[2018]JMSC Civ. 13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 3328

BETWEEN	**DONOVAN FOOTE**	**CLAIMANT**
AND	**JMMB MERCHANT BANK LIMITED (Formerly CAPITAL & CREDIT MERCHANT BANK LIMITED)**	**DEFENDANT**

Mr. Donovan Foote on behalf of himself

Mr. Emile Leiba and Mr. Courtney Bailey instructed by DunnCox for the Defendant

HEARD: 30 January 2017, 31 January 2017, 31 March 2017 and 31 January 2018

EFFECT OF CONSENT JUDGMENT ON MORTGAGEE'S POWER OF SALE- MORTGAGE–EXECUTION OF POWER OF SALE -- MORTGAGEE'S DUTY TO MORTGAGOR – APPROPRIATE TEST FOR EXECUTION OF SALE – INTEREST ON MORTGAGE DEBT

CORAM: GEORGE, J

Background

[1] The Claimant Mr. Donovan Foote, Attorney-at- Law, of 103 East Street, Kingston located in the parish of Kingston has filed suit by way of a Fixed Date Claim Form dated

the 09th July 2008 against the Defendant, Capital & Credit Merchant Bank Limited(now JMMB). The Claim as filed by Mr. Foote originally included the Gleaner Company Limited as the 2nd Defendant. However, pursuant to an application by the Gleaner Company, the suit against it was struck out. Thereby resulting in Capital & Credit Merchant Bank/ JMMB being the sole Defendant.

[2] Mr. Foote, through his claim, seeks to recover inter alia damages for breach of a consent judgment issued by this court on the 16th July 2003. This alleged breach arose from the Bank's exercise of a power of sale under a mortgage agreement that existed between both parties. In exercising its power of sale, Mr. Foote's property located at 103 East Street, Kingston and from which he operates his law practice was sold by the Bank to the Gleaner Company. The said property had two storeys and it housed a restaurant and rooms on the lower floor, which were rented out. Mr. Foote's primary contention is that the consent judgment issued by the court, precluded the Bank from exercising its power of sale, and as such, their actions amounted to an interference with or a breach of the consent judgment. For ease of reference the Defendant is hereafter referred to as "JMMB'.

[3] The facts giving rise to the subject consent judgment are that, by Mortgage instrument dated May 1, 1995, Mr. Foote mortgaged the subject property to JMMB as security for a loan of Two Million Dollars ($2,000,000.00). Mr. Foote failed to honour his monthly payments within the stipulated due date, as a result, JMMB issued a demand notice dated April 25, 1995, requesting payment of the outstanding sums. This however was otiose. JMMB, thereafter, on the 16th February 1998 filed a suit against Mr. Foote in a bid to recover the sum of $3,595,002.22. This sum being principal and interest due under the mortgage, plus interest accruing at Two Thousand Nine Hundred and Thirty Three Dollars, Forty Three cents ($2,933.43) per day. Mr. Foote filed a counterclaim challenging the amount and interest claimed in the suit. However, instead of proceeding to the trial of the claim and counterclaim, on the 16th July 2003, by consent, the Honourable Mr. Justice Donald McIntosh ordered that judgment be entered for the Claimant against the Defendant in the sum of $3,526,002.6, inclusive of interest and costs.

[4] Mr, Foote failed to honour the terms of the consent judgment. As a result, by an Agreement for Sale dated the 27th August 2007, JMMB, pursuant to its power of sale under the mortgage, proceeded to sell the subject property to the Gleaner Company for $6,400,000.00. Prior to the signing of the Agreement for Sale, at some point in early 2007, it came to Mr. Foote's attention that the Gleaner Company was interested in purchasing the property from JMMB. In response, by letter dated 2nd March 2007, Mr. Foote outlined inter alia that there was an extant consent judgment that satisfied JMMB's interest in the property and that it was therefore questionable whether JMMB could properly exercise any power of sale in their favour without his knowledge or consent. Clearly, this missive by Mr. Foote did not possess the power to sufficiently dissuade the Gleaner Company Limited from purchasing the property from JMMB, as by the 15th of February 2008, the sale was completed by the registration of a transfer of the premises in the Gleaner's favour as proprietor in fee simple.

[5] Among Mr. Foote's contention was the existence of a letter dated 24th August 2005, through which JMMB referred to an "arrangement" whereby Mr. Foote had agreed to pay a minimum of $20,000.00 monthly towards the settlement of his debt. It was highlighted that the payments as agreed were not being made as such he was given until the 31st August 2005 to clear a shortfall of $75,000.00, failing which its attorneys would be instructed to resume legal actions through the Courts. Mr. Foote paid $100,000.00 within the time stipulated and as such he was under the belief that JMMB would not execute its power of sale without further notice to him.

[6] The events as outlined above provided the catalyst that resulted in Mr. Foote's Fixed Date Claim Form filed the 9th July 2008 seeking the following remedies against JMMB and the Gleaner Company:

i) Damages for Breach of Contract/Consent Judgment and/or Inducement of Breach of contract and/or improper wrongful exercise of power of sale.

ii) That the aforementioned sale between the 1st and 2nd Defendant be set aside.

iii) An injunction restraining the 2nd Defendant from transferring by sale or otherwise the said property to anyone other than the Claimant herein.

iv) An injunction to restrain the 2nd Defendant by itself, its servant and/or agent or otherwise from recovering possession of the said property from the claimant without an order of this Honourable Court.

v) Exemplary and/or Aggravated Damages

vi) Cost and Attorney Cost.

[7] Subsequent to the filing of a Defence by JMMB and the Gleaner Company, Mr. Foote was served with a notice to quit by the Gleaner Company, whom thereafter proceeded to file an action for recovery of possession against him in the Resident Magistrate Court for the Corporate Area. Mr. Foote made an application that the recovery of possession matter be transferred to the Supreme Court so that it could be joined with the matter at bar. Her Honour, Miss Judith Pusey acceded to this request. However, The Gleaner Company appealed that decision. The Gleaner Company then filed an application on the 9th of March 2010, to strike out Mr. Foote's Statement of case filed the 9th of July 2008.This application was made on two bases. Namely that, Mr. Foote's claim has failed to disclose reasonable grounds for bringing the claim against the Gleaner Company and that the claim is an abuse of the process of the court.

[8] Mr. Foote's statement of claim against the Gleaner Company was struck out by His Honour, Mr. Justice Anderson on the 27th October 2010. Mr. Foote thereafter filed an application for permission to appeal against the judgment of Anderson J. However, this application was refused by the Court of Appeal in a judgment delivered on the 24th of November 2011, with written reasons handed down on 29th June 2012.

[9] In my view, the judgment as issued by the Court of appeal has negatived several of the remedies sought by Mr. Foote. The specific remedies are those concerning the agreement for sale between JMMB and the Gleaner Company, and the injunctions against JMMB and the Gleaner Company. The Learned Judges of Appeal, have already

deliberated on the issues surrounding these remedies in their written reasons and have made pronouncements. These remedies would therefore no longer be live issues before this court. Accordingly, the remedies that now stand to be determined are those relating to the claims against JMMB for damages for breach of contract/consent judgment, exemplary and or aggravated damages, as well as those for costs.

Issues

[10] It therefore follows, that the issues to be determined by this court are:

1. Whether JMMB had authority to execute its power of sale?

2. Whether or not the appropriate test in the execution of a power of sale by a mortgagee is “the true market value of the property” or that “all reasonable steps have been taken to secure the best price for the property”?

