



## **THE CAYMAN ISLANDS LAW REFORM COMMISSION**



### **FINAL REPORT**

## **THE ENFORCEMENT OF MORTGAGE – TYPE SECURITY OVER REAL ESTATE: IS REFORM OF THE LAW NECESSARY?**

**28<sup>th</sup> JULY, 2021**

## **THE CAYMAN ISLANDS LAW REFORM COMMISSION**

<b>Chairman</b>	<b>Mr. Hector Robinson, QC</b>
<b>Commissioners</b>	<b>Hon. Justice Alexander Henderson, QC, (retd.)</b> <b>Mr. Vaughan Carter, Attorney-at-Law</b> <b>Mr. Abraham Thoppil, Attorney-at-Law</b> <b>Ms. Reshma Sharma, Solicitor General</b> <b>Mrs. Candia James-Malcolm, Director of Public Prosecutions (actg.)</b>
<b>Director</b>	<b>Mr. José Griffith, Attorney-at-Law</b>
<b>Senior Legislative Counsel</b>	<b>Ms. Catriona Steele, Attorney-at-Law</b>
<b>Paralegal Officer</b>	<b>Ms. Felicia Connor</b>
<b>Administrative Secretary</b>	<b>Mrs. Lourdes Pacheco</b>

## TABLE OF CONTENTS

Acknowledgements	3
Introduction	4
Background	4
Research and Consultation Process	4
The Discussion Paper	6
Areas of Examination	6
Questions for Consideration	6
Options Examined for Reform	7
(a) Enacting provisions through new legislation or amendments to the Registered Land Act (2018 Revision)	8
(b) Adopting the Directives of the European Parliament and of the Council; and	8
(c) Adopting Specific Legislative Measures in Other Jurisdictions	9
(i) The United Kingdom Law of Property Act, 1925; and Pre-action Protocol	9
(ii) The United Kingdom Consumer Credit Act, 1974	11
(iii) The Canada, Ontario Mortgages Act, 1990	12
(iv) The Australia, New South Wales, Real Property Act, 1990	12
Public and Stakeholder Responses to the Discussion Paper	13
The Consultation Registered Land (Amendment) Bill, 2020	13
Provisions of the Consultation Registered Land (Amendment) Bill, 2020	14
Public and Stakeholder Responses to the Registered Land (Amendment) Bill, 2020	15
Recommendations for Reform	15
The Provisions of the Proposed Registered Land (Amendment) Bill, 2021	16
Conclusion	19
Appendix 1 - The Proposed Registered Land (Amendment) Bill, 2021	20
Appendix 1A - Blacklined Principal Act to Reflect the Proposed Registered Land (Amendment) Bill, 2021	21
Appendix 2 - The Discussion Paper - The Enforcement of Mortgage-Type Security Over Real Estate: Is Reform of the Law Necessary?	22
Appendix 3 - Public and Stakeholder Responses to the Discussion Paper	23
Appendix 4 - The Consultation Registered Land (Amendment) Bill, 2020	24
Appendix 5 - Public and Stakeholder Responses to the Consultation Registered Land (Amendment) Bill, 2020	25

## **ACKNOWLEDGEMENTS**

The Law Reform Commission extends thanks to all stakeholders and the general public for the valued contribution leading up to the conclusion of this Final Report.

## FINAL REPORT

### THE ENFORCEMENT OF MORTGAGE-TYPE SECURITY OVER REAL ESTATE: IS REFORM OF THE LAW NECESSARY?

#### INTRODUCTION

In accordance with section 12 of the *Law Reform Commission Act (2019 Revision)*, the Law Reform Commission (“the Commission”) submits for the consideration of the Honourable Attorney General its Final Report titled “**The Enforcement of Mortgage-Type Security Over Real Estate: Is Reform of the Law Necessary?**”.

#### BACKGROUND

1. This Final Report contains recommendations which seek to respond to issues that relate to enforcement of mortgage-type security over residential properties and is supported by a proposed “**Registered Land (Amendment) Bill, 2021**”. The proposed Bill for consideration is attached as *Appendix 1*.
2. By a referral made on 30<sup>th</sup> January, 2018, the Honourable Attorney General required the Commission to consider whether it is necessary to reform the legislative framework for mortgage-type security over land and, in particular, over residential properties.
3. This request followed a heightened level of public comment, and concern, regarding the number of mortgage enforcement procedures, colloquially referred to as “*foreclosures*”. The dominant theme of the public commentary has been the level of hardship that has been experienced by the owners of residential property who have been affected by these procedures.
4. The concerns of the public were echoed by Members of Parliament and prompted the then Minister of Financial Services and Home Affairs to request, through the Honourable Attorney General, that the Commission conduct a comprehensive review of the applicable legislative framework in the Cayman Islands.

