

CAYMAN ISLANDS



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**GRAND COURT PRACTICE DIRECTION NO. 5 OF 2012**

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### **PRACTICE DIRECTION ON APPLICATIONS UNDER SECTIONS 72, 75 AND 77 OF THE REGISTERED LAND LAW (“THE RLL”).**

In the recent past a number of decisions of this Court have dealt, in different ways, with the subject of applications under the RLL, for leave of the Court to enforce charges under the RLL by way of sale by private treaty.

These Practice Directions seek to explain the practice of the Court which has emerged as the result of those decisions.

Typically, Originating Summonses seek the following kinds of relief or variants thereof:

1. Declaratory relief to the effect that the defendant chargor (“the chargor”) is in default of payment under the charge;
2. That the charge be enforced by sale of the charged property by way of public auction or private treaty, by the chargee acting in good faith and having regard to the interests of the chargor.
3. That a reserved price be fixed for the sale by way of private treaty.
4. That the property be listed for sale on the CIREBA Multi-listing System (“the MLS”).
5. That other terms and conditions of the sale be determined, if any.

6. That leave be granted to issue a Writ of Possession with respect to the property.
7. Alternatively, that the chargee be given reasonable access to the property for the purpose of viewing or for any other purpose in connection with the chargee's efforts to sell the charged property
8. Costs.

Whether or not any aspect of relief is granted will of course be a matter for the exercise of discretion by the Court having regard to the particular circumstances of each case, including the conduct of the parties (see section 77 of the RLL and *National Building Society v Cranston* 2011 (1) CILR 67 and *Bank of Butterfield (Cayman) Ltd v. Thornton and Thornton Cause No. 307 of 2010* written decision given on 29<sup>th</sup> March 2011)

Where the chargee has a power of sale under the charge and has complied with the requirements of the RLL for the giving of notice, the jurisdiction of the Court to exercise its discretion to vary or add to the provisions of section 75 of the RLL to allow the chargee to sell by way of private treaty (in addition to or instead of by way of public auction) will not be in dispute. Section 77 provides that the parties to a charge may vary or add to the provisions of section 75:

*“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 the circumstances of the case, so orders”.*

Factors of importance to the exercise of the Court’s discretion will include:

- a. That the property must not be sold at an undervalue (*Paradise Manor Ltd. v. Bank of Nova Scotia* 1984-85 CILR 437; *Bank of Butterfield (Cayman) Ltd. v Jervis and Jackson* 2011 (1) CILR 54;
- b. That the sale has to be in good faith (*Paradise Manor Ltd v. Bank of Nova Scotia* (above) and *Bank of Butterfield v. Jervis and Jackson* (above));
- c. The best evidence of market value is the reaction of the market (*Scotiabank (Cayman Islands) Ltd. v. Rankine* 2004-05 CILR Note 26 and *Bank of Butterfield v. Thornton & Thornton* (above));
- d. The standard of care required of the chargee: that of a reasonable man in respect of the conduct of his own private affairs (*Paradise Manor Ltd v. Bank of Nova Scotia* (above));
- e. Leave to sell by private treaty at *a reserve price set by the Court* will not usually be granted without previous attempts to market the property and to sell by public auction on the open market (*Bank of Butterfield v. Jervis and Jackson* (above));

- f. Before leave to sell by private treaty *at a reserve price set by the Court* will be given, there will usually be to the satisfaction of the Court, evidence at least of attempts to sell by way of public auction (now defined to include sale by listing on the MLS at a reserve price set by the chargee aimed at realizing the true market value: see **Scotiabank Trust v Ebanks and Gordon** below).
- g. However, leave to sell by private treaty may be granted where there has been no prior attempt to sell on the open market where the Court is satisfied that it is in the interest of justice so to order, especially bearing in mind that attempts to sell by way of a formal public auction could add unnecessarily to the costs to be ultimately passed on to the chargor (**National Building Society of Cayman v. Cranston** (above)). Where such leave is granted to sell by private treaty (that is: without a reserved price being set), the order will usually be conditioned as being subject to the chargee “acting in good faith and having regard to the interests of the chargor”.
- h. “*Sale by public auction*” does not necessarily require a formal auction with a bidding process conducted by an appointed auctioneer but “in substance, the sale of a property through the MLS is a public auction” (**Scotiabank & Trust (Cayman) Ltd. v. Cecilia Ebanks (as**

*administratrix of estate of Allan Ebanks) and Rudolph Gordon (as administrator of estate of Allan Ebanks) GC Cause No. 298 of 2010, Judgment delivered January 12<sup>th</sup> 2012.*

- i. The sanction of the Court of a price obtained whether by public auction (by listing on the MLS or otherwise) or by private treaty, is more likely to be granted where the original asking price had been set by the chargee by reference to an independent valuation. In this way the Court will be able more likely to conclude that the chargee has acted in good faith in exercise of its rights under the charge.
- j. There is no need for an application to the Court for placement of the property 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 section 75 of the RLL, can sell by way of public auction without the leave of the Court (*Bank of Butterfield v. Jervis and Jackson* (above)).
- k. An application to the Court is necessitated only where leave to sell by private treaty (whether by fixing of a reserve price or otherwise) is required by way of a variation of section 75 of the RLL as agreed in the charge loan agreement.

1. Where the Court considers that a chargee has brought an unnecessary application for leave to sell by public auction, the Court will refuse to grant an order for the costs of so doing (*Bank of Butterfield v. Jervis and Jackson* (above)).

Other factors which the Court will consider will include:

- (i) the defendant(s)' position and whether they have notice of the application;
- (ii) whether the defendants are represented and have a proper understanding of the application;
- (ii) whether there is any element of unfairness or unreasonableness in the chargee's application;
- (iv) whether an order for costs should be imposed upon the chargor, over and above any right that the chargee might have to recover costs under the charge loan agreement.

Hon. Anthony Smellie  
Chief Justice

22<sup>nd</sup> May 2012