that the property was valued in excess of CI\$700,000. They advised that they could not afford to obtain an updated valuation.

1 50. Given the foregoing, the position must be that valuations are guides as to the
2 initial listing price, but that, ultimately, it is the market itself which
3 determines a property's true value.

4
5 51. In this regard, the history of the valuation and listing of the Property is very
6 illuminating. I have been provided with several valuations, obtained between
7 2001 and 2018. I find that I can place no weight on any valuations that are
8 more than 3 years old, as there are simply too many factors that could occur
9 over such a long period which would affect the value of a property. Although
10 there has been no direct expert evidence on the issue, I take judicial notice of
11 the fact that the housing market in the Cayman Islands is not static, it
12 fluctuates as a result of many factors. Some of those factors are mentioned
13 in the valuations for this Property, such as demand and availability of
14 properties of similar type at the relevant time, the condition of the property,
15 location and amenities in the area. *The best evidence of market value at any*
16 *given time is the reaction of the market.*

17
18 52. In 2014 BCQS estimated the Property's market value to be CI\$350,000, while
19 Integra Realty Resources estimated the market value to be CI\$425,000.00.
20 The Property was therefore listed at CI\$425,000.00. The list price was
21 reduced to CI\$400,000.00 in February 2015 due to lack of interest. The price
22 was further reduced to CI\$385,000.00 in April 2015 following a further
23 period during which no showings were requested by potential purchasers.
24 On both occasions the market interest report suggested that the lack of
25 interest was due to the property being in an unfinished and dilapidated state
26 and in a remote location. In 2015 the bank obtained an updated valuation
27 report based on a full inspection of the property. JEC concluded that the
28 market value of the property was CI\$371,000.00 while Bould Consulting
29 concluded that the property was valued at CI\$333,000.00. As a consequence
30 of these reports in December 2015 the Bank instructed that the list price be
31 reduced to CI\$370,000.00.



1 53. After the Defendants defaulted on the last agreement in 2016, the Property
2 was relisted in September of that year at CI\$350,000.00. On the basis of a
3 further market interest reports the list price was reduced to CI\$340,000 in
4 February 2017, CI\$330,000 in August 2017 and CI\$320,000 in November
5 2017. The reports identified a number of obstacles to selling the property
6 including the 2nd Defendant's presence at the property, the length of time the
7 property had been on the market, that the property was not connected to city
8 water and poor upkeep.

9
10 54. The Bank instructed JEC and Bould Consulting once more in December 2017.
11 They concluded that the Property was valued at CI\$322,000.00 and
12 CI\$300,000.00 respectively. The Defendants take particular objection to
13 these two reports as they were done without an inspection of the house
14 ("drive-by" only).

15
16 55. As I have already outlines, the Defendants assert that the low valuations of
17 more recent reports are as a result of large-scale collusion between the
18 appraisers, realtors and banks to sell foreclosed properties below their true
19 value, to secure their own fees while leaving owners significantly out of
20 pocket. The Defendants have the burden of proving on the balance of
21 probabilities that the Bank acted in breach of its duty of care, including the
22 assertion that it was sold under value.



1 56. In preparation of today's hearing the Defendants instructed IRR to complete
2 a report. The 1st Defendant adduced this report in evidence. The report
3 appears to be very thorough. IRR concluded that the Property's market value
4 is CI\$290,000.00. Unusually, the Defendants invite me to find the IRR's
5 report unreliable and inadmissible. They complain that IRR's approach to
6 the Realtor for the sale price was inappropriate, tainting the appraiser's
7 opinion. They assert that the appraiser's conclusion that the market value is
8 the same as the list price is evidence of collusion. I have read the report and I
9 can find no basis for believing that the appraiser artificially decreased the
10 value or that there was any flaw in their methodology. I noted that the
11 appraiser made an upward adjustment to the square-foot value, which acts in
12 the Defendants' favour. I am satisfied that IRR's report is accurate and
13 reliable.

14
15 57. JEC and Bould updated their report last month and they further decreased
16 their assessments. Given the history of the ever decreasing list price being
17 unable to attract purchasers for so many years and the condition of the
18 property as evidenced in the various reports, I am not surprised at their
19 conclusions.



1 58. JEC, Bould Consulting and IRR are certified and Court approved firms. They
2 are bound by a Code of Ethics. I could not find any flaws in their
3 methodology. Having reviewed the reports I can find no basis for suspecting,
4 let alone finding, that the IRR, JEC, Bould Consulting or any of the other
5 companies who have valued the Property in the past are part of a conspiracy
6 to assist the Bank in selling this property. The Defendants have not
7 presented any credible evidence to even suggest that there is collusion or
8 bad faith, only general hearsay and speculation. For the same reasons I reject
9 the Defendants' suggestion that I direct the Lands and Survey Department to
10 conduct yet another valuation. I accept the 2017 and 2018 reports are
11 reliable estimates of the Property's market value. There is no need for me to
12 calculate the median value between any of the reports as the purchase price
13 is within a reasonable margin of the recent reports.

14
15 59. Common sense dictates that a scheme to sell this Property under value would
16 be counterproductive to the Bank as the present purchase price is
17 considerably less than even the remaining principal balance. A successful
18 sale of the Property at a higher price years ago would have been more
19 beneficial for the Bank and the Defendants, as the Bank may have recouped
20 more if not all of the outstanding sums and avoided years of legal and penalty
21 fees and efforts trying to resolve the matter.