#### RESEARCH AND CONSULTATION PROCESS

5. The research of the Commission into this issue included an examination of –
  - (a) whether the existing law in its current state strikes the best balance between the interests of chargees and chargors;
  - (b) whether there are means by which the burden of protection of chargors’ rights might be lessened;
  - (c) whether the desired objectives may be achieved by amending existing laws, or whether the most effective method of reform is to enact new primary or secondary legislation; and
  - (d) whether there should be legislation which deals specifically with security over residential property.

6. The research findings of the Commission resulted in the formulation, for public consultation, of a Discussion Paper titled – “**The Enforcement of Mortgage-Type Security Over Real Estate: Is Reform of the Law Necessary?**”<sup>1</sup>. The Paper is attached as *Appendix 2*.
7. The Discussion Paper was subsequently published for public comment and also forwarded to the following institutional stakeholders –
  - the Cayman Islands Bankers’ Association;
  - the Cayman Islands Chamber of Commerce;
  - the Cayman Islands Real Estate Brokers Association;
  - the Cayman Islands Legal Practitioners Association;
  - the Cayman Islands Company Managers Association;
  - the Cayman Islands Compliance Association;
  - the Cayman Islands Directors Association;
  - the Cayman Islands Institute of Professional Accountants;
  - the Society of Trusts and Estates Practitioners;
  - the Cayman International Insurance Association;
  - Cayman Finance;
  - the Cayman Islands Association of Mediators and Arbitrators;
  - the Cayman Islands Contractors Association;
  - the Cayman Society of Architects, Surveyors and Engineers;
  - Judicial Administration;
  - the Cayman Islands Monetary Authority;
  - the Lands and Survey Department;
  - the Ministry of Commerce, Planning & Infrastructure; and
  - the Members of Parliament.
8. Stakeholders and members of the general public were accordingly invited to respond to the issues and questions identified in the Discussion Paper. The consultation period for the Discussion Paper commenced on 23<sup>rd</sup> November, 2018 and, after acceding to requests made by various stakeholders to extend the time for submission of comments, the consultation period eventually concluded on 31<sup>st</sup> May, 2019. By the end of the consultation period, the Commission received responses from the following members of the public and organisations –
  - Mr. Norman Linton;
  - Ms. Carroll Yates;
  - Mr. Michael Lemay;
  - Mr. Jarrod Coe;
  - Mr. Wayne Newberry;
  - Ms. Amanda Scott;
  - the Cayman Islands Legal Practitioners' Association;
  - the Royal Bank of Canada;
  - the Cayman National Bank;
  - the Cayman Islands Lands and Survey Department; and
  - the Cayman Islands Real Estate Brokers Association.

---

<sup>1</sup> 23<sup>rd</sup> November, 2018

## THE DISCUSSION PAPER

### AREAS OF EXAMINATION

9. In the Discussion Paper, the Commission examined the following areas –
- (a) the common law position as it relates to mortgages;
  - (b) the Law of Property Act, 1925 (U.K.), which modified the common law;
  - (c) the enactment of the *Registered Land Act, 1971*;
  - (d) the abolition of the common law concept of a mortgage and the creation of registered charges over land;
  - (e) the terms and conditions of a charge;
  - (f) the chargee's remedies in the event of a breach of the chargor's obligations;
  - (g) the chargee's right to exercise the power of sale under sections 72, 75 and 77 of the *Registered Land Act (2018 Revision)*;
  - (h) the public auction method of disposing property;
  - (i) the sale process and the requirement to act in good faith;
  - (j) the recommended practice under the Cayman Islands Bankers' Association's Banking Code;
  - (k) the right of the chargor to redeem the property charged; and
  - (l) the chargor's entitlement to damages against the chargee after a power of sale is exercised.

### QUESTIONS FOR CONSIDERATION

10. Based on the review of the current status of the law and the areas of concern raised by various observers, the Commission identified several questions for consideration. These are as follows –
- (a) Should there be new and separate legislation specifically dealing with the enforcement of mortgage security over residential property?
  - (b) Should there be comprehensive legislation adopting the principles prescribed under the EU Directives relating to residential immovable property dated February 2014?
  - (c) Should specific provisions regulating the service and enforcement of notices of the exercise of a chargee's statutory enforcement powers, in respect of residential property, be incorporated in broader consumer protection legislation?
  - (d) Should all contemplated reform be effected by amending the *Registered Land Act (2018 Revision)*?
  - (e) Should the *Registered Land Act (2018 Revision)* make a distinction between the procedures to be adopted with respect to residential property as opposed to property used for other purposes?
  - (f) Should there be a reintroduction of the power of foreclosure whereby, pursuant to a court application, title to the charged property is transferred to the secured chargee, but with the consequence that the obligations of the chargor are totally extinguished?
  - (g) Should there be an express power in section 75 of the *Registered Land Act (2018 Revision)*, or its equivalent, permitting a secured chargee to sell the charged property by private contract, as well as by public auction?

