IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO: CL-80/99

BETWEEN:

BARCLAYS BANK PLC

Plaintiff

AND

JAMES ROBERT HENRY

First Defendant

ANN MARIE HENRY

Second Defendant

Mr. Saunders for the plaintiff; and
The first defendant in person.

JUDGMENT

This matter came before me on the 3rd December 1999, on the first hearing of an originating summons issued on the 22nd September 1999. At the conclusion of the hearing I reserved judgment, and promised to give my ruling by fax. This I now do.

By the originating summons the plaintiff seeks:

> "An order pursuant to section 77 of the Registered Land Ordinance that the Plaintiff may sell the property of the Defendant situate at the Bight and Thomas Stubbs, Providenciales, Turks and Caicos Islands described as title number 60813/5 the Bight and Thomas Stubbs, by way of private treaty or by any other means the Plaintiff thinks fit."

By way of background, the plaintiff Bank is the chargee of the subject parcel, under a charge dated the 4th May 1992, and registered on the 26th May 1992. The charge was to secure advances made by the plaintiff to the defendants, and a guarantee given by the defendants, totaling in all $300,000.00. The defendants are the registered owners of the

parcel, and are the chargors. The defendants are in default under the charge, and the Bank is proceeding to enforce its security by way of sale. The Bank has twice attempted to sell the subject property by way of public auction, but has failed to do so.

The terms of the charge are set out in a schedule to the registered charged, and contain the following clause at paragraph 8 (d):

> "(d) Upon the Bank obtaining an Order of the Court permitting this clause to be enforced, section 75 of the Ordinance shall be varied with respect of this charge so as to provide that the Bank in exercising its power of sale may sell the charged property by private treaty instead of public auction if it shall so determine in its sole and absolute discretion; "

Having failed to sell the property by auction, the Bank is now applying to this Court for an appropriate order to allow it to proceed to sell the property by private treaty, pursuant to that clause in the charge. The issue which arises is not whether the Court has power to make such an order, for it is beyond doubt that it does, and both sides agree that sale by private treaty is a preferable way of proceeding. The issue is as to the sale price.

It appears from the plaintiff's affidavit in support that the Bank has received an offer of $180,000.00 for this property, and (notwithstanding the terms of the summons) is seeking the Court's approval of a sale by private treaty at that price. That gives rise to two issues:

(i) whether the Court has power on such an application as this to approve a specific transaction, or a specific price; and

(ii) if it does, whether it is appropriate on the facts of this case to approve the proposed sale price.

The law is contained in the Registered Land Ordinance, section 75 of which provides as follows:

"(i) 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 installments, 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."

It is perhaps unfortunate, in this day and age and in the context of a small island jurisdiction, that the Ordinance still insists upon sale by public auction. The reasons why this is not always commercially practicable are set out at length in the affidavit of Mr. Timothy O'Sullivan sworn in support of this application. I can well understand, and accept, that a sale by public auction is often not feasible, and may also be in the interest of neither party, because it tends to produce a sale at an undervalue, if a sale can be achieved at all. However, the statue does permit a variation of these provisions. Section 77 provides:

"77. The provisions of sections 70 (2) and (3), 72, 73, 74 and 75 of this Ordinance 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 the conduct of the parties and to the circumstances of the case, so orders."

I think it is important to note that this provision does not confer upon the Court the power to alter the statue, nor does it confer in terms the power to approve the sale, or a sale at a particular price. What it empowers the Court to do is 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."

In support of its contention that the statutory provisions enable the Court to approve a specific transaction, at a specific price, the plaintiff relies upon the case of Paradise Manor Limited (in liquidation) and Ors. -v- Bank of Nova Scotia [1985] CILR 437. That is a decision of the Court of Appeal of the Cayman Islands, approving a decision of a Grand Court Judge to permit a sale by private treaty at a specified price. The Cayman Registered Land Law is, in these respects at least, identical to the Turks and Caicos Islands Ordinance. The appeal turned on the correctness or otherwise of the valuation, and it seems to have been assumed by all sides that it was proper and appropriate for the Judge at first instance to deal with that question. The issue in the case was, therefore, disposed of by the following finding of the Court of Appeal:

> "I hold that the Bank made every reasonable effort and took all the necessary steps to obtain a sale of the property. In my view the bank took reasonable precautions to obtain the best price reasonably obtainable at the time of the sale. It cannot therefore be said that the sale to George Town Associates was at an undervalue. It is for these reasons that I dismissed the Appeal and the Respondent's notice." (at 456 per Zacca P.)