22
23 60. I reject the Defendants' assertion that this Property is valued in the region of
24 CI\$500,000 to CI\$800,000.00 as they assert. They have not adduced any
25 evidence to corroborate this. The rebuild cost is one method of determining
26 the market value, but not the only definitive method. In this instance, the
27 valuations are consistent with the market's response.



1 61. The 2nd Defendant submitted that if the Property has to be sold then he
2 should be paid for his “sweat equity”. He proposes that he should receive a
3 portion of the proceeds to reflect his labour and investment in the property
4 over the years, irrespective of the loan balance: as the owner he should not
5 come away “empty-handed”. However, the concept of “sweat equity” has no
6 foundation in law.

7
8 62. On the evidence before me I am satisfied beyond doubt that the Bank has
9 made every effort to assist the Defendants in retaining the house. They have
10 acted in good faith and the purchase price agreed is aligned with its true
11 market value.

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13
14 *The Offer to Purchase*

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16 63. With respect to the Defendant’s argument that the OTP has expired, it is
17 important to recognise that the contract for sale is between the Bank and the
18 purchaser; the Defendants are not a party to that transaction. That
19 agreement gives rise to rights and liabilities between the contracting parties.
20 Whether the Defendants are provided a copy of the OTP or not is immaterial.
21 On the evidence adduced by the Bank I am satisfied that the Bank has
22 accepted an offer to purchase following public auction, which is now
23 unconditional. The Defendants no longer have a right of redemption; The
24 Bank has the right of possession (see paragraphs 43-45 above).



1 *Other complaints*

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64. The Defendants assert that the Bank should be estopped from selling the Property as it would leave them out of pocket as the sale price is considerably more than the balance of the loan. Whether the debt is more or less than the purchase price is immaterial to whether the Bank has a power of sale.

65. The Defendants have referred to community concerns that the number of foreclosures are increasing. They seek the Court's intervention to prevent what they consider to be unfair practices by banks against Caymanians who fall on difficult times. Without commenting upon the validity of their concerns, this is not the appropriate forum. Any policy decisions or legislation providing consumer protection or changes to the regulation of the banking industry or the Law are matters for Government and the Legislature.

66. For the avoidance of doubt, even if the Bank had not yet accepted an offer, the Court could not have mandated the Bank to refinance the loan. This is a commercial transaction in which the bank has acted in good faith and in accordance with the Law and the Charge.

67. Even in February/March of this year, when the Defendants made their last attempt at refinancing the loan, it was too late as the Bank had already accepted the offer to purchase as they were entitled to do.



1 68. I have no reason to doubt that the initial causes of this family's financial
2 difficulties were beyond their control and unfortunate, but they do not
3 provide a reason in law to prevent the Bank from exercising its lawful power
4 of sale over the Property. The Defendants entered into these various
5 agreements freely. It is unfortunate that the Defendants did not accept years
6 ago that they would not be able to maintain the repayments in the long-term.
7 This has led to them incurring considerable additional costs, substantially
8 increasing their debt with the Bank. Although they were may not have been
9 the creators of their initial plight (nor were the Bank), they compounded the
10 situation by failing to accept the inevitable.

11
12 69. It is my judgment that there is no basis in law on which the Court can prevent
13 the sale of the Property from completing; the Bank is entitled to an order for
14 possession and to issue of Writ of Possession. Upon the sale concluding, the
15 Bank will issue the Defendants with an updated statement at which time they
16 will be advised of the remaining balance on the loan. It is a matter between
17 the Bank and the Defendants as to how, and how much, of the remaining debt
18 will be enforced. Given that the Defendants have been aware of the sale of
19 the Property since February of this year, they were served with a notice
20 requesting vacant possession in March and the completion date has already
21 been postponed as a result of the Defendants' attempt to prevent the sale, I
22 order that the Defendants and any other occupants vacate the Property
23 within 7 days. The Bank may issue of Writ of Possession on or after 7 days
24 from today.

25
26 70. I make no order for costs as counsel for the Bank confirms that the costs of
27 these proceedings are governed by the terms of the Charge.



1 71. As a final observation, I note that by virtue of section 72(3) of the Law, in the
2 event that there has been an irregular or improperly exercise of the Bank's
3 power of sale, the Bank has breached its obligation to act in good faith or the
4 property has been sold under value, the Defendants' only remedy is damages
5 against the Bank. This provision was not drawn to my attention during the
6 application for the interim injunction. Had this been drawn to my attention I
7 would not have granted the interim injunction.

8
9
10 **ORDER**

- 11
12 1. The Defendants' summons filed on 18th April 2018 is dismissed.
13 2. The interim injunction made on 19th April 2018 is discharged.
14 3. The Plaintiff's application for an Order for possession is granted. The
15 Defendants shall deliver up vacant possession of the Property to the Plaintiff
16 within 7 days of this order.
17 4. The Plaintiff is granted leave to issue a Writ of Possession on or after 7 days
18 of this Order.
19 5. No Order as to costs.

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22 Dated the 9th day of May 2018

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28 Hon. Justice Kirsty-Ann Gunn
29 Acting Judge of the Grand Court