- (h) Should the *Registered Land Act (2018 Revision)* specifically define what constitutes a 'public auction' and prescribe minimum mandatory requirements for a sale to be considered a public auction within the meaning of the Act?
- (i) Should there be a codification of specific minimum steps a secured chargee should take in order to demonstrate that it has acted in good faith in the exercise of its power of sale?
- (j) Should there be a specific statutory prohibition against a chargee selling the charged property to a party connected to itself?
- (k) Should there be an express statutory prohibition against a pre-payment penalty for early redemption of a charge?
- (l) Should there be a repeal of section 77 of the *Registered Land Act (2018 Revision)*, which allows the parties, in the terms of the charge, to amend the provisions of the *Registered Land Act (2018 Revision)*, specifically relating to the required period of default and the duration of a notice under section 72?
- (m) Should there be provisions for the creation of fixed term charges over residential property, pursuant to which the chargee may not require the chargor to repay the entire loan 'on demand' in the event of a single breach?
- (n) Should there be a limit to the amount of expenses for which the chargor may be liable upon the enforcement of a power of sale?
- (o) Should any of the following amendments or new provisions be adopted regarding the section 72 notice?
- (p) Should there be a prescribed form specifying the required contents of the notice, including the specific amounts outstanding, and the steps which the chargor should take to remedy the default?
- (q) Should the section 72 notice be limited only to defaults in the payment of principal and interest and the defaults in keeping the property insured?
- (r) Should there be a longer or shorter period of default which triggers a section 72 notice than that provided for at present?
- (s) Should there be a longer or shorter period within which the chargor is required to remedy the default than that provided for at present?
- (t) Should there be a prescribed pre-action protocol which should be followed by chargees who seek to enforce their security over residential property, to replace the voluntary Code of Conduct for Bankers, and which is to be taken into consideration by the courts to determine whether the chargee has acted in good faith in exercising its security?
- (u) Should there be a specific requirement that the secured chargee serve all interested parties, such as prior and subsequent chargees, and any person who has registered a caution against the charged property?
- (v) Should there be an adoption of more modern modes of service which are more likely to bring the notice to the attention of the chargor?

### **OPTIONS EXAMINED FOR REFORM**

11. In addition to the questions posed, the Commission examined several options for reform. These are as follows -

- (a) enacting provisions through new legislation or amendments to the *Registered Land Act (2018 Revision)*;
- (b) adopting the Directives of the European Parliament and of the Council; and
- (c) adopting specific legislative measures from other jurisdictions.

**(a) Enacting provisions through new legislation or amendments to the *Registered Land Act (2018 Revision)***

12. The Commission found that the *Registered Land Act (2018 Revision)* makes no distinction between charges created over residential property and those created over others, such as industrial or commercial property. The Commission noted that it is in the process of considering proposals for the introduction of consumer protection legislation, but as matters stand, there is no legislation outside the *Registered Land Act (2018 Revision)* which is capable of affording protection to the owners or occupiers of residential property when faced with enforcement proceedings undertaken by secured chargees.

**(b) Adopting the Directives of the European Parliament and of the Council**

13. The Commission gave consideration to the principles of consumer protection legislation as set out in the Directives of the European Parliament and of the Council, dated February 2014, on credit agreements relating to residential immovable property (“the EU Directives”).
14. Some of the legislative principles set out in the EU Directives which the Commission considered relevant include -
- (a) the promotion of measures that support the education of consumers in relation to responsible borrowing and debt management;
  - (b) the introduction of measures which will require that the providers of secured credit, when creating the agreements which will lead to the secured loan, shall act in a manner which is honest, fair, transparent and professional, taking account of the rights and interests of consumers;
  - (c) the requirement that any advertising concerning such agreements must specify certain information such as: the borrowing rate and whether such rate will be fixed or variable; the duration of the term of the loan; the amount of the instalments; the number of instalments; and a warning of any factors which may result in an increase in the amount payable by the chargor;
  - (d) the requirement that chargees provide a customer seeking credit with personalised information enabling the customer to compare the options for credit available in the market, to assess their implications and to make an informed decision as to whether to enter into the agreement;
  - (e) the creation of and ensuring of access to a database for all chargees containing information which would allow existing and prospective chargees to assess and monitor the creditworthiness of their chargors;
  - (f) a requirement that chargors be allowed to repay their indebtedness in full or in part prior to the expiry date without penalty for so doing;
  - (g) the introduction of measures to encourage chargees to exercise forbearance before enforcing their powers of sale;
  - (h) allowing the chargee to impose reasonable additional charges on the chargor in the event of a default;
  - (i) allowing the chargee and chargor to agree in their credit agreement that the chargor may transfer the property to the chargee in total satisfaction of the outstanding debt;

- (j) ensuring that appropriate and effective complaints and redress procedures exist for the out-of-court resolution of disputes between chargors and chargees, using existing bodies where possible.