3. Whether or not the appropriate test has been utilized by JMMB in the exercise of its power of sale?

4. Whether or not Mr. Foote remains indebted to the Bank after the proceeds of the sale of the property are applied to the mortgage debt?

5. Whether or not JMMB is liable to Mr. Foote on his claim for damages for breach of contract/breach of consent judgment and whether or not Mr. Foote is entitled to an award of aggravated/exemplary damages?

The Claimant’s Submissions

[11] Mr. Foote, appearing on behalf of himself contended that the Consent agreement between both parties amounted to an agreement that his property would not be sold by JMMB, and that any further course of action to be taken, would be by way of an order of the court. He further surmised that in these circumstances, the power of sale under the mortgage could not arise, and therefore was not exercisable under section 106 of the Registration of Titles Act.

[12] The gravamen of his submissions is that JMMB had failed to provide him with the requisite statutory notice of their impending sale. He outlined that he was informed by letter dated the 24th August 2005 of JMMB's intention to resume legal action in the court to recover the debt owed. However, in his estimation they did the opposite; that is, JMMB proceeded to sell his property by way of private treaty to the Gleaner Company Limited, whom, according to him, had knowledge of the impropriety of the sale. He further outlined that both parties have continuously acted oppressively, unreasonably and unlawfully towards him. This he states is evidenced by the Gleaner Company's actions of Saturday the 17th July 2010, whereby, they "*maliciously broke off the locks to the property, replaced them with locks of their own and placed security guards there*"; thus, preventing him from entering his law office. He further highlighted the two factors he believes to be most egregious about these particular circumstances. The first being that the Gleaner Company saw it fitting to take the law into its hands; that is, they attempted to recover possession of the property, even though Her Honour Ms. Judith Pusey had refused to grant the Gleaner Company's request for recovery in the Resident Magistrate's Court, on the premise that the filing of the Plaint seemed vexatious. The second factor is that such a course of action could be taken, especially since the result of the appeal of the Order of Her Honour Judith Pusey was still outstanding at the time.

[13] Given the particular circumstances, the hallmark features of Mr Foote's contention is the absence of a new statutory notice before sale; the existence of a consent judgment and the new payment 'arrangements' between the parties. Although he had been served such a notice in 1999, he was of the view that this would have become stale and overtaken by subsequent events. It was Mr. Foote's belief that the most suitable course of action to be taken is that the sale agreement between JMMB and the Gleaner Company should be vitiated as the mandatory statutory notice was not again served prior to the sale and/or in the alternative. He opined that the power of sale did not arise as the consent judgment was now the instrument governing the relationship between them as debtor and creditor, as such, he was of the view that JMMB should have followed the civil procedure rules in relation to the enforcement of

judgments. It is his view that in any event, there was a new payment arrangement which he had fulfilled.

The Defendant's Submissions

[14] Counsel appearing for the Defendant has essentially sought to negate Mr. Foote's contention that he was due a statutory notice, or that the power of sale did not arise and that the consent judgment vitiated their power of sale under the mortgage. Counsel submitted that JMMB's power of sale under the mortgage was properly exercised. The evidence discloses JMMB's letter dated August 24, 2005 which indicates that if Mr. Foote failed to clear the arrears by the 31st August 2005, their Attorneys would be instructed to resume legal actions through the courts. Although JMMB proceeded to sell the property instead of petitioning the court for an enforcement order, in support of the course of action taken by JMMB, Counsel made special reference to the matter of **Donovan Foote v Capital & Credit Merchant Bank Limited and The Gleaner Company** [2012] JMCA App 14.

[15] This judgment examined whether or not the Claim against the Gleaner Company was to be struck out. At that time, the esteemed Judges of Appeal concluded that the legal position was that "…*so long as the mortgage debt, or any part of it remains unpaid, the mortgagee's power of sale remains unaffected by any previous attempt to collect the mortgage debt by other means, such as an action"*. Counsel further referred the court to paragraph 51 of the judgment where it was highlighted that "*The authorities clearly show that any such pre-existing judgment [i.e. The Consent Judgment] could not be effective to deprive the 1st respondent [the Bank] of its rights under the mortgage, so long as any part of the mortgage debt remained unpaid, which there is no question that it did in this case*". Counsel further outlined that this position was also sanctioned in the case of **Lloyd v Mason** where it was stated that *"a mortgagee whether legal or equitable, does not waive his security by bringing an action against his debtor*".

[16] This point of law was also used by Counsel to answer the question of whether or not JMMB is liable to Mr. Foote on his claim for damages for breach of contract/breach

of consent judgment. Counsel reiterated the general principal in these terms; "*the entry of the consent judgment would not have precluded the Bank from pursuing its remedy of a power of sale as the law permits a mortgagee to pursue its remedies concurrently or consecutively and Mr. Foote had failed to honour the terms of the Consent Judgment thereby leaving the mortgage debt outstanding"*. Special reference was made to an alleged agreement that Mr. Foote opined was entered into by both parties. The terms being that Mr. Foote would pay $20,000.00 each month towards the consent judgment and that the bank would not proceed with any further litigation. In response to this, counsel outlined that JMMB disputes the suggestion that any such contract was entered into with Mr. Foote. They outlined that, at the highest, JMMB had an understanding with Mr. Foote that as $20,000.00per month was too small an amount to service the $3,500,000.00 consent judgment debt, Mr. Foote would be required to pay significantly more each month, but in any event, payments of no less than $20,000.00 was to be made every month. Counsel outlined that Mr. Foote failed to honour the minimum monthly payment that JMMB had indicated it would accept as payment towards the consent judgment. Counsel was also swift to mention that JMMB maintains that it did not at any time enter into any agreement with Mr. Foote to refrain from exercising its power of sale under the mortgage, and further, that no understanding between itself and Mr. Foote as to the minimum monthly payment it would accept towards the consent judgment could prevent it from exercising its power of sale under the mortgage. Thus, it is their view that Mr. Foote's claim for breach of contract is therefore misconceived and without any basis in fact or law.

[17] Counsel contended that JMMB, as the mortgagee, in exercising its power of sale was simply to act in good faith and to take reasonable precautions to obtain the proper price of the property at the time of the sale. This duty they said was properly discharged, as the price for which the property was sold, did in fact represent its market value and the proper price at the time of the sale. In their estimation, JMMB's actions of advertising the sale of the property by public auction, listing the property for sale by private treaty with real estate brokers and obtaining valuation/on reports from competent valuators are the strongest evidence of JMMB's efforts to obtain the best price.

[18] It was further submitted on JMMB's behalf that after the application of the proceeds of sale to the mortgage debt, Mr. Foote nonetheless remains indebted to the bank. This amount they stated was $2,467,378.71, this sum being interest on the mortgage debt. They asserted that even if this court was to find that after the entry of the consent judgment JMMB was limited to recover the balance under the consent judgment, Mr. Foote in any event would remain indebted to them. They premised this on clause 2(j) of the Mortgage Deed which read as follows: -

> *If any rate of interest payable hereunder is higher than the rate payable by Law on a judgment debt the taking of any judgment on any of the covenants herein contained shall not operate as a merger of the said covenant in such judgment or affect the mortgagee's right to interest at such higher rate as well after as before judgment.*

[19] This clause was interpreted by counsel to mean that the interest rate to be used in calculating interest on the consent judgment was not the statutory rate of interest on judgment debts, but rather, the rate of interest under the mortgage.

