IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2005HCV05221

BETWEEN	**LORENZO MURDOCK**	**FIRST CLAIMANT**
AND	**JANETTE MURDOCK**	**SECOND CLAIMANT**
AND	**VICTORIA MUTUAL BUILDING SOCIETY**	**DEFENDANT**

Mrs. Valerie Neita-Robertson and Mrs. Sharon Usim instructed by Sharon A. Usim & Company for the claimant

Mr. William Panton and Miss Cindy Lightbourne instructed by DunnCox for the defendant

Heard: November 16, 17 and 18 2010, January 11 and 12, April 7, 2011 and September 6, 2012

MORTGAGE-EXERCISE OF POWER OF SALE-DUTY OF MORTGAGEE

SIMMONS, J

[1] On the 24th May 2000 the claimants purchased all that parcel of land part of Cold Harbour Estate now known as San San in the parish of Portland ("the property") from Jerry Walmsley and Nikki Jones for the sum of United States two hundred and forty-five thousand dollars (US$245,000.00). The purchase was partially funded by a mortgage from the defendant in the sum of United States one hundred and twenty thousand dollars (US$ 120,000.00). The property which was valued by Property Management Services Limited (PMS) at US$683,333.34 (the first valuation) was used to secure the mortgage. Its forced sale value was stated to be US $ 546,666.67.

[2] There is no dispute that the claimants fell into arrears in or about August 2000. This is evidenced by a letter from the Defendant dated the 2nd August 2000 which is contained in the agreed bundle of documents. At that time, the arrears according to the Defendant amounted to Jamaican eleven million nine hundred and thirty four thousand seven hundred and forty five dollars and seven cents (J$11,934,745.07).

[3] On the 30th day of December 2003 the property was sold by private treaty for Jamaican Ten Million Five Hundred Thousand dollars (J$10,500,000.00) after an unsuccessful attempt at sale by way of public auction on the 27th May 2003. The property was valued by Mr. Theo M. Dixon (TMD) on the 30th April 2003 at J$10,020,000.00 with a forced sale value of J$8,000,000.00 (the second valuation). A valuation was also undertaken by Real Estate Brokers and Appraisers (REBA) on the 19th May 2003. They valued the property at $13,670,000.00 or (US$205,041.90) with a forced sale value of J$10,936,000.00 or (US$164,033.52) (the third valuation). Both of these valuations were commissioned by the defendant.

[4] The claimants do not deny being in arrears but dispute the amount said to be owed by them at the time of the sale. They also deny receipt of any written communication from the defendant advising them that they were in arrears and that the property would be sold if those arrears were not settled within a particular time. The claimants have also taken issue with the price for which the property was sold and the fact that only one attempt was made to sell the property by way of public auction.

[5] Arising from this, they filed a claim in which the following reliefs are sought:

1. An inquiry as to whether the money produced by the sale of the property was a fair and proper price;

2. An inquiry as to damages;

3. Damages for negligence and/or breach of contract and/or breach of fiduciary duty on the basis that the defendant failed to obtain an accurate valuation report and sold the property at a gross undervalue.

It is alleged in the Particulars of Claim, that the defendant failed to properly advertise the said property and exercised its power of sale in a reckless manner.

[6] The defendant in its defence has denied that it sold the property at an undervalue and has asserted that in an attempt to safeguard its interests and the claimants' equity of redemption in the property, it sought to obtain an accurate valuation prior to the sale. This it is said was the reason behind the third valuation being commissioned. The defendant has also stated that the claimants were informed by way of a letter dated the 17th March 2003 that it would exercise its power of sale if they failed to make their monthly payments. This letter it is said was sent to the claimants by way of registered post on the 2nd April 2003 and was never returned.

[7] An ancillary claim was filed by the defendant in which a claim was made for the sum of Jamaican one million two hundred and thirty nine thousand eight hundred and ninety nine dollars and sixty one cents (J$1,239,899.61) plus interest of Jamaican two hundred and forty eight thousand five hundred and sixty eight dollars and ninety eight cents (J$248,568.98) for the period December 30, 2003 to March 22, 2006. The principal sum, it is alleged represents the difference between the sum that was owed by the claimants and that realized from the sale of the property. Interest is claimed at the rate of 14% per annum until payment.

