



**IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS**

ACTION NO. CL 147/22

BETWEEN:

ASCENDANCY TCI LTD

PLAINTIFF

-and-

(1) SEAN GERALD RODGERS

(2) NYOSHI NATASHA RODGERS

DEFENDANTS

WRITTEN REASONS

Before: **The Hon. Mr Justice Anthony S. Gruchot**

Appearances: **Ms Devon McLean of Stanbrook Prudhoe for the Plaintiff**
No appearance by the Defendants

Hearing Date: **6th July 2023**

Venue: **Court 5, Graceway Plaza, Providenciales.**

Delivered: **12th July 2023**



1. On 6th July 2023 I made the following orders:

- 1) The Plaintiff is permitted to effect the sale of the property, Title 60609/68, Norway and Five Cays, Providenciales ('the Property') pursuant to sections 75 and 77 of the Registered Land Ordinance, effective immediately.
- 2) That the Plaintiff has conduct of the sale.

- 3) The Defendants and any other person occupying the property must vacate the Property and take all appropriate steps to give the Plaintiff vacant possession of the Property within 30 days of service of the Court Order upon the Defendants.
 - 4) The Plaintiff be granted costs of this application to be payable from the proceeds of any sale of the Property by private treaty.
2. In accordance with the guidance of the Court of Appeal in **Turtle Cove Hotel and Residences Ltd -v- Tides Development Project Inc; Phoenix Development Ltd v Tides Development Project Inc**¹ these are the reasons for the decision.

Background

3. The Defendants are the registered proprietors of parcel 60609/68 Norway and Five Cays, Providenciales Turks and Caicos Islands ('the Property').
4. On the Property is a partly constructed residence.
5. On 24th January 2008 the Defendants charged the Property to Scotiabank (Turks and Caicos) Ltd. ('Scotiabank') to secure a loan of US\$387,350.00 together with interest and charges thereon.
6. The charge was registered at the Land Registry as instrument number 3749/08.
7. The Defendants defaulted on the loan and in 2012 Scotiabank sought leave from the court to sell the property pursuant to the terms of the charge, by private treaty². The Defendants successfully sought a stay of those proceedings and commenced another action, number CL 277/12, alleging divers breaches of the loan agreement by the bank. By way of the judgment dated 19th March 2018 Ramsay-Hale CJ dismissed the Defendants' claim. At paragraph 59 of her judgment, she concluded:

¹ CL-AP 1 of 2022; CL-AP 2 of 2022 [2022] TCACA 8 (13 July 2022).

² Action number CL 196/12.

“The Plaintiffs’ claim for breach of contract is dismissed. I will hear counsel on the matter of interest and orders consequential to the dismissal of the claim including orders in the matter of CL 196/12 which has been stayed on the application Plaintiffs.”

8. The present application was supported by 2 affidavits of Gennaro Pimentel Loria, director of the Plaintiff. Exhibited to the first affidavit is a copy of an order of 21st March 2018, in CL 196/12, granting *inter alia* leave to Scotiabank to sell the Property by private treaty, the same relief as sought herein.
9. On 26th October 2022 Scotiabank assigned and transferred its charge to the Plaintiff. The transfer of charge is registered with the Land Registry as instrument number 3341/2022. Notice of the assignment had previously been given by Scotiabank to the Defendants on 19th July 2018.
10. The Defendants have failed to make any payment towards the loan or otherwise following the 21st March 2018 order. The balance outstanding on the loan as of 5th January 2023 was US\$603,278.96.

The Present Application

11. Ms McLean submitted that the Plaintiff as a result of the assignment and transfer of the charge, effectively stands in the shoes of Scotiabank. Nonetheless, on 21st February 2023, the Plaintiff served on the Defendants, a default notice dated 27th January 2023 pursuant to section 72 of the Registered Land Ordinance (Cap. 9.01) ('RLO') and has commenced a new action.
12. The Court raised the issue that no section 64 RLO notice fixing the date for payment had been disclosed. Ms McLean submitted that one had not been served on this occasion, but as Ramsay-Hale CJ had been satisfied with the notices that she could rely on those previous notices, however, she further submitted section 72 RLO had been varied in the charge. Ms McLean directed me to a copy of the charge exhibited

to the first affidavit of Gennaro Pimentel Loria, more particularly to paragraph 5(c) of the schedule to the charge which provides:

“That section 72 of The Statute³ shall be varied and extended pursuant to the provisions in that behalf contained in section 77 of The Statute so that the powers of sale and appointing a receiver thereby conferred ... may be exercised by the Bank at any time after demand for repayment has been made hereunder ... and it shall not be necessary to give any such notice to the chargor as is mentioned in section 72 of the said Statute.”

13. In **Meridian Mortgage Corporation Ltd. -v- John Michael Hayes Shibley**⁴ I have previously dealt in detail with the circumstance where there has been an omission to serve a section 64 notice and the charge contained a similar provision as set out above. I held that in appropriate circumstances the section 72 notice may be regarded as a section 64 notice and service of a section 72 notice may be dispensed with⁵.
14. Ms McLean provided the Court with a second affidavit of Sashauna Williams proving service on the Defendants of the Notice to Hear Originating Summons on 24th June 2023⁶.
15. In the circumstances I was persuaded that the Defendants were in default of their obligations under the charge and that the Plaintiff had complied with the requirements of the RLO, sections 72 and 75 having been varied by the terms of the charge, and made orders in accordance with section 77 of the RLO. Further, I noted that the Defendants had been served with the Notice to Hear the Originating Summons notwithstanding that they failed to respond to the Originating Summons,

³ The Statute is defined at section 1 (a)(5) of the Schedule to the charge as being the Registered Land Ordinance 1967 and all amendments thereto from time to time.

⁴ CL 110/21 [2022] TCASC 37 (18 October 2022).

⁵ See also *Temple Mortgage Fund Ltd -v- Rigby McKenzie* TC 2003 SC 3 and *Paradise Manor Limited (in liquidation), W.M. Becker and M.L. Becker -v- Bank of Nova Scotia* [1984–85 CILR 437].

⁶ The first filed affidavit of Sashauna Williams dealt with the service of the section 72 notice and the Originating Summons.

having not filed an Acknowledgement of Service and that they had failed to attend the hearing.

Disposition

16. The Order made is set out at paragraph 1 above.

12th July 2023

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court