Analysis

Whether JMMB had authority to execute its power of sale?

[20] The series of events that have beset Mr. Foote are most unfortunate. However, the dictates of the law by which I am guided are clear. The judgment as handed down by the Court of Appeal, concerning the Gleaner Company's interlocutory application to strike out Mr. Foote's claim against it, has nullified most of Mr. Foote's submissions and by extension the reliefs sought by him. Essentially, the Court of Appeal's reasoning has sanctioned JMMB's inherent right to sell the subject property. Therefore, all issues concerning the validity of JMMB's power of sale and whether it had been vitiated by the consent judgment of 16th July 2003 has already been considered and addressed by the decision and reasoning of the Court of Appeal. However, I have made note of the fact that Mr. Foot is deeply concerned that the Court of Appeal, in its judgment, gave no consideration to the fact that JMMB had failed to give him a fresh notice. This he argued ought to have been given to trigger JMMB's power of sale. Mr. Foote's evidence in this regard was that upon falling short with his payments on the consent judgment, he met

with representatives from JMMB on the 8th March 2004 and entered into a subsequent agreement, whereby it was agreed that he would pay the sum of $20,000.00 per month commencing March 2004 towards the settlement of his debt. He outlined that he again fell short on this payment and by letter dated the 24th August 2005, he was advised by the bank that in the event he failed to clear the shortfall by 31st August 2005, its Attorneys would be instructed to resume legal actions through the courts. As a result, he outlined that a total of $100,000.00 was paid to JMMB. This amount he said was $25,000.00 more than the amount of $75,000.00 which was demanded by JMMB. It is his evidence that in breach of this arrangement JMMB sought to collect the judgment debt by selling the property without a Court Order or without giving him fresh notice.

[21] In an attempt to persuade this court that clause 2(h) of the Mortgage Agreement vitiated the need for a fresh notice Counsel for JMMB highlighted Clause 2(h) of the Mortgage Agreement which reads –

> *The statutory powers of sale and of appointing a receiver and all powers conferred on mortgagees by the Registration of Titles Act may be exercised by the mortgagee not only on the happening of the events mentioned in the said Act but also upon any default after any demand for payment of the moneys hereby secured or any part thereof or immediately upon any other default in or non-compliance with any of the covenants condition or obligations on the part of the Mortgagor herein contained or hereunder implied without it being necessary in any one or more of such cases to serve any notice or demand on the Mortgagor anything in the Registration of Titles Act or any other Act or Law to the contrary notwithstanding BUT upon any sale made under the statutory power in that behalf the purchaser shall not be bound or concerned to see or enquire whether such sale is consistent with this proviso…*

Counsel further directed me to the matterof **Diane Jobson v Capital & Credit Merchant Bank Ltd & Ors**. [2007] UKPC 8. In this matter, the Privy Council dismissed the claimant's appeal against the respondent bank in circumstances where the bank had sold the claimant's property following her default on mortgage payments without notice to her pursuant to a clause in the mortgage permitting it to do. The facts are that in 1980, the appellant Diane Jobson bought a small fruit farm. She borrowed $50, 000.00 from Capital & Credit Merchant Bank Ltd to repair hurricane damage. As security she executed an Instrument of Mortgage. Clause 10 provided that -

> *"That the Powers of Sale and of distress and of appointing a Receiver and all ancillary powers conferred on Mortgagees by the Registration of Titles Act shall be conferred upon and be exercisable by the Mortgagee under this instrument without any Notice or demand to or consent by the Mortgagor NOT ONLY on the happening of the events mentioned in the said Laws BUT ALSO whenever the whole or any part of the Principal Sum or the whole or any part of any monthly instalment of interest shall remain unpaid for THIRTY DAYS after the dates hereinbefore covenanted for payment thereof respectively or whenever there shall be any breach or non-observance or non-performance of any covenant or condition herein contained or implied…"*

In October of 1989 Ms. Jobson paid the first monthly instalment and paid nothing more thereafter. A standard letter was sent to her from the bank notifying her that she was in arrears with her payments. It further stated that unless she paid within 10 days, the bank would exercise the power of sale. The property was thereafter sold pursuant to a contract made at an auction. The purchasers commenced recovery proceedings against her and she in turn issued a third party notice against the bank, claiming that it had not been entitled to exercise the power of sale. The question to be answered by the Privy Council was whether, despite the provisions of clause 10 of the mortgage, it was necessary for the bank to have given Ms. Jobson notice that she was in default.

[22] In answering the question reference was made to Sections 105 and 106 of the Registration of Titles Act, which reads as follows-

> *"105. A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum [or] interest…secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge, or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee…may give to the mortgagor…notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book.*
>
> *106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice,*

> *or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee…may sell the land mortgaged or charged…and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."*

[23] The bank failed to comply with the notice provisions enunciated in sections 105 and 106. However, according to the Privy Council, the terms of clause 10 of the mortgage were clearly intended to modify the provisions of sections 105 and 106 by dispensing with the need for notice and by providing that simple non-payment for 30 days or any breach of covenant was to be an event of default which made the power exercisable. In their view, the issue to be determined was whether it was open to the parties to modify the statutory requirements in this way. In support of its contentions, the bank relied upon section 128 of the Registration of Titles Act, which the Privy Council highlighted appeared to have escaped the attention of the courts below. The section reads -

> *"Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument…"*

[24] For this reason, the Privy Council was duly satisfied that, read as a whole, clause 10 gave ample notice that it was a modification of the statutory power and that the power of sale was therefore validly exercised. The question therefore is whether JMMB was entitled to proceed without further notice or whether by virtue of section 128 of the Registration of Title Act they were permitted to opt out of the notice provision of sections 105 and 106 of said Act.

[25] It is to be noted that, Mr. Foote subsequent to the meeting held on the 8th March 2004 with representatives from JMMB, had made positive attempts to honour the

"arrangement" to pay the minimum of $20,000.00 each month to clear his arrears. This is evidenced by the schedule of payment presented to this court which showed an attempt by him to clear his arrears. His payment of $20,000.00 may not have been done each consecutive month as expected, but, when his payments were made he did make total payments in excess of $20,000.00, per month. This is evidenced by JMMB's letter dated the 24th August 2005 where the bank outlined that he was only $75,000.00 short of the minimum amount that should have been paid to that point. He was given until the 31st August 2005, to clear this amount, which as outlined in his evidence he paid $100,000.00, being $25,000.00 more than he was instructed to pay. These payments were made after he had highlighted to JMMB, his financial constraints, the fluctuation of his salary and the commitments he had to his family.

[26] The evidence put forth by Mr. Depass is that there was no agreement with Mr. Foote for him to pay $20,000.00 each month. This he said was really a proposal by Mr. Foote to pay $20,000.00 per month, which JMMB did not agree to, but rather encouraged him to pay as much as he could. Upon a perusal of the minutes of the meeting of the 8th March2004, I will agree that it was not conclusively said by JMMB that Mr. Foote was at liberty to pay $20,000.00, upon listening to Mr. Foote and his circumstances, JMMB merely extended some compassion. However, whilst doing this it was made clear that his proposal and his circumstances would be discussed at the next credit committee meeting and that in the interim he should continue to make any payments that he could, the minimum being $20,000.00, in light of his record.