[8] The claimants in their response to this claim have sought to rely on a statement of account received from the defendant in which it is indicated that there is a nil balance on their account. They have also averred that if the defendant had exercised it's power of sale in a proper manner there would be no shortfall between the sum owing and that realized on the sale.

[9] The issues to be resolved in this matter are as follows:-

a) Whether the defendant properly exercised its power sale by giving written notice to the claimants to settle the outstanding installments before it sold the property;

b) Whether the property was sold at an undervalue; and

c) Whether the defendant having given the claimants a Statement of Account indicating a nil balance is entitled to recover the sum of one million two hundred and thirty nine thousand eight hundred and ninety nine dollars and sixty one cents (J$1,239,899.61).

Exercise of the Power of Sale

[10] Mrs. Janette Murdock's evidence is that the claimants did not receive the defendant's letter of the 17th March 2003 notifying them of its intention to exercise its power of sale. She asserted that they became aware of the defendant's intention by way of a newspaper advertisement in the Sunday Gleaner newspaper sometime in January 2003. She was unable to state the date of that advertisement.

[11] When cross examined Mrs. Murdock stated that the claimants were always in communication with the defendant through its officers Mrs. Fisher, Mrs. Walters, Mr. Knight and Miss Lee. She also stated that the claimants did not have any difficulty receiving mail and that their correct mailing address was Berrydale in the parish of Portland.

[12] Counsel for the defendant directed her attention to a letter from the defendant dated July 2, 2001 in which the amount of the arrears was stated and the claimants were advised that if the outstanding amounts were not settled the property would be sold by public auction on September 25, 2001. Mrs. Murdock stated that she did not receive this letter and denied that the claimants' letter to the defendant dated the 19th July 2001 was a response to that sent by the defendant. The claimants' letter states that they were experiencing difficulties meeting their mortgage payments and that they would be using their Toyota Coaster bus to earn additional income. It was also indicated that they intended to settle most if not all of the arrears by the end of August 2001.

[13] Mrs. Murdock was then referred to two other notices from the defendant dated the 10th and the 16th August 2001 addressed to the claimants at Berrydale in the parish of Portland. She stated that she did not recall receiving these notices. Mrs. Murdock also indicated that whenever she received a notice of arrears it would be passed on to either Mrs. Robertson or Mrs. Usim.

[14] Counsel for the defendant also referred Mrs. Murdock to a letter dated the 23rd August 2001 from the defendant which was also addressed to the claimants at Berrydale. That letter refers to that sent by the claimants dated the 19th July, 2001. It indicates that the defendant was giving the claimants additional time up to the 31st August 2001 to settle their arrears. It is also stated in that letter that the property would only be withdrawn if they reduced the arrears to under two months. Mrs. Murdock indicated that she was not aware of having received that letter or having read it before. She was then referred to a letter dated the 6th September 2001 from Mr. Murdock to the defendant in which he stated that he was unable to pay off the arrears ***" in given time"***. Mrs. Murdock stated that she saw no link between the defendant's letter and the one sent by her husband. She also pointed out that the words ***"in the given time"*** could have been a response to a telephone call as no reference was made to the defendant's letter.

[15] Mrs. Murdock was then referred to a letter from the defendant dated the 29th January 2003 addressed to the claimants at Berrydale in which the writer, Miss Clarke, referred to two previous letters of January 1st and 16th, 2003 and indicated that an appraisal of the property would have to be done to ensure that a "reasonable reserve price is fixed". The writer also requested that the account be immediately brought up to date. Mrs. Murdock indicated that she had no recollection of having received that letter but was aware that the arrears on the account were significant.

[16] It was also indicated by Mrs. Murdock that upon being informed that correspondence had been sent to them by the defendant which they did not receive, she provided the said defendant with an email address she however indicated that no request was made for copies of the previous correspondence allegedly sent by the defendant.

[17] The defendant's evidence in relation to this issue was given by Mrs. Patricia Fisher, Senior Assistant Mortgage Manager in her witness statement dated the 10th September 2008. Paragraph 18 of that witness statement states that the parties were in negotiations to enable the claimants to meet their obligations under the mortgage. This was followed by written as well as verbal demands by the defendant for the settlement

of the outstanding balance. The claimants have not denied that verbal demands were made by the defendant for the settlement of outstanding sums.