### **(c) Adopting Specific Legislative Measures in Other Jurisdictions**

15. The Commission examined other jurisdictions which have enacted legislation which may also serve as useful guides for any new or amended legislation to be adopted in the Cayman Islands. In that regard, the Commission considered the following –

- (i) The United Kingdom Law of Property Act, 1925;
- (ii) The United Kingdom Consumer Credit Act, 1974;
- (iii) The Canada, Ontario Mortgages Act, 1990; and
- (iv) The Australia, New South Wales Real Property Act, 1990.

#### **(i) The United Kingdom Law of Property Act, 1925**

16. In the UK, section 103 of the Law of Property Act, 1925 (applying to England and Wales) provides that the mortgagee shall not exercise the power of sale unless and until -

- (a) notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
- (b) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
- (c) there has been a breach of some provision contained in the mortgage deed or under the Act, on the part of the mortgagor, other than a covenant for payment of the mortgage money or interest.

17. These provisions are not dissimilar to the provisions under section 72 of the *Registered Land Act (2018 Revision)*. The period of the default notice; (three months); is identical to the period under the section 72 notice, however, the pre-existing default period is two months in England, compared to one month in the Cayman Islands.

### **18. Pre-action Protocol**

The Commission examined the existence of a pre-action protocol for possession claims relating to mortgage arrears and found that the protocol does not change the legal rights and obligations of the mortgagor and mortgagee under the Act. It however sets out the conduct of the parties that the courts will consider before making an order for possession.

The stated aims of the protocol are to:

- (a) ensure that the lender and the borrower act fairly and reasonably with each other in resolving any matter concerning mortgage arrears;
- (b) encourage greater pre-action contact between the lender and the borrower in order to seek agreement between the parties, and where agreement cannot be reached, to enable efficient use of the court's time and resources; and
- (c) and encourage lenders to check who is in occupation of the property before issuing proceedings.

19. The Protocol seeks to do the following –

- (a) address, among other matters, the initial contact and provision of information by the lender to the borrower; the postponement of the start of a possession claim; and further matters to be considered before commencing a possession claim;
- (b) recommend that, among other things, the lender must provide the borrower with information on the current monthly instalments and the amounts paid for the last two years; and information on the amount of the arrears, which should include – the total amount of the arrears; the total outstanding on the mortgage; and whether interest or charges have been or will be added, and, where appropriate, details or an estimate of the interest or charges that may be payable;
- (c) require the lender to consider a reasonable request from the borrower to change the date of regular payment (within the same payment period) or the method by which payment is made;
- (d) require the lender to respond promptly to any proposal for payment made by the borrower and if the lender submits a proposal for payment, the borrower must be given a reasonable period within which to consider such proposals;
- (e) where the borrower fails to comply with an agreement under the protocol, require the lender to warn the borrower, by giving 15 days' notice in writing of an intention to start a possession claim;
- (f) prohibit the lender from commencing a possession claim for mortgage arrears where the borrower can demonstrate that he has submitted a claim to the Department for Works and Pensions, or a local authority, for various benefits, or to an insurer under a mortgage payment protection policy;
- (g) recommend that the lender postpone the proceedings where the borrower provides evidence of a reasonable likelihood of obtaining the benefits or recovery under the insurance policy, or provide evidence of an improvement in the borrower's financial circumstances in the foreseeable future;
- (h) where the borrower can demonstrate that reasonable steps will be taken to market the property, at a reasonable price, with appropriate professional advice, require the lender to consider postponing the start of a possession claim to allow the borrower a realistic period to sell the property;
- (i) where the lender agrees to postpone starting a possession claim, require the borrower to provide the lender with, among other things, the particulars of sale, and details of the estate agent instructed to deal with the sale;
- (j) where the chargee decides not to postpone the start of a possession claim, require the chargee to provide the chargor with the reasons for its decision at least five business days before starting proceedings; and

(k) recommend that before commencing a possession claim, the parties should consider alternative solutions such as extending the term of the mortgage; deferring payment of interest due under the mortgage and capitalising the arrears.

20. The Commission noted that if a similar protocol were to be adopted in the Cayman Islands, to be effective, there will be a need for significant amendments to the law and procedure for the exercise of the power of sale. At present, the lender is not entitled to possession merely by virtue of there being a default in the obligations under the charge.
21. The chargee becomes entitled to possession upon the acceptance of an offer to purchase pursuant to the exercise of the power of sale.
22. Further, based on the firm statements in the Grand Court practice directions, there may be adverse costs consequences to a lender who makes a court application for directions regarding the exercise of its power of sale before taking steps to sell the property by public auction. Under the present statutory and procedural regime there is very limited scope for a pre-action protocol to be effective.
23. This does not suggest that there would be no utility to the adoption in the Cayman Islands of a similar protocol relative to the exercise of a power of sale. The Commission believes that such a protocol could, for example, prescribe matters to be taken into consideration by the Court when considering whether a chargee has '*acted in good faith*' and has had due regard to the interests of the chargor, within the meaning of section 75 of the *Registered Land Act (2018 Revision)*. This is a relevant factor, both to an application for approval of variations of the provisions of the statute by the terms of the charge, and to proceedings brought after the sale, relating to whether the lender has acted reasonably in the exercise of the power of sale.
24. The Commission believes that if such a protocol were to be effective within the current statutory and procedural scheme, it would have to be imposed as steps to be taken either prior to or after the issue of a section 72 notice, and in such a manner that failure to comply with the protocol would affect the validity of a section 72 notice.