That case does not, therefore, help me as to what the Court of Appeal would have done if the point with which I am grappling had been taken.

There are several compelling reasons why I do not think that section 77 of the Registered Land Ordinance confers upon this Court the power to approve a specific transaction at a specific price. The first is that, if it were intended to confer such a power it should have been done in specific and express terms. This would have been easy enough for the draftsman to have done. Instead the formula that was adopted deals only with the Court sanctioning a contractual variation of the statutory provisions. In this case, the contract itself does not talk about the Court approving a specific transaction or a price. Instead it

permits the Bank to sell the charged property by private treaty instead of public auction "if it shall so determine in its sole and absolute discretion."

There are also practical considerations against the construction for which the plaintiff contends. A chargee seeking to enforce its security by way of sale by private treaty, will usually need advance sanction to that course of action before embarking upon it. A sale by private treaty is going to require that the property be advertised, or exposed to the market in some appropriate way, such as by listing with one or more real estate agents. The chargee is, therefore, likely to want to come to the Court before it has identified a specific purchaser.

It also appears that the scheme of the Registered Land Ordinance, as it applies to charges, is to leave their enforcement as much as possible between the chargor and chargee, without involving the Court. Thus no order is required for the exercise of the power of sale itself, and the chargee enjoys other rights, such as that to lease or to put in a receiver, without any need to apply to the Court. The only time that an application to the Court is necessary is if the chargee wishes to act under the terms of the charge, and they differ from the statutory scheme.

If the Court is to be involved in approving or fixing the price, then that poses real difficulties as to evidence and the mode of proof. How is the Court to determine the appropriate price? May it rely upon affidavit evidence alone, or, if there is a dispute, should it hear expert evidence from both sides. If it is required to hear live expert evidence with cross-examination, then the trial of the issue may be protracted, and that may severely impede the chargee in exercising its remedies under the charge. On the other hand, if it is to proceed summarily on affidavit evidence alone, then it may be faced with making difficult decisions on contested facts without the benefit of cross-examination. Moreover, if the Court is supposed to fix the price by some such summary means, that is taking away from the chargor's common law right to bring an action after sale to challenge the sale price. In any such action the question of valuation would be dealt with by live evidence. If, therefore, the Court is to proceed summarily under

section 77, the chargor will be deprived of the opportunity to canvass the valuation issues with live evidence. Where the valuation issues are complex, or the value of the property itself high, that may be a very significant circumscription of the chargor's rights.

The difficulties are well illustrated by the present case. The plaintiff filed no evidence from a valuer. Instead an attorney deals with the history of the matter, and he produces a valuation of September 1996, from a Mr. Russell Alwell, BSc ARICS, in the sum of $245,000.00. That valuation describes the property, but give no indication of how the valuer has approached his task. The same valuer than makes a further valuation, which is conveyed by a letter of the 8th January 1999, in which he values the same property at US$300,000.00 for it current open market value, and US$250,000.00 for its "forced sale value." There is then a letter of the 17th June 1999, again from the same valuer, revising that assessment, and describing it as a "desk top" assessment. The letter recites that the property has in fact been empty and suffered from neglect, the necessary repairs being estimated in the region of US$35,000.00 to US$40,000.00, and the valuer therefore revises down his "forced sale" valuation to US$185,000.00. There is no explanation of how this figure relates to the earlier one, and it plainly does not do so arithmetically. Against that the first defendant produces three recent valuations. They are not exhibited to an affidavit, but I allowed him to put them before the Court as he is appearing in person. There is a valuation from Prestigious Properties (1995) Ltd. in the range of US$319,000.00 to US$329,000.00. There is another from Hamilton and Pratt Realty Ltd. for US$420,000.00. There is then a monthly rental valuation from National Colony Reality Ltd., which assesses a realistic weekly rental at US$2,800. Again, none of these valuers explained how they arrived at their figures, or indeed what their instructions were – I do not know whether they were valuing this property with a view to a forced sale under a charge, or whether they were simply taking an optimistic stab at the starting price for a listing of the property with a real-estate agent.