[27] Inherent in the wording of Clause 2(h) is that a power of sale will be exercised against a mortgagor if subsequent to a demand for monies owing or part thereof, the mortgagor negates the payment and remains in default. It follows then, that if the mortgagor pays the sum demanded or part of it then the mortgagee's power of sale will not be exercised against him. In the instant matter, Mr. Foote did continue in default of the mortgage. The minimum sum that the bank agreed that he could pay whilst awaiting a decision to be taken by it, in relation to his circumstances, was $20,000.00. this did not absolve Mr. Foote from his default, it being clear that Mr. Foote was still in default, it was therefore, technically open for the bank to exercise its power of sale without notice.

In light of this, JMMB was entitled to exercise its power of sale against Mr. Foote's property and it had no obligation to give Mr. Foote a fresh notice. Mr. Foote's concern about the existence of the consent judgment is also without merit and is met by the Court of Appeal's judgment in this said matter. The Court of Appeal in its expression of the law in this regard, has stated that so long as a mortgage debt, or any part of it, remains unpaid, the mortgagee's power of sale remains unaffected by any previous attempt to collect the mortgage debt.

[28] The Court of Appeal ruling in this matter suggests that the statutory notice given in 1999, coupled with the 24th August 2005 letter of demand, rendered the sale agreement negotiated between the Gleaner company and JMMB in 2007 valid. This is so, despite the fact that up until the execution of the sale, Mr. Foote was still endeavouring to make payments towards his arrears. The consent judgment nor the letter of demand, did not act as a stay of proceedings; neither did they vitiate JMMB's power of sale. Therefore, upon Mr. Foote's breach of the consent judgment and upon him satisfying the payments requested in the letter of 24th August 2005, the process did not start over, it was a continuing state of affairs, as such, a, fresh notice was not required. In fact, pursuant to clause 2(h) no notice was required at all.

[29] The case of **Marcella Vassell v Victoria Mutual Building Society** Suit No. V01 of 2000 delivered 14th April 2000, which was presented by Mr. Foote, in support of his contention that he was entitled to a fresh notice does not assist this court. That matter concerned whether or not an injunction was to be granted to restrain the bank from continuing to exercise its power of sale. The real issue in the substantive claim was whether the bank had given a demand notice and had further to this, exercised its power of sale earlier than the 30 days following the said notice and so was acting contrary to the provisions of sections 105 and 106 of the Registration of Titles Act. It was the Claimant's position that a letter sent by the Defendant bank requiring payment of a sum of money by a particular date was a demand notice. Nevertheless, the bank proceeded to sell the property at a time when it was alleged that the power of sale had not arisen. This case, advanced by Mr. Foote, was an interlocutory proceeding for which his Lordship Harrison J had granted the injunction because he agreed that the matter

was one in which serious questions could arise for a trial judge to determine the operative date for the mortgagee exercising its power of sale under the mortgage contract. On the question of equitable estoppel although the point was raised, there was no determination of it, one way or another. I have not been able to find any final judgment of the court in the matter.

[30] Despite the assertions by Mr. Depass, my view remains the same, that is, although Mr. Foote had highlighted his financial difficulties in the meeting of the 8th March 2004, he did make a positive attempt to clear his arrears and he did yield to request of the letter of 24th August 2005, to pay the sum of $75,000.00 by the 31st August 2005.It is unfortunate, but understandable, that in doing this, along with the existence of the consent judgment, he would have been led to have a legitimate expectation that his situation was being considered and that JMMB had suspended the exercise of its power of sale until he was otherwise advised. It seems inequitable to allow JMMB, or for JMMB to have proceeded without giving him further notice, which might have prompted further and more urgent action to alleviate or resolve the issue. However, the authorities indicate that JMMB can do as it has done. In fact, this is a position supported by Clause 2(h) of the Mortgage instrument evidencing the terms of the contract between the parties.

[31] As the validity of JMMB's exercise of its power of sale is without question, I turn now to an assessment of whether the sale was executed in accordance with the dictates of the law, and whether, in arriving at a sale price, JMMB had applied the appropriate test. However, the appropriate test must first be determined. Thus, I now turn to an assessment of the second issue -

Whether or not the appropriate test in the execution of a power of sale by a mortgagee, is "the true market value of the property" or that "all reasonably steps have been taken to secure the best price for the property"?

[32] In assessing this question, the appropriate starting point is a discussion of the mortgagee's duty of care towards the mortgagor. It is settled law that the mortgagee

must act in the utmost good faith in the execution of his power of sale. However, there has been disparity in whether the mortgagee is under an obligation to obtain the "true market value of the property, or whether proof that he has taken all reasonable care to obtain a proper price will be sufficient to render the sale properly executed. The authorities as provided by counsel representing JMMB have been most helpful. Paragraph 659 of Halsbury Laws of England, 4th ed. reissue which explains the duty of a mortgagee, reads as follows –

> *"Duty of mortgagee on exercise of power of sale: A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent. He can decide if and when to sell on the basis of his own interests. He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. This duty is owed to the mortgagor, subsequent mortgagees and a surety but not to others such as beneficiaries under a trust of the mortgaged property. The duty cannot be replaced or supplemented by liability in negligence. It canhowever, be excluded by agreement.*
>
> *If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so lowas to be in itself evidence of fraud, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale or if it would be inequitable as between the mortgagor and the purchaser for the sale to be set aside. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it".*

[33] In **Cuckmere Brick Company Limited and Another v Mutual Finance Limited** [1971] Ch 949, a mortgagee in advertising the subject property for sale failed to highlight that planning permission had been granted for the erection of apartments on the mortgaged land, as such, the sale price was much lower than it ought to have been. For this reason, the mortgagee was held liable for the difference between the purchase price obtained and the proper market value of the property.Cross LJ at page 646 stated the applicable legal position as follows –

> *A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power of the mortgagor for it was given to him for*

> *his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power. Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at.*

[34] Salmon LJ had this to say at page 643 –

> *It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it…*
>
> *The proposition that the mortgagee owes both duties, in my judgment represents the true view of the law…*
>
> *I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.*

[35] On observation, it appears that the genesis of the disparity in the applicable test to be applied lies within the reasoning as put forward by Lord Cross who was of the view that the test to be applied is that the sale was a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at, whilst within Lord Salmon's purview, the sale had to be one where reasonable precautions were taken to obtain the true market value of the mortgaged property.