[18] At paragraph 19 the witness stated that on the 17th March 2003 she wrote a letter to the claimants informing them that the property would be put up for sale by way of public auction if they continued to fail to make the payments due to the defendant. The letter is addressed to the claimants at Berrydale, Fellowship Post Office in the parish of Portland which she states is the return address indicated in correspondence received from the claimants.

[19] Mrs. Fisher also indicated at paragraph 5 of her further witness statement dated the 28th July 2009 that the letter dated the 17th March 2003 was sent by registered post to each of the claimants at both Berrydale and lot 161 Capricorn House which is the civic address of the property and that there is no record that any of them have been returned undelivered. A list of registered letters from the General Post Office dated the 2nd April 2003 which forms part of the agreed bundle of exhibits was referred to in support of that assertion. The letters referred to by the witness are listed at items 1-4 of that list.

Was the property sold at an undervalue?

[20] The claimants' allegation that the property was sold for less than its value is based on the fact that the second and third valuations differed significantly from that which was obtained when the application for the loan was being considered in June 2000 (the first valuation).

[21] Both claimants gave evidence in relation to this issue. Mrs. Murdock stated that the mortgage was granted on or about the 16th February 2000 in the sum of US $120,000.00. She indicated that the application had been made in Jamaican currency but that they were advised by Mrs. Joan Walter of the defendant company that their application would be processed more quickly if they applied for the loan in United States currency. The application was redone and the mortgage was approved and disbursed.

[22] She also gave evidence that they began to experience problems in meeting their monthly obligations in 2001. Mrs. Murdock indicated that in order to deal with that situation the claimants contacted Mr. Knight and Mrs. Patricia Fisher with a view to converting the mortgage loan to Jamaican dollars. It is alleged that the defendant through its agents agreed to do so.

[23] In order to effect this change Mrs. Murdock stated that a new valuation report was necessary and Mrs. Fisher recommended that they use PMS which was located in Port Antonio. The approved list of valuators included other companies situated in Kingston, Ocho Rios, Mandeville and Montego Bay but Mrs. Murdock stated that they were advised by Mrs. Fisher that based on the cost of travelling it would be more economical to use one situated in Port Antonio. The property was valued for United States six hundred and eighty three thousand three hundred and thirty three dollars and thirty four cents (US$683,333.34) in March 2001.

[24] The claimants continued to make their mortgage payments in United States dollars. Their evidence is that they experienced a "severe" downfall in their business between September and December 2001 allegedly because of the terrorist attacks in the United States on September 11 of that year. As a result, they made a verbal contact with Mr. Richard Kidd requesting the conversion of the loan to Jamaican currency. Mrs. Murdock stated that the claimants also informed Mrs. Joan Walter of their difficulties and this was followed by lengthy negotiations between themselves and the defendant with a view to renegotiating the terms of the mortgage. She indicated that they wrote several letters to the defendant requesting the conversion of the loan and no response was forthcoming. Specific reference was made to letters dated September 10th, 11th and 29th 2003. The letter of the 10th September also indicates that the claimants intended to pay a sum not less than US$40,000.00 by the 26th September 2003.

[25] In the letter of the 11th September the claimants indicated that they were not in agreement with the third valuation by REBA and gave a detailed assessment of the said report. They also requested a copy of the previous valuation. REBA gave a valuation of (J$13,670,000.00) or (US$ 205,041.90) with a forced sale value of (J$10,936,000.00) or

(US$164,033.52). They also asked that a new valuation be conducted before the property was put up for sale.

[26] The letter of the 29th September reiterated the claimants' position that the property was "grossly" undervalued by PEB. They also indicated their intention to make a payment by the 5th October 2003 and renewed their request for a copy of the second valuation report. That report was disclosed to the claimants on the 29th August 2006. The claimants allege that this valuation did not take into account the value of land in the area and did not refer to certain items which would have added to the value of the property. They also indicated that in their opinion the building was "grossly undervalued". In addition to this, Mr. Murdock stated that Mr. Dixon spent half an hour at the property and did not go to the area where the two water tanks were located. It is also stated that he failed to take into account the fruit and lumber trees situated on the property and did not measure the concrete areas. This is in contrast to Mr. Noel Williams of PMS who is stated to have spent approximately nine hours gathering information for the first valuation.