**(ii) The United Kingdom Consumer Credit Act, 1974**

25. Section 88 of the Consumer Credit Act, 1974 contains a number of provisions with regard to the contents of the default notice to be served on a debtor in default which may usefully be adopted with respect to the section 72 notice of the *Registered Land Act (2018 Revision)* or its statutory replacement. The section provides that –
  - (1) The default notice must specify –
    - (a) the nature of the alleged breach;
    - (b) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken; and
    - (c) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach, and the date before which it is to be paid.
  - (2) The default notice must contain information in the prescribed terms about the consequences of failure to comply with it and any other prescribed matters relating to the agreement.

- (3) The default notice must also include detailed information specifying the extent of the default.
- (4) The default notice may include a provision allowing the borrower to remedy the breach at any time after the expiry of the notice (but before the exercise of the power of sale), together with a statement that the provision will be ineffective if the default is duly remedied.

### **(iii) The Canada, Ontario, Mortgages Act, 1990**

26. The statutory position in Ontario, Canada is similar to the position in the Cayman Islands, but with some important differences.
27. Under section 24 of the Canada, Ontario, Mortgages Act, 1990, which is the equivalent of section 72 of the *Registered Land Act (2018 Revision)*, a mortgagee's power of sale arises three months after default in the payment of principal or interest, or in the payment of any insurance premium due on the property. This compares with the one month requirement under section 72 of the *Registered Land Act (2018 Revision)*. Note, however, that the Ontario power of sale does not arise in respect of performance default, except for failure to pay the insurance premium.
28. The prescribed manner of sale is similar to that provided for under section 75 of the *Registered Land Act (2018 Revision)*. The Ontario provision expressly permits a sale by private contract in addition to a sale by public auction.
29. The Commission believes that an amendment to section 75 of the *Registered Land Act (2018 Revision)*, to permit sale by private contract, is worthy of consideration. The current sale process in the Cayman Islands is in effect a private sale. Although it may be accurate that a sale on the MLS is a reverse mortgage, it is doubtful whether that was contemplated at the time section 75 of the *Registered Land Act (2018 Revision)* was enacted. Calling a sale on the MLS a public auction therefore has a ring of artificiality.
30. The notice of default, the equivalent of the section 72 notice in the Cayman Islands, prevents the mortgagee from exercising the power of sale until after 45 days after service of the notice. This compares with three months under the *Registered Land Act (2018 Revision)*. As such, the total period from the date of default to the date the power of sale arises is approximately 135 days in Ontario, and approximately 120 days in the Cayman Islands.
31. The Ontario statute prescribes the persons on whom the default notice must be served including all prior and subsequent mortgagees, and any other persons appearing to have a registered interest in the property.

### **(iv) The Australia, New South Wales, Real Property Act, 1990**

32. The Real Property Act, 1990, the governing statute in New South Wales, Australia, also prescribes the persons on whom the equivalent of the section 72 notice must be served. These include every prior or subsequent mortgagee, and every caveator (the equivalent of a person lodging a caution under the *Registered Land Act (2018 Revision)*).
33. Importantly, the statute also prescribes the means of service and the required contents of the default notice. For example, the statute prescribes that the notice specifically require the mortgagor -

- to observe the agreement or condition in respect of the observance of which the mortgagor is in default; or
  - to pay the principal, interest, annuity, rent-charge or other money in respect of the payment of which the mortgagor, charger or covenant charger made default; and
  - to pay a reasonable amount for those costs and expenses and specifies the amount.
34. The notice is also required to notify the mortgagor that, unless the requirements of the notice are complied with within one month after service of the notice (or, where some other period exceeding one month is limited by the mortgage), it is proposed to exercise a power of sale in respect of the mortgaged property.

### **PUBLIC AND STAKEHOLDER RESPONSES TO THE DISCUSSION PAPER**

35. The responses received from stakeholders to the questions raised and options proposed varied. Generally, there are views which suggest that whilst the forced sale of residential property is a matter which requires close scrutiny, such sales are an inevitable feature of a free and properly functioning property market.
36. Responses further suggest that an inability on the part of lenders to effectively enforce, within a reasonable time, their security rights in the event of default would likely restrict the availability of financing to purchasers, which would in turn have an adverse effect on the real estate market. As such, these respondents do not view the law as being unfair or requiring any fundamental reform.
37. On the other hand, there are respondents who suggests the opposite. These respondents support the need for legislation which facilitates fairness and reasonableness between lender and borrower when seeking to resolve any matter of default in relation to a charge over land.
38. These respondents see a need for greater consumer protection strategies to allow borrowers to retain possession of their homes and to prevent lenders from engaging in what are viewed as unfair practices when disposing of properties which are in default. Additionally, it is viewed that lenders should be prevented from taking unfair advantage of borrowers by imposing what is regarded as usurious fees, and by disposing of properties below the market value, which leaves a residual balance for the borrower to repay.
39. The responses of the public and stakeholders to the Discussion Paper can be found in *Appendix 3*.