[36] Of further note, is the Privy Council decision of **Tse Kwong Lam V Wong Chit Sen and Others**[1983] 2 All ER 54. In **Tse Kwong Lam** the applicable test mirrored the sentiments as applied by Lord Cross in Cuckmere Brick Company. Here, the test was enunciated in the following terms: whether the mortgagee has acted in good faith and

taken reasonably precautions to obtain the best price reasonably obtainable. The facts of **Tse Kwong Lam**are,are that in 1963 the appellant arranged for the construction of a 15 storey building on land leased by him in Hong Kong. The construction was partly financed by borrowing Hong Kong 1.4 million dollars on the security of a mortgage over the remainder of the building under a legal charge which contained the usual power of sale. The mortgagor failed to pay the sums due and the mortgagee thereafter required payment of all principal and interest due under the mortgage and gave notice of his intention to exercise his power of sale if payment was not made. The mortgagor failed to fulfil his obligations and subsequent to advertisements being placed in three newspapers on three separate days giving notice of the auction and a minimum description of the property, at a board meeting of a company which was financed entirely by the mortgagee and the directors of which were the mortgagee, his wife and his son, it was resolved that the mortgagee's wife should bid up to $1.2 million for the property at the auction on behalf of the company. At the auction the only bid came from the mortgagee's wife who bid the reserve price of $1.2 million and the property was knocked down to her. The appellant disputed the sum claimed and also counterclaimed to set aside the claim to the company on the ground that the sale to the company had been improper and at an undervalue. The mortgagee's claim was referred to an arbitrator, who found that the amount owed by the appellant was some $239,000.00. Judgment was given for that amount in favour of the mortgagee but execution was suspended pending determination of the appellant's counterclaim. The judge finding that the price paid by the company was not a proper price, refused to set aside the sale to the company because of the lapse of time and instead awarded the appellant damages. On appeal by the mortgagee and cross appeal by the appellant, the Hong Kong Court of Appeal set aside the judgment. The appellant appealed to the Privy Council.

[37] In handing down judgment, intrinsic in Lord Templeman's words were the facts that –

> *(1) There was no inflexible rule that a mortgagee exercising his power of sale under a mortgage could not sell to a company in which he had an*

> *interest. However, the mortgagee and the company had to show that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the method of sale, the steps which ought reasonably to be taken to make the sale a success and the amount of the reserve. The mortgagee was not bound to postpone the sale in the hope of obtaining better price or to adopt a piecemeal method of a sale which could only be carried out over a substantial period or at some risk of loss, but sale by auction did not necessarily prove the validity of a transaction, since the price obtainable at an auction which produced only one bid might be less than the true market value*
>
> *(2) Applying those principles, the company was not barred by law from purchasingthe mortgaged property, but, in view of the close relationship between the company and the mortgagee and in particular the conflict of duty and interestto which the mortgagee was subject, the sale to the company could not be supportedunless the mortgagee proved that he had taken all reasonable steps to obtain the best price reasonably obtainable. On the evidence, the mortgagee had failed to establish that. However, because the appellant had been guilty of inexcusable delay in prosecuting his counterclaim, he was not entitled to have the sale set aside but only to the alternate remedy of damages. It followed therefore to that extent the appellant's appeal would be allowed.*

[38] In **Moses Dreckett v Rapid Vulcanizing Company Limited** (1988) 25 JLR 130, in seeking to clarify Lord Templeman's pronouncements, Campbell J.A. in delivering judgment appears to have adopted Salmon L.J. views in Cuckmere Brick Company that the appropriate test was that of the true market value. At page 143, he stated the following -

> *It is clear that though Lord Templeman stated that an auction does not necessarily prove the validity of a transaction, he is not to be understood as saying that an auction at which there are competitive bids by persons who have no foreknowledge of information improperly given by mortgagee which could reduce the level of the bids, will not be accepted as valid and will not provide cogent evidence that the mortgagee has taken reasonable steps to obtain the true market value of the property by, and through, the medium of the auction itself. In this regard the view of Salmon L.J. in Cuckmere Brick Co., (supra) at p.643 is most apposite. He said:*
>
> > *"Nor in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding is exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes."*

> *Thus Salmon L.J. was saying that consistent with the principle which he later enunciated at p.646 which has been stated earlier in this judgment, an auction which has not been manipulated by the mortgagee to obtain the true market value of the mortgaged property on the date on which he decides to sell. The view expressed by Salmon L.J., (supra) negatives any obligation on the mortgagee to fix or have fixed, any reserve price (in circumstances where he does not bid at the auction), because he has the right to accept the highest bid even if it was below what was ascertained true market value. Equally, the mortgagee is not obliged to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price when the sale is by auction. He can properly rely on the independent competitive biddings at the auction to obtain the true market value, and even if this not obtained through poor attendance at the auction and or exceptionally low bids, he is not on that account per se liable to his mortgagor for breach of any duty to take reasonable precaution to obtain the true market value. To the contrary, the mortgagee could say that he had taken reasonable steps to protect the mortgagor b having an auction which has been conducted without any impropriety.*

[39] At this point, I must add that I have made note of the fact that the line of cases highlighted concerns the execution of a power of sale by way of an auction, whilst the case at bar is one where the sale was conducted by way of private treaty. In my view, these cases are nonetheless applicable when assessing the pre-conditions to be satisfied when executing a power of sale, whether by auction or by private treaty. In the final analysis grave emphasis will always be placed on the steps that were taken to assist the mortgagee in arriving at the price at which a property was sold, and the steps taken will be the determinative factor of whether or not the power of sale was properly executed.

[40] Alas, in a final attempt to settle the disparity, in **Cornwall Agencies Limited v The Bank of Nova Scotia Jamaica Limited and Amalgamated (Distributors) Limited** [2016] JMCA Civ 49, the Court of Appeal in reviewing Cuckmere, Moses Dreckett and International Trust and Merchant Bank Ltd v Gardiner SCCA No. 111/2000, delivered on 30 March 2004 held that the proper test to be derived from Cuckmere and applied in respect of the mortgagee's duty in exercising its power of sale, was not to obtain "the true market value", but to "take reasonable care to obtain a proper price".

[41] In **Cornwall Agencies Limited**, the Bank of Nova Scotia was sued by Cornwall Agencies, a wholesale distributor. Its Claim was for conspiracy, negligence, fraud and "loss and damage" arising from the bank's exercise of "purported powers of sale contained in a mortgage agreement" which it was contended, that the bank sold the property at undervalue. The Claim that the bank sold at an undervalue arose from the fact that there were clear differences in several valuations that were conducted. An auction was eventually done. However, the bids presented were below the expectation of the auctioneer. The auction was closed as a result. Sometime thereafter, the property was valued once again at the request of the bank and it was outlined that the property valued $40,000,000.00 to $45,000,000.00 with a forced sale value of $31,500,000.00. The property was sold for $26,000,000.00. In making her determination of whether the sale price was reasonable, the trial judge examined the valuations and the circumstances in relation to each and in considering whether the appropriate valuation was "that of a fair market value or a forced sale value in view of the fact that the valuation reports bear different values for each category". The trial judge's view was that the manner in which the transaction was completed suggested that the fair market value was the correct valuation to be used rather than the 'forced sale' value. On appeal, the Court of Appeal, reversed the trial judge's decision.