[27] Mrs. Murdock in her witness statement alleged that according to the second valuation the value of the property would have depreciated by approximately eighty one per cent (81%) over three years. With respect to the defendants counterclaim, Mrs. Murdock expressed the view that had the property had been sold for its true value no loss would have been incurred by the defendant.

[28] Evidence in relation to the value ascribed to the property was also given by Mr. Robert Anderson. The witness stated that he had occasion to visit the property as a result of an advertisement for sale which was published in the Daily Gleaner newspaper. He indicated that he has knowledge of real estate values for land in the area in which the property is situated as a result of purchases made by him and his observations of market values in the area. In his opinion, the property owned by the claimants was worth over United States six hundred thousand dollars (US$600,000.00). The witness also indicated that he had offered to purchase the property for US$550,000.00 and that the sale was have been completed by June 24, 2004.

[29] Under cross-examination, Mr. Anderson stated that when he said that he deals with real estate he meant that the buys and sells real estate. He also indicated that he has invested in approximately 6 -10 properties in the parish of Portland. He stated that has no qualifications as a valuator and he employs a professional valuator when he is going to purchase property. He admitted that he did not see the advertisement pertaining to the sale of the property but had received the information from persons in the area. He also stated that he was trying to delay the transaction in order to get a better price and confirmed that no paperwork had been done in an effort to proceed with the sale. The witness also indicated that the claimants did not agree with the terms of payment proposed by him and that up to end of 2003 there was no verbal or written contract between the parties. His evidence is that they did not correspond until June 2004 when Mr. Murdock contacted him. Mr. Anderson stated that he was not in a position to complete the sale in June 2004. He also gave evidence that the swimming pool was cracked when he visited the property.

[30] The defendant's evidence in relation to this matter was given by Mrs. Patricia Fisher, Mr. Theophilus Dixon, Miss Joan Walter and Mr. Barrett.

[31] Mr. Dixon stated that he has been a real estate valuator since 1982 and has been licensed since 1989. He also indicated that he has had a relationship with the defendant since 1982. He asserted that the second valuation of the property is both true and accurate.

[32] In cross-examination, he confirmed that Mrs. Fisher had asked him to conduct a valuation of the property. He also confirmed that trees would be taken into account in the valuation process but stated that they do not always add to the value. Mr. Dixon stated that he did not count the cedar trees on the property as it was fenced. He disclosed that the mahogany trees were not counted either, as he thought that was unnecessary. He valued the trees on the property for two million Jamaican dollars (J$2,000,000.00) and included it in his assessment of the value of the land.

[33] The witness stated that the area in which the property is situated is classified as a resort area. He indicated that he made enquiries about the value of houses in the area

to assist with the valuation. He expressed the view that the Murdock's house was incomplete as the basement area was unpainted, had no doors or windows, no electricity and the floor was made of earth. Mr. Dixon also stated that the property was not landscaped and had no fencing. He also said that the driveway was not asphalted and the pool was empty. He also stated that in doing the valuation he took into account the replacement value of the property and not the rental value as that would only be relevant if the property was rented. In his view the property could not have been rented in the condition that it was in at the time. He stated that he did not know the rental value for properties in the San San area at the time.

[34] Miss Walter who dealt with the claimants' application denied their assertion that she told them to enlist the services of PMS to value the property when the application for the mortgage loan was being made. She indicated that she recommended that they use PMS based on the fact that its main office was situated in Portland and it was also included on the defendant's list of approved valuators. In cross examination, she stated that she was not concerned that the property which was valued at over United States six hundred thousand dollars (US$600,000.00) was being sold to the claimants for United States two hundred and forty five thousand dollars (US$245,000.00). Miss Walter indicated that it was not unusual for properties to be sold for an amount that is less than that at which they are valued. She indicated that the first valuation was relied on for the purposes of the loan as well as for peril insurance.

[35] Mrs. Fisher's evidence is that whilst the defendant recommends the use of valuators on its list, individuals are not precluded from obtaining a valuation from someone who is not on the list. She maintained that the decision to use PMS was that of the claimants.