### **THE CONSULTATION REGISTERED LAND (AMENDMENT) BILL, 2020**

40. The Commission relied on its examination of the issues and responses to the questions posed in the Discussion Paper and an examination of the options for reform to formulate ‘the consultation *Registered Land (Amendment) Bill, 2020*’. The Bill is attached as *Appendix 4*.
41. The Bill was published for public comment and was also forwarded to the following institutional stakeholders –
- Cayman Islands Bankers’ Association;
  - Cayman Islands Chamber of Commerce;
  - Cayman Islands Real Estate Brokers Association;

- Cayman Islands Legal Practitioners Association;
- Cayman Islands Company Managers Association;
- Cayman Islands Compliance Association;
- Cayman Islands Directors Association;
- Cayman Islands Institute of Professional Accountants;
- Society of Trusts and Estates Practitioners;
- Cayman International Insurance Association;
- Cayman Finance;
- Cayman Islands Association of Mediators and Arbitrators;
- Cayman Islands Contractors Association;
- Cayman Society of Architects, Surveyors and Engineers;
- Judicial Administration;
- Cayman Islands Monetary Authority;
- Lands and Survey Department; and
- Ministry of Commerce, Planning & Infrastructure.

42. Stakeholders and members of the general public were accordingly invited to respond to the provisions of the ***Registered Land (Amendment) Bill, 2020***. The consultation period commenced on 29<sup>th</sup> August, 2020 and, after acceding to requests made by various stakeholders to extend the time for submission of comments, eventually concluded on 20<sup>th</sup> January, 2021. By the end of the consultation period, the Commission received responses from the following members of the public and organisations –

- Cayman Islands Legal Practitioners Association;
- Bedell Cristin Cayman Partnership for and on behalf of Cayman Islands Bankers' Association;
- Hon. Anthony Smellie, Chief Justice;
- Registrar for Lands and Survey Department;
- Ministry of Financial Services and Home Affairs;
- Cayman Islands Monetary Authority;
- Sandra Edun-Watler, Attorney-at-Law;
- Andrea A. Calderon and Raul E. Martinez, Snr.;
- Asher Carlyle Ebanks;
- Norman Linton, Private Lender; and
- Wayne Newberry, Investor.

## **PROVISIONS OF THE CONSULTATION REGISTERED LAND (AMENDMENT) BILL, 2020**

43. The *Registered Land (Amendment) Bill, 2020* –

- (a) provides for a comprehensive foreclosure pre-action protocol which sets out several mandatory steps to be explored between chargee and chargor before a chargee can exercise a power of sale against a chargor including, examining in detail, all the circumstances of the chargor;
- (b) permits the chargor to appeal a pre-action protocol decision through an appropriate independent alternative dispute resolution mechanism and during that period the power of sale proceedings shall be stayed;

- (c) requires the chargee to clearly advise the chargor with respect to the terms of the loan agreement and the implications for non-compliance;
- (d) requires that the chargor obtain independent legal advice or other competent advice before committing to a loan;
- (e) requires the chargee to refrain from concluding any loan agreement unless the chargee has reasonable grounds to believe that the chargor has been properly advised and understands the contractual obligations;
- (f) provides for the particulars to be included in the notice of default and the form that the notice must take;
- (g) identifies what constitutes a public auction and the procedures to ensure fairness in the sale of foreclosed property at an auction;
- (h) sets out the factors to be considered when determining the market value of land during power of sale proceedings and the method to calculate the best value;
- (i) sets out the factors that would constitute acting in good faith in the disposal of land; and
- (j) prohibits the application of a penalty for early redemption of a charge.

### **PUBLIC AND STAKEHOLDER RESPONSES TO THE REGISTERED LAND (AMENDMENT) BILL, 2020**

- 44. The *Registered Land (Amendment) Bill, 2020* was made available for public consultation. Attached as *Appendix 5* is a table which reflects the comments made by stakeholders on the Bill.
- 45. Several respondents expressed concern with respect to the impact the proposed changes would have on potential borrowers and called for a clear understanding of the meaning of terms and the need for consistency throughout the Bill. Recommendations were made to delete several provisions due to the risk of difficulties posed and the undermining nature of those particular provisions. Further, it was stated that the Bill creates practical problems related to an imbalance in its objective and with respect to knowledge, access, damage, expense, and third party liability.
- 46. Significant concern was expressed with respect to the extensive proposed changes made in the Bill which could have some serious unintended consequences on borrowers. These consequences related to access to finance, the cost of finance, volume and cost of enforcement actions and the certainty of procedure. Additionally, respondents commented on the lack of areas addressed which pose an important bearing on how banks respond, as well as the lack of clarity and vague language seen within several proposed amendments.
- 47. It was recommended that clarity, certainty and specificity should be reflected to ease concerns often raised in courts in relation to the power of sale. Some respondents proposed that amendments to the Bill be incorporated into a standalone mortgage law due to its vast and broad encompassing subject. On the other hand, several respondents viewed the proposals as a significant step in the correct direction and suggested a few refinements.