Because of these difficulties, even if the law was that I was able to approve a price on a application under section 77, I would not, at this stage of these proceedings, have been able to do so on the evidence before me. These proceedings are brought by originating summons, and the matter came before me on the first hearing of that summons. This

would, therefore, have been a case where I did not dispose of the originating summons altogether at the first hearing, and I would have proceeded, pursuant to Ord. 28, r. 4 (2), to give such directions as to the further conduct to the proceedings as I thought best adapted to secure the just, expeditious and economical disposal of the summons. That would involve giving directions as to the filing of further, and proper, evidence.

However, for the reasons given above, I do not think it appropriate to proceed to a full trial of the contested valuation point on this originating summons. I do not think that that is my function. I think that my function is limited to determining whether the circumstances are such as to excuse strict compliance with the statutory provision for sale by public auction. I can indicate, on the basis of the evidence in Mr. O'Sullivan's affidavit concerning the Bank's attempts to sell the property in that way, that I consider it plainly just in all the circumstances that the chargee should be free to dispose of this property by private treaty.

The plaintiff also invites me to give general guidelines as to the conduct of such sales, and draws my attention to paragraph 24 to 29 of Mr. O'Sullivan's affidavit. Among the questions which those paragraphs pose is that of the appropriate qualification or expertise of the valuer, and in particular whether quantity surveyors or professional real-estate agents are preferable for these purposes. I do not think I can comment in detail on that, because every case will turn on its own facts. Obviously the valuer, if he is to give acceptable opinion evidence, will have to establish his qualifications to the satisfaction of the Court. However, in general terms, it does seem to me that the question that any valuer should be addressing is that established by Cuckmere Brick Co. Ltd. & Anor. -v- Mutual Finance Ltd. [1971] Ch. 949; [1971] 2 All E.R. 633, namely that of "the true market value." It is, therefore, to the market that the valuer will have to have regard. It may be that the cost of the lot plus the replacement cost of the building is helpful in ascertaining the true market value, but it may have little bearing on it in the case of a market which is either booming or slumping. In my experience, the normal method of valuing property for forensic purposes is to establish the market value by reference to recent sales of comparable properties. If there are no direct comparables, then the valuer

may have to use his skill and experience to do the best he can from comparables which are not particularly close, making allowances for the differences. In all of this it has to be recognised that valuation is not an exact process, and is more of an art than a science. But whatever approach he adopts, the valuer must, if his valuation is to be of any use at all, be able to explain how he arrived at the valuation he proposes, and to do so in a rational and logical way which the Court can follow.

In the circumstances of this case, it was also said to me that the true market value can be established by the one offer that has been received. That may or may not be the case. I would need an expert to assist me on that. I would also need to consider the degree of exposure to the ordinary market that the property had had. In general terms, in an exceptional case, like that of Paradise Manor, which was a unique property, partly developed, and only of appeal to a very specific market, it may be that the market price can be set by the only offer received. However, that does not necessarily apply to a standard property where there is a wide and established market.

SUMMARY

In the circumstances of this case I find that the Bank has taken all reasonable steps to procure a sale by auction, and I am quite satisfied that a realistic sale by that means is not achievable. In those circumstance I think that the Bank should be at liberty to pursue a sale under the terms of its charge, and I therefore sanction the Bank acting upon the terms of clause 8 (d) thereof. For the avoidance of doubt, and for the reasons given above, this is not intended to amount to specific approval of any particular sale, or sale at any particular price. In my judgment the price is for the chargee to determine, acting under the charge in its discretion, but subject to its overall duty to achieve a sale at the "true market value."

If the Bank had sought that limited relief from the outset, I doubt if this application would have been opposed. The chargor accepted, in argument before me, that sale by private treaty was, in general terms, preferable to that by auction. However, under the terms of the statute an application was needed. The Bank is, therefore, to have its cost of issuing

the summons and filing its evidence to be taxed if not agreed. However, as to the attendance at the hearing before me I make no order as to the cost of that.

Dated this 15th day of December 1999

Richard Ground
Chief Justice