[36] The witness confirmed that the claimants had requested that their loan be converted to Jamaican currency and had requested a new valuation. She also indicated that they had obtained a valuation from PMS in 2001. At that time market value was United States six hundred and eighty three thousand three hundred and thirty three dollars and thirty four cents (US$683,333.34), with a forced sale value of United States

five hundred and forty six thousand six hundred and sixty six dollars and sixty seven cents (US$546,666.67).

[37] She stated that the outstanding balance was not paid and the defendant decided to exercise its power of sale after written communication was sent to the claimants informing them that this would be done if they failed to settle the outstanding amount.

[38] The defendant in preparation for this course of action, commissioned the second valuation. This was done by (TMD) on the 30th April 2003.

[39] Mrs. Fisher stated that she contacted TMD to enquire why its figures differed so greatly from those in the PMS report of the 18th November 1999. TMD is stated to have confirmed the accuracy of its report. The defendant was said to have commissioned the third valuation from REBA in an effort to obtain a true valuation of the property.

[40] At paragraph 25 of her witness statement Mrs. Fisher stated that the defendant employed the services of D.C.Tavares & Finson Realty limited to have conduct of the auction. That auction was scheduled for the 27th May 2003 but the reserve price of Jamaican ten million dollars (J$10,000,000.00) was not met. The property was then put up for sale by private treaty. A letter dated the 28th May 2003 was sent to Mr. Lorenzo Murdock at Berrydale, Fellowship P.O. Portland informing the claimants of the outcome of the auction and that the property would be sold by private treaty without any further notice to them. The said letter was also copied to Mrs. Janette Murdock at that same address and to both claimants at 161 Capricorn House, San San, Portland.

[41] The witness also indicated that the defendant was informed by a letter from the claimants dated the 27th May 2003 that they were in the process of finalizing an agreement for sale with a prospective buyer who would be making a deposit towards the purchase of the property. The defendant responded in a letter dated the 9th June 2003 and requested that the claimants provide a copy of the signed agreement for sale and the name of the Attorney with carriage of sale. Mrs. Fisher's evidence is that no signed agreement was ever sent to the defendant.

[42] Mrs. Fisher confirmed that the claimants had indicated to the defendant their dissatisfaction with the REB valuation. She however indicated that having commissioned two valuations the defendant had no reason to doubt the accuracy of the valuation.

[43] On the 13th October 2003 the defendant in its response to a letter from the claimants dated the 29th September 2003 informed them that since they had not paid the amount promised in their letter, the property would be sold by private treaty without further reference to them.

[44] Mrs. Fisher's evidence is that the proceeds of sale of Jamaican ten million five hundred thousand dollars (J$10,500,000.00) were insufficient to cover the claimants' debt which amounted to Jamaican eleven million nine hundred and thirty four thousand seven hundred and forty five dollars and seven cents (J$11,934,745.07). The defendant was said to have sustained a loss of Jamaican one million two hundred and thirty nine thousand eight hundred and ninety nine dollars and sixty one cents (J$1,239,899.61). The claimants were requested by letter dated the 29th July 2004 to settle that amount. In 2005 the debt was written off by the defendant.

[45] In cross examination the witness indicated that a valuation is done before a decision is taken whether or not to grant an application for a mortgage. She however indicated that she was not involved in that process. Mrs. Joan Walter, the branch manager was said to be the person who would have been acquainted with the claimants' application.

[46] With respect to the choice of valuator, she stated that the defendant has a list of approved valuators who in her opinion are reputable. In the event that a client chooses to use someone who is not on the panel, the valuation would have to be certified by the defendant. The witness declined to address suggestions that the claimants were told that they were to use PMS and that they were not given a choice. The PMS valuation which was used for the loan application and peril insurance up to the time when the third valuation was obtained from REB Ltd in May 2003.

[47] Mrs. Walter indicated that when exercising its power of sale the defendant would be interested in getting a reasonable sale price and as such would obtain a valuation report. She said that PMS was not used although the defendant's policy is to go back to the original valuator. She stated that the defendant chose to use TMD as they were situated in close proximity to the property. She said that the mortgagor would not be contacted nor be