[42] At paragraph 52, Panton P., referring to the Cuckmere case stated the following-

> *Cross LJ regarded as clear the power of the mortgagee to "sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase priceis only sufficient to discharge the mortgage debt and the interest owing on it". In the opinion of Cross LJ, though, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at" [p 969 G0H].*

[43] At paragraph 53, he further outlined that Cairns LJ, after reviewing several 19th century case, stated as follows –

> *I therefore consider that **Tomlin v Luce** (1889) 43 Ch. D. 191 is the stronger authority and I would hold that the present defendants had a duty to take reasonable care to obtain a proper price for the land in the interest of the mortgagors." (page 978 A).*

[44] Paragraph 54 is of equal importance. The learned Judge of Appeal outlined that -

> *On the basis of the expressions of the learned judges of appeal there is little wonder that the headnote of the Law Reports version of the judgments does not give pride of place to the "true market value" statement contained in the judgment of Salmon L.J. Instead, it highlights the mortgagee's duty "to take reasonable care to obtain a proper price". This reflects the position taken by Cross and Cairns LJJ. I am of the view that the All England Reports version of what was said does not fully capture the difference in approach of the majority (Cross and Cairns LJJ). My view is not of a recent origin. An examination of the judgment of this court in International Trust and Merchant Bank Ltd v Gardiner (above) confirms this. Bingham JA delivered the judgment of the court, in which I concurred. Pages 18 to 20 state the true legal position as reflected in the views I have earlier expressed.*

[45] Panton P., in his final conclusion recounted all steps taken by the bank in exercising its power of sale. These are as follows: A public auction was done, the result of which was disastrous. The property was then listed with dealers and after a year's wait, the property was sold to Amalgamated Distributors, (the tenant of Cornwall Agencies). He further outlined that there was no evidence of any other entity or individual that showed an interest in purchasing the property at a higher rate. Implicit in these words as uttered by Panton P., is the fact that there will be circumstances where a mortgagee, despite all his efforts, will be unable to secure the true market value of a property; as such his only recourse will then be to sell the property for the best price it could have reasonably obtained. This in itself is the true test.

[46] It therefore follows that the third issue to be discussed is -

Whether or not the appropriate test has been utilized by JMMB in its exercise of its power of sale?

[47] In concluding that the appropriate test is that the mortgagee has taken all reasonable steps to secure the best price that can reasonably be obtained. This second issue now translates to, whether or not JMMB has taken all reasonable steps to secure the best price for Mr. Foote's property?

[48] In **Tse Kwong Lam** mentioned above, Lord Templeman at page 63 a-b in outlining the steps to be taken by a mortgagee who wishes to secure a mortgaged property for a company in which he is interested ought to show that -

> *[h]e protected the interests of the buyer by taking expert advice as to the method of sale, as to the steps which ought reasonably be taken to make the sale a success and as to the amount of the reserve. There was no difficulty in obtaining such advice orally and in writing and no good reason why a mortgagee, concerned to act fairly towards his borrower, should fail or neglect to obtain or act on such advice in all respects as if the mortgagee were desirous of realising the best price reasonably obtainable at the date of the sale for property belonging to the mortgagee himself.*

[49] Although Lord Templeman's dicta was addressed to a mortgagee who wished to secure the mortgaged property for a company in which he was interested, these steps are universally applicable to all mortgagee and mortgagor relationships. In fact, Panton P., at paragraph 55 of**Cornwall Agencies,** in sanctioning the mortgagee's actions of conducting an auction, listing the property with dealers and then only resorting to selling the property after approximately one year of waiting, as sufficient evidence that no other entity or individual showed an interest in purchasing the property at a higher rate, underpins the position that these actions by a mortgagee are evidence that the mortgagee has done all he can to secure the best price that can reasonably be obtained.

[50] As it concerns the case at bar, the evidence of Mr. Peter Depass, the Attorney-at-Law who acted on JMMB's behalf in relation to the recovery of the loan amount, as well as the evidence of Mr. Richard Dyche and Mr. Vincent Auld, two bankers employed atJMMB are quite useful. Mr. Peter Depass outlined to this court that upon receiving the statutory notice on the 9th of February 1999, Mr. Foote made no efforts to settle his indebtedness under the mortgage and as such, the loan remained in default. Thus, JMMB proceeded in its efforts to sell the property, advertising it for sale by way of public auction. He outlined that by letter dated March 9, 1999, he wrote to D.C. Tavares &Finson Co. Ltd ("DCTF"), requesting that they advertise the property for sale at public auction on April 15,1999, by placing three (3) advertisements in the Daily Gleaner

Newspaper. It was highlighted that enclosed was also a copy of the Conditions and Particulars of Sale. Mr. Depass recounted that by letter dated March 31, 1999, DCTF wrote to him and confirmed that in keeping with his instructions, they had arranged for the property to be advertised for sale by public auction on April 7, 14 and 15 1999. Mr. Depass, on the same day, March 31, 1999 wrote to Mr. Foote and advised him that due to his default under the Mortgage the Bank had advertised the Property for sale at public auction and that the sale was to take place at the showroom of D.C. Tavares & Finson Company Limited on April 15, 1999. To this letter he said was enclosed a copy of the Conditions and Particulars of Sale. Mr. Depass, also outlined that on April 1, 1999, he wrote to JMMB and enquired as to what the reserve price should be at the public auction. By letter dated April 9,1999, the bank replied to indicate that the reserve price in respect of the auction should be $5,100,000.00 which was the reserved price indicated in a 1998 valuation done by C.D. Alexander.

[51] Through Mr. Depass, it was learnt that, despite JMMB's efforts to sell the property by advertising and public auction, it was unable to secure a purchaser for the property, as there were no bidders for the property. This he said was communicated to JMMB, who by letter dated May 13, 1999, instructed him to refer the property for sale by private treaty and to proceed with the litigation to recover the amount outstanding under the loan. Mr. Depass further outlined that given Mr. Foote's failure to satisfy the consent judgment (the details of which were mentioned above), the Bank attempted yet again to sell the property by public auction in 2006. He recounted that by letter dated July 27, 2006, he wrote to DCTF and again enclosed the Conditions and Particulars of Sale and requested that they advertise the property for sale at public auction on August 17, 2006 by placing three advertisements in the Daily Gleaner newspaper. By letter dated August 18, 2006 he was advised by DCTF that the auction would be rescheduled to September 14, 2006, with advertisements to be placed on August 21 and 30 and September 6 and 14, 2006.

[52] It is Mr. Depass' evidence that JMMB's effort to sell by public auction in 2006 was like the first attempt, unsuccessful. This he said was duly communicated to JMMB, who in turn commissioned C.D. Alexander to prepare a second valuation report in

respect of the property to assist with JMMB's efforts to sell the property in 2006. He outlined that C.D. Alexander submitted a valuation report dated July 17, 2006, wherein, the market value of the property was appraised as being $8.5 million and the reserve price as being 6.4 million. He further went on to highlight that by letter dated September 29, 2006, the Gleaner Company offered to purchase the property from JMMB for $6,000,000.00. Through negotiations, it was ultimately agreed that the property would be sold for $6.4 million, following which the transfer to the Gleaner Company was duly executed on the 17 October 2007.

[53] At this juncture, I will refrain from setting out in full details the evidence of Mr. Dyche and Mr. Auld as collectively they have corroborated the evidence as put forth by Mr. Depass.

[54] Explicit in Mr. Dyche's evidence is that the steps taken by JMMB in the execution of its power of sale of the subject property are that the property was advertised for sale by public auction in 1999 and again in 2006. On each occasion, three advertisements were published in the Daily Gleaner, however, these advertisements proved futile as on the dates of auction – 15 April 1999 and 14 September 2006 – no bids were placed for the property. Mr. Dyche also brought to the court's attention that JMMB, in its quest to have the property sold, obtained valuation reports from a competent valuator. Namely, Mr. Ivan Powell of CD Alexander Company Realty Limited who prepared the valuation reports of the property in 1998 and again in 2006.

