

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2014/0180

BETWEEN:

[1] **MARCUS A WIDE**
[2] **MARK MCDONALD**

Claimants

AND

[1] **S & J LIMITED**
[2] **CARIBBEAN FINANCE & MORTGAGE CO. LTD**

Defendants

Appearances:

Mr. Craig Christopher for the Claimants

Sir Clare Roberts QC & Ms. S. Roberts for the Defendants

2015: February 13
February 18

JUDGEMENT

- [1] **Cottle, J.:** The defendants are customers of First Caribbean International Bank (Barbados) Ltd (the bank). They negotiated loan facilities with the bank and secured the loans by mortgaging to the bank certain commercial property in Antigua. The defendants executed a fixed and floating charge debenture over the assets of the first named company. They also executed three registered charges over the two parcels of land that comprise the mortgaged property.

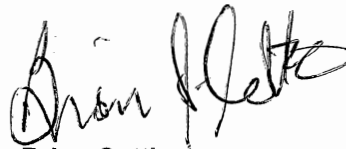
- [2] On 4th December, 2012 the bank gave the defendants notice to pay off. The defendants defaulted. Clause 6 of the debenture and clause 7 of the first defendant's registered charge permitted the bank to, inter alia, sell the mortgaged real property, known as Jasmine Court and Serendipity Place respectively. Clause 7 and 8 of the second defendant's registered charge likewise allowed the bank power of sale.
- [3] The bank appointed the claimants as receiver managers of the defendants' mortgaged property. The claimants now apply to the court for leave to sell the interest of the defendants in the mortgaged property by closed bid private treaty to satisfy the debts outstanding under the debentures and registered legal charges.
- [4] The application was supported by an affidavit of the first claimant. He described the process of sale undertaken by the claimants. Advertisements were placed in the Antigua Observer, the Barbados Nation and the Trinidad Guardian. The adverts ran one day per month for three consecutive months in each newspaper.
- [5] The claimants are experienced receiver managers in the region. They determined that public auctions have historically little uptake and the sales value realized are low. Closed bids have proven to be more effective at achieving higher sales prices. Using their knowledge of the regional market, the claimants emailed 114 regional entities with details of the mortgaged properties. They invited sealed bids.
- [6] At the end of the process they received only two bids, for 5.6 million and 4 million respectively for the properties. The receiver managers determined that these were the best offers and now approach the court for leave to accept them.
- [7] The defendants object to the proposed sale. They offer several bases upon which the claimants' application ought to be rejected.

Receiver Managers have no power of sale.

- [8] Section 72(2) of the Registered Land Act cap 374 as amended allows the chargee to either appoint a receiver of the income of the charged property or sell the charged property. In the present case the bank have exercised the power to appoint a receiver. Section 73 sets out the powers of the receiver. It does not list any power to sell the charged property. As I understand the argument, it is only the bank which has the power to sell, not the receivers.
- [9] In the case of CIBC Caribbean Ltd v Richard Santos ANUHCv2002/0063 Mitchell J considered the Registered Land Act and concluded, "the chargee has a choice of two remedies, either to appoint a receiver or to sell the charged land."
- [10] This objection is purely technical and has no merit in the present case. The application for leave to sell the charged property is made on behalf of the bank. The bank filed an affidavit in the proceedings in support of the application of sale. The bank has also applied to be joined as a party.
- [11] In any event part 19.2 (3) of the CPR 2000 allows the court to add a new party to proceedings without an application if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings. If this were the only ground of objection this court would not hesitate to add the bank as claimants rather than have the matters in dispute remain unresolved.
- [12] Counsel for the defendants also contends that even if there were power in the claimants to sell they can only do so within the statutory parameters. The proviso to section 72 (2) of the Registered Land Act reads:
- "... provided that a chargee who has appointed a receiver may not exercise the power of sale unless the charger fails to comply with a further notice served on him under subsection (1) within three months of the date of such service."
- [13] It is common ground that no such notice was given to the defendants.

- [14] The claimants argue that this requirement to serve a notice has been waived by the parties by their conduct in this matter. After the initial notice to pay off was served, the defendants approached the bank. They made certain proposals to settle the debts. There were several rounds of discussions. The claimants agreed that they would support the banks efforts to sell the mortgaged properties if the bank would relieve them of all obligations under their personal guarantees.
- [15] The claimants say that the parties were all aware of the intention to sell and the defendants had agreed in principle to the sale by private treaty albeit with the condition that the personal guarantees be released. In these circumstances the service of a second notice to pay off setting out the debt then owed, has been satisfied in substances. It would be otiose to notify the defendants of something they were perfectly aware of and actually willing to participate in the sale process. Section 77 of the Registered Land Act allows the parties to contract out of the provisions of the legislation. Counsel urges the court to find that the conduct of the parties evinces an agreement to waive requirements of section 72(2).
- [16] This is an attractive argument. Why should the court intervene in a commercial agreement arrived at by the parties treating at arms length? The answer is that the court is constrained to follow the clearly expressed intention of the legislature. The parties may contract out of the provisions of the Registered Land Act, but this must be expressed in the deed of charge itself. It is not open to the court to infer a contract on the basis of the conduct of the parties. This is consistent with the basic principles dealing with dispositions of interests in real property. There is always a requirement for writing.
- [17] In the absence of evidence that a second notice to pay off has remained uncomplished with, the bank has no power to sell, having appointed the claimants receiver managers.
- [18] That is sufficient to dispose of the matter before this court. I do not go on to consider the efficacy of the publication method used by the claimants or the issue of the value at which the proposed sale was to be affected. The application by the claimants is therefore refused.

[19] Despite the fact that the defendants have succeeded I do not think it would be just to let them have their costs on this application. I will make no order as to costs.



Brian Cottle
High Court Judge