### **RECOMMENDATIONS FOR REFORM**

- 48. The Commission considered all comments and options emerging from the consultation process and the legislative approaches adopted in other jurisdictions. In the view of the Commission, the review of the law relating to the enforcement of security over land supports the need for reform of the *Registered Land Act (2018 Revision)*.

49. The Commission believes that this may be best achieved by the introduction of new legislative provisions aimed at remedying some of the clear deficiencies in the *Registered Land Act (2018 Revision)*; thereby clarifying some of the existing provisions under the legislation and creating enhanced protections for chargors in certain areas. It is clear that the greatest concerns relate to the impact of the existing legislation on residential property owners and as such the recommendations focus on residential property.
50. Accordingly, the Commission recommends a legislative framework to address the incidence of foreclosures in the form of amendments to the *Registered Land Act (2018 Revision)*, which are contained in the *Registered Land (Amendment) Bill, 2021*. The amendments captured in the proposed legislation seek to streamline the provisions which the Commission believes impacts the charge of land and to provide for a “Pre-lending and Pre-action Protocol” which is supported by a “Questionnaire”, both of which are intended to —
- (a) ensure that a chargee and a chargor act fairly and reasonably with each other in resolving any matter concerning a charge over land; and
  - (b) encourage greater pre-action engagement between the chargee and chargor in order to seek agreement between the parties.

#### **THE PROVISIONS OF THE PROPOSED REGISTERED LAND (AMENDMENT) BILL, 2021**

51. The *Registered Land (Amendment) Bill, 2021*, (**Appendix 1**), proposes to do the following -
- (a) Introduce a definition of “*residential premises*”. This definition seeks to make it clear that the legislation only applies to residential premises and not premises which are the subject of commercial use.
  - (b) Remove focus on the Special Acknowledgement at this stage and place emphasis on the right of the proprietor to charge the proprietor’s property by an instrument in the prescribed form to secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment of a condition.
  - (c) Clarify that any money secured by a charge is payable three months after the service of a demand in writing unless a later date for repayment is specified in the charge instrument. Currently, the default date for repayment is three months after service of the demand, but the charge instrument can specify any date, including one that is less than three months after service of the demand.
  - (d) Provide that a charge presented for registration shall be accompanied by a Special Acknowledgement in the form set out in Schedule 3 and signed by the chargor; or where the chargor is a company, by the name of the persons attesting to the affixation of the common seal of the company.
  - (e) Provide that a Special Acknowledgement or an attestation or exercise of express or implied authority is valid only if the chargee has complied with the requirements specified in the Pre-lending and Pre-action Protocol; and the chargee presents reasonable evidence to confirm that the chargor acknowledges an understanding that the chargee shall have the power to appoint a

receiver of the income of the charged property or to sell the charged property where there is a default.

- (f) Expand the range of natural disasters that shall be covered by insurance of the charged land or building to include an earthquake, flood or any other catastrophic event.
- (g) Extend the lease period which would require the chargor to obtain the consent of the chargee when seeking to lease the charged land, from one year to two years. The *Registered Land Act (2018 Revision)* currently requires that only leases longer than two years must be registered. As such, this amendment seeks to bring consistency with respect to duration of the lease. Further, the Bill clarifies that the charged land or lease should not be transferred without the consent of the chargee.
- (h) Deal with the right of redemption. The right of redemption is fundamental to any mortgage relationship. At common law, the interest that the mortgagor retains upon the grant of a mortgage is the right of redemption. As such the Bill clarifies that a chargor may redeem the charged land, lease or charge on payment of all money due and owing under the charge, on fulfilment of any obligation secured by the charge, and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on the chargee before it has been sold. Any agreement or provision which purports to deprive the chargor of this right of redemption shall be void; and land, a lease or a charge shall be deemed to have been sold when an offer has been accepted on the sale of the charged land, a bid has been accepted at an auction sale or an agreement has been reached for the sale of the land leased or charged under the private treaty.
- (i) Repeal the provision relating to the chargor redeeming the charged land, lease or charge before the date of repayment specified in the charge. This provision is punitive in nature in that it requires the chargor to pay the interest that is due for the remaining period of the charge.
- (j) Reduce the notice period required of the chargor to advise of an intention to redeem the charged land, lease or charge from three months to one month. As a consequence, the interest payable is also amended from three months' interest to one month's interest.
- (k) Provide for the requirement of the chargee, in the event of default by the chargor in payment relating to charged residential property, to serve a notice on the chargor in writing to include particular items. These particulars include -
  - the date of default in payment of the principal, interest and other charges or the agreement;
  - the principal, interest and other charges due;
  - the period of time within which the default should be remedied;
  - the action to be taken if the default is not remedied;
  - the nature of the breach;
  - if the breach is capable of remedy, what action is required to remedy the breach and the date by which that action is to be taken;
  - if the breach is not capable of remedy, the sum required to be paid as compensation for the breach, and the date before which the compensation is to be paid;
  - the consequences of failure to comply with the notice; and