[55] I have examined the valuation report of Mr. Powell dated July 17, 2006 and its accompanying Addendum, being letter dated the 15 June 2015. Mr. Powell's report lists the Market Value of the property as $8,500,000.00 and the forced sale price as $6,400,000.00. In the accompanying addendum he states that three methods were used to arrive at the market value, these are: cost approach, income approach and sales comparable approach. In applying the cost approach, a rate of $4,500 per square feet was used for building 1 and $4,000 square feet for building 2. These rates he states were taken from Burrows and Wallace Building Cost Information which was applicable in June 2006 when the valuation was conducted. These rates were applied to the

square footage of the buildings, the cost depreciated for age and condition and the depreciated amounted added to the land value. The total arrived at by his calculations was $8,400,000.00.

[56] In applying the income approach $250.00 per square feet was applied to 1888 square feet for building 1 to arrive at an income indication value of $4,720,000.00. Building 2 was not considered for income as it was a building in poor condition. In applying the sales comparable price; the sale of properties on the neighbouring streets of Orange Street, West Street and King Street, for the year 2003 was assessed and the sale amount respectively were, $8,000,000.00, $7,000,000.00 and $8,000,000.00. There were no sales directly on East Street; as such, the sale amount was adjusted for differences observed in properties. The sale comparable price ultimately arrived at was $8,000,000.00.

[57] I have noted some deficiencies in the methods used by Mr. Powell to arrive at the market value. Firstly, in reference to the cost approach, he recounts that the rates used were taken from Burrows and Wallace Building Cost Information. However, he has failed to provide this court with the excerpt from Burrows and Wallace justifying the rates as used by him. Secondly, again with the cost approach method it was outlined that the cost was depreciated for age and condition, but, he has failed to inform this court on what authority the cost was depreciated and by what percentage. As regards the sales comparable method, it was mentioned that as there were no sales on East Street and that the sales amount for the stated property were adjusted, however, he has failed to give specific details on the manner in which these sums were adjusted. Also, the sales referred to occurred in 2003, three years prior to the date the sales agreement was negotiated for the subject property. These deficiencies have created some doubt in my mind as to the actual value of the property as presented by Mr. Powell.

[58] Mr. Foote, in his evidence revealed that as a result of the sale, he had lost the market value of his property which at the time of the sale was valued at $16,000,000.00. Under cross examination, when asked whether this figure was based on a valuation that he had secured, he outlined that his assertion was mainly based on the valuation but

that he also had the figure he would sell it for in mind. Under further questioning, he affirmatively stated that the $16,000,000.00 was partly based on his opinion. Mr. Mervyn Downe, a valuator employed at D.C. Tavares & Finson Realty Limited, sanctioned the findings of Mr. Reynolds in his valuation report dated the 24th of February 2016. D.C. Tavares & Finson Realty Limited was instructed by Mr. Foote's former Attorneys Ballantyne, Beswick & Company to provide an expert opinion on the value of the subject property at two specific scenarios, firstly, the property as is, presently vacant and used as a car park and secondly assuming that the original structure, which has been demolished, still exists. These findings as stated by Mr. Reynolds outlined that the property, in its use as a car park, valued $7,000,000.00 and on the assumption that the building was still in existence, the current value of the property was $18,000,000.00. He outlined that these figures were arrived at based on their research and applying what they considered the suitable adjustments. However, no mention was made of what these suitable adjustments were. It was further elaborated that the method used to arrive at this value was the sales comparison approach. A total of four properties (including the subject property) were used to arrive at the value of $18,000,000.00. I will now proceed to set out the details of the properties compared:

> *No. 103 East Street Kingston (Comm) – Lot size 3,596.0 sq.ft Vol.1226 Fol. 539 Date of Sale" February 18, 2014. Sale Price $6,400,000.00*
>
> *No. 26 East Street, Kingston (Vacant) Lot Size – 1,871.0 sq. ft. Vol. 1179 Fol. 912 Date of Sale: July 18, 2014. Sale Price: $ 18,000,000.00*
>
> *No. 26 Hanover Street, Kingston (Vacant)- Lot size 2,375.0 sq. ft. Vol. 327 Fol. 14 Date of Sale: March 7, 2013. Sale Price $2,700,000.00*
>
> *Nos. 24-26 Sutton Street, Kingston (Comm) – Lot size – 2,398.0 sq. ft. Vol. 148 Fol. 28. Date of Sale: April 22, 2015. Sale Price $4, 500,000.00*
>
> *No. 103 East Street, Kingston Vol. 1226 Fol. 539 Date of Valuation: August 11, 1998. Sale Price: $6,000,000.00*

[59] Upon observation, I find it strange that Mr. Reynold's in utilizing the sales comparison approach to value the property would also use the subject property which is being valued as a comparison. Mr. Downe, during cross examination was asked whether or not this was a usual practice. His response was that if there is a lack of

evidence it might be put in, but, it might not be the best type of comparison, but, if it was a relatively recent sale, then the property being valued might not be a good comparison.In my view, the usage of the subject property has done little to help Mr. Foote's case. The valuation as it appears seems to have confused the dates. It speaks to a sale conducted on the February 18, 2014 of which the sale price was $6,400,000.00. However, the sale for $6,400,000.00 was the sale to the Gleaner pursuant to the 27th August 2007 sale agreement and subsequent negotiations between JMMB and the Gleaner company and as averred above, transfer to the Gleaner company was done on the 15th February 2008. Essentially, Mr. Reynolds has sought to compare a sale that was completed in 2008, with a sale that was completed at the lower end of East Street (No. 26), 6 years later.

[60] Indeed, I have noted that under cross examination Mr. Downe has sought to clarify this, and has outlined that reference to a sale dated the 18th of February 2014 was a mistake, and that looking at the title demonstrated that the sale alluded to would have been the 2008 sale. When presented with the question of whether properties at the lower end of East Street valued more than those to the upper end, he responded yes, all things being equal, but all things are not equal. He also agreed with counsel that all the properties listed in the sales comparison, the exception being the 1998 Valuation done by C.D. Alexander Company Realty, was dated from 2013 upwards.

In a bid to persuade this court that the valuation report of C.D. Alexander Realty was more accurate, JMMB, through its Attorneys enlisted the services of an independent valuator Mr. Connel Steer of Allison Pitter and Co. Chartered Valuation Surveyors. At the time of the preparation of this report, Mr. Steer had 33 years of experience in this field. The task bestowed on Mr. Steer was that he was to advise on the market value of the subject property for August 2007 (the date of the agreement for sale) and November 2006 (the date when the sale was negotiated). He was also asked to advise on whether the C.D. Alexander Company Realty Limited valuation report dated the 10th July 2006 or whether the D.C. Tavares & Finson Realty Limited report dated March 2008 more accurately reflected the market value of the property. Mr. Steer's findings were that in July 2006, the market value was $8,000,000.00 to $8,200,000.00 and that the forced

sale value in July 2006 was $6,560,000.00 and in March 2008, this was $7,600,000.00. In the Addendum dated July 24, 2015, Mr. Steer outlined that he used two methods of valuation. These are the Income Investment Approach and the Comparative Sales Approach. Mr. Steer outlined that they were forced to rely on the building area of 270 square metres (2,914.0 square feet) as outlined in the C.D. Alexander Company Realty Limited report as the area of 123.69 square metres (1,330.0 square feet) outlined in the D.C. Tavares & Finson Realty Limited report seemed impractical and erroneous. I must add that in the Addendum, Mr. Steer gives a lesser value of $7,000,000.00 to $7,500,000.00 for the property. As regards the period July 2006, for the market data comparables, three properties were used. These are: 40 Port Royal Street, 2 Duke Street and Lot 1A and 1B, and 81B King Street.

