

IN THE GRANT COURT OF THE CAYMAN ISLANDS

CAUSE NO: 468 OF 2010

BETWEEN BANK OF BUTTERFIELD (CAYMAN) LTD. PLAINTIFF
AND JASON DALKEITH JERVIS
JESSICA NATALIA JACKSON DEFENDANTS

IN CHAMBERS
THE 8TH FEBRUARY 2011
BEFORE THE HON. CHIEF JUSTICE

Appearance: Mr. Dixie of Mourant for the bank

REASONS FOR RULING

1. By its Originating Summons the Plaintiff seeks, among other things, an order to the following effect:

“That the Plaintiff, in the exercise of the powers of sale under the Charge is entitled to exercise the powers of sale under the Charge and is at liberty to sell the property described in the Cayman Islands Land Register as Registration Section Lower Valley Block 38B Parcel 213H2 by public auction or by private treaty.”

2. It is clear that by section 72 (2) of the Registered Land Law (2004 Revision) (“the Law”), a chargee has the 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.
3. By section 75(1) it is also clear, that the right to sell in the exercise of the power of sale, subject to the chargee’s duty to act in good faith, is a right to sell by

public auction, but subject to such reserve price and conditions as the chargee thinks fit to impose upon the process of the auction.

4. Section 78, that which is relied upon by the Plaintiff Bank here, allows the Court to intervene in these terms:

“The provisions of Sections 70(2) and (3), 72, 73, 74 and 75 may, in their application to the charge, be varied or added to in the charge.

Provided that 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.”

5. Viewed in the context of the Law, what the Plaintiff’s application seeks, therefore, is an order varying the terms of section 72, in so far as Section 72 would require the chargee to sell by public auction, and so, to allow the Plaintiff to sell by private treaty. Hence the terms of the Originating Summons quoted above.
6. As no order of the Court is required for the chargee to exercise the power of sale by public auction in keeping with section 75, the Court’s sanction is indeed required for a sale by private treaty.
7. It is the long settled practice of this Court that the variation of the Law by way of the grant of leave to sell by private treaty instead of by public auction, will not be given until after a fair attempt by the chargee to sell by public auction. The reason for this is obvious and important and I explain it as follows.
8. Section 75 imposes a duty upon the chargee to act in good faith when exercising the right to sell by public auction. One aspect of that duty requires the chargee to seek to get the best price the market will yield (“the market price”). In order to do

so, the chargee will obtain an independent valuation and seek to market the property for sale by public auction at that valuation price or some other reserve price that the chargee might set pursuant to section 75; but being mindful at all times that such a reserve price can only be justified as being that which the market will actually yield at the time.

9. Until that attempt to sell by public auction has been taken, the Court can have no way of knowing whether some other lower price to be fixed as the reserved price for sale by private treaty is a reasonable price. Yet, the imprimatur of the Court is what is ultimately sought by the chargee to absolve it of its duty to obtain the best price when the Court sanctions a sale at a price less than that which the market, with persistent effort over time, might yield.
10. It follows, secondarily, that an application to the Court, for which costs will be incurred which the chargee will seek to be passed to the chargor, should not be brought until after the section 75 powers have been exercised and the appropriateness thus shown, for variation of the Law to allow sale by private treaty.
11. In this case no attempt has been made by the Plaintiff to obtain the market price by way of sale by public auction. It required no leave of the Court to attempt to do so. Section 75 makes that plain.
12. This application has therefore been adjourned generally to allow for sale by public auction before restoration of the application for leave to sell by private treaty.

13. I make no order for costs and record the view of the Court that the costs of this application which is premature should not be visited upon the chargor by reliance on the terms of the loan.
14. This happens to be the second application of this kind refused today for similar reasons. I therefore provide these reasons to be taken as applicable, *mutatis mutandis*, also in the second cause: ***Cause 459 of 2010 – National Building Society of Cayman v Wellington.***

Hon. Anthony Smellie
Chief Justice

February 10 2011