- whether the chargor would be permitted to remedy the breach at any time after the expiry of the notice and prior to the exercise of the power of sale.
- (l) Provide that in the case of residential premises, before exercising the power of sale the chargee shall comply with the pre-action conduct requirements specified under the Pre-lending and Pre-action Protocol as set out in Schedule 1.
- (m) Provide that the chargor, after receiving the Questionnaire on the chargor's financial circumstances, shall complete and return the Questionnaire to the chargee within seven days.
- (n) Provide that if the chargor fails to complete and return the Questionnaire within seven days, or unreasonably fails or refuses to provide information to, or otherwise cooperate with the chargee, the chargee shall be entitled to discontinue any discussions with the chargor commenced in accordance with the Pre-lending and Pre-action Protocol.
- (o) Provide that within seven days after receiving the Questionnaire from the chargor, and the chargee has complied with the pre-action conduct requirements under the Pre-lending and Pre-action Protocol, the chargee shall serve on the chargor notice in writing either advising the chargor of a proposal to either enter or not to enter into an agreement with the chargee to vary the conditions or the charge, or to provide relief from the notice served under the legislation or to enter another agreement and to provide the chargor with the proposed terms of variation of the charge or of the other agreement.
- (p) Provide that the chargor may within seven days of receiving a notice of the decision of the chargee, refer the chargee's proposed terms for agreement or the chargee's decision under the chargee's internal review mechanism, if any, for review or submit any dispute arising from or in relation to the chargee's decision for resolution under any mechanism for alternative dispute resolution prescribed in the charge instrument.
- (q) Provide that the chargee shall not take any steps to enforce any of the chargee's powers prior to five days after the chargor has been notified of the result of the review under the chargee's internal review mechanism or of the dispute resolution process. In addition, the chargee shall not take any steps prior to three months following the service of the notice served.
- (r) Provide that the chargee shall take no steps to enforce any of the chargee's rights until after the determination of any application to the court made by either the chargor or the chargee.
- (s) Impose liability on the chargor for money secured by the charge where the chargee of land occupied for residential premises has complied with the relevant requirements set out in the Pre-lending and Pre-action Protocol.
- (t) Expand the methods through which a chargee may exercise a power of sale to include sale by private treaty, and by listing and marketing on a multiple listing system.
- (u) Provide that the chargor shall be entitled to bid for the purchase of the charged land in any public auction or purchase the charged land.

- (v) Set out where a chargee is entitled to recover possession of the charged land by a bid that has been accepted at a public auction, by an agreement to sell the charged land following the listing and marketing of the charged land on a public multiple listing system or by an agreement to sell the charged land by private treaty.
- (w) Permit a chargee or chargor of land occupied for residential premises to, subject to the provisions of the legislation, apply to the court for directions on any question in relation to the exercise of the chargee's powers.
- (x) Require that notices be published in a widely circulating local newspaper for two consecutive editions or that they be displayed in a prominent place on the land affected.

### **CONCLUSION**

52. Accordingly, the Commission recommends for consideration, the *Registered Land (Amendment) Bill, 2021*.

**The Cayman Islands Law Reform Commission**  
**28<sup>th</sup> July, 2021**

**APPENDIX 1**

**THE PROPOSED REGISTERED LAND (AMENDMENT) BILL, 2021**

**APPENDIX 1A**

**BLACKLINED PRINCIPAL ACT TO REFLECT  
THE PROPOSED REGISTERED LAND (AMENDMENT) BILL, 2021**

**APPENDIX 2**

**THE DISCUSSION PAPER**

**THE ENFORCEMENT OF MORTGAGE-TYPE SECURITY OVER REAL ESTATE: IS  
REFORM OF THE LAW NECESSARY?**

## **APPENDIX 3**

### **PUBLIC AND STAKEHOLDER RESPONSES TO THE DISCUSSION PAPER**

**APPENDIX 4**

**THE CONSULTATION  
REGISTERED LAND (AMENDMENT) BILL, 2020**

**APPENDIX 5**

**PUBLIC AND STAKEHOLDER RESPONSES TO THE CONSULTATION  
REGISTERED LAND (AMENDMENT) BILL, 2020**