[61] 40 Port Royal Street was sold in October 2005 for $17,500,000.00. As the sale was in a better location, an adjustment was done by 10% for location. There was also a further downwards adjustment of 15% as the size of this property was twice that of the subject property. 2 Duke Street was sold in April 2006 but completed November 2006 for $11,000,000.00. This property was also in a better location than the subject property as such there was a downward adjustment of 20%. The third properties were sold by public auction in August 2006 for $38,000,000.00. The overall value was listed as $2,700.0 to $2,800.00 per square feet.

[62] Using the investment approach, for the period March 2008, Mr. Steer outlined that the building valued $8,500,000.00 to $9,000,000.00. Two properties were used for the Market data comparables, these are, 51A Duke Street which was sold on June 2008 for $8,400,000.00 and 79 Harbour Street sold February 2008 for $5,500,000.00. An upward adjustment of 10% was done for the size of the building and 15% was subtracted as the building had a better location. The value was conclusively listed as $2,900.00 to $3,150 per square feet.

[63] Upon examining the Expert Reports as presented to me, I am more inclined to adopt the findings as outlined by Mr. Steer. Mr. Steer's report has rectified the deficiencies evident in Mr. Powell's report as he has provided specific details of the

various percentages that influenced the several adjustments that were made, and even for the market data comparables, the sale period which he used (2005 and 2006) was closer in time to the period when the sales agreement for the subject property was negotiated (2007). Interestingly, the figures as outlined by Mr. Steer, notably, that the market value in 2006 was $8,000,000.00 to $8,200,000.00 and that the forced sale value was $6,560,000.00 are within the region which the subject property was eventually sold for (that is $6,500,000.00). As regards the 2008 and 2016 Valuation reports prepared by D.C. Tavares Realty, as opined above, they do very little to assist Mr. Foote's case. The 2008 valuation report was prepared in March of 2008, after the sale of the property was already concluded and approximately 18 months after the sale price was originally negotiated. Additionally, the 2016 report which updates the 2008 report speaks to "current market values" that is, market value for the property in 2016 (both in its current use as a car park and assuming that the building still existed). The market values spoken of should have been retroacted to the period 2006 as was done by Mr. Steer in his 2015 Valuation Report. Reference to the market value for the period 2016 as well as a sales comparable with properties sold upward of 2013, does not assist the court in arriving at a suitable conclusion for the question of what is the best price JMMB could have obtained for the subject property when the sale price was negotiated in 2006. On these premises, I have no choice but to disregard the valuation reports of D.C. Tavares Realty.

[64] The subject property was placed on public auction on two occasions – April 15, 1999 and again on September 14, 2006. Prior to these auctions, the property was duly advertised by three advertisements placed in the Daily Gleaner. Further to this, JMMB enlisted the services of two separate valuators with over 20 years of experience. I have also noted Mr. Depass' evidence where he outlined that upon JMMB's failure to secure a sale by way of the public auction in 1999, he was instructed by JMMB, by letter dated May 13, 1999 to refer the property for sale by private treaty. He further recounted that the bank was unable to sell the bank by private treaty in 1999. In my view, these actions taken by JMMB accentuate the fact that it took all reasonable steps to secure the best price for Mr. Foote's property. I therefore accept that $6,500,000.00 was the best price

that JMMB could have garnered for the property. It follows therefore that the fourth issue for discussion is: -

Whether or not Mr. Foote remains indebted to the Bank after the proceeds of the sale of the property are applied to the mortgage debt?

[65] Upon the signing of the Mortgage Deed, Mr. Foote agreed to repay JMMB the sum of $2,000,000.00 plus interest at 38%. It follows therefore that upon his default, Mr. Foote would be liable to pay not only the outstanding principal but also the outstanding interest. Mr. Depass' letter of 13 March 2008, which I am told was incorrectly dated the 31 March 1999, outlined to Mr. Foote that the net proceeds of the sale were applied to recoverable expenses, to the interest outstanding as well as to the outstanding principal. This amount was a total of $5, 455,880.00. Mr. Depass also informed Mr. Foote the sum of $2,467,378.71 remained owing and due to the bank. This amount was the remaining interest to be paid by virtue of the mortgage deed. The question that now follows is whether Mr. Foote is liable to pay the rate of interest as stipulated in the mortgage deed, or whether he should pay the statutory rate of interest on judgment debt?

[66] In my view, the applicable rate of interest is that dictated by the mortgage deed. This is vested in the fact that in exercising its power of sale under the mortgage deed, JMMB had forfeited all terms and conditions relevant to the consent judgment. There was an unreserved reversion to the terms and conditions of the mortgage deed. I hasten to add that even if I am wrong on this point, Clause 2(j) of the mortgage deed is particularly useful. It reads -

> *If any rate of interest payable hereunder is higher than the rate payable by Law on a judgment debt the taking of any judgment on any of the covenants herein contained shall not operate as a merger of the said covenant in such judgment or affect the Mortgagee's right to interest at such higher rate as well after as before judgment.*

[67] Implicit in this clause is the fact that JMMB is not bound by the statutory rate of interest on any judgment debt, but rather, it is entitled to the interest rate which proves to be higher. The rate of interest on judgment debt is 6%, whereas, the rate of interest

under the mortgage agreement is 38%. It therefore follows that Mr. Foote remains liable to pay to JMMB any and all interest at the contractual rate on any amount that is outstanding subsequent to the net proceeds of sale being applied to the mortgage debt.

[68] The fifth issue for discussion is –

Whether or not JMMB is liable to Mr. Foote on his claim for damages for breach of contract/breach of consent judgment and whether or not Mr. Foote is entitled to an award of aggravated/exemplary damages?

[69] The simple answer to this question is no. There is no liability on the part of JMMB to Mr. Foote. As is evident in the authorities presented by Counsel for the Defendant, the entry of the consent judgment did not prohibit JMMB from pursuing its remedy of power of sale. The law permits a mortgagee to pursue its remedies concurrently or consecutively and Mr. Foote had failed to honour the terms of the Consent judgment, thereby leaving the mortgage debt outstanding. It follows therefore that Mr. Foote's claim for exemplary or aggravated damages is of no moment. In **Rookes v Barnard** [1964] AC 1129, the House of Lords outlined the circumstances under which an award would be made for exemplary damages. It was held that, except where specifically authorised by statute, exemplary damages should be awarded where there is clear evidence of oppressive, arbitrary or unconstitutional action by servants of the government or where a defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable. In my view, no evidence has been put forward by Mr. Foote which puts JMMB in any of these two categories. As regards the claim for aggravated damages, such awards are usually made to compensate a claimant for injure to his proper feelings of dignity and pride. The circumstances are such that, JMMB in the execution of its power of sale acted squarely within its rights, thus, I have no choice but dismiss all claims made by Mr. Foote.

ORDERS

1. Mr. Foote's claim for Damages for Breach of Contract/Consent Judgment and/or Inducement of Breach of contract and/or improper wrongful exercise of power of sale is denied.

2. Foote's claim for Exemplary and/or Aggravated Damages is denied.

3. Judgment for the Defendant.

4. Cost is awarded to the Defendant to be agreed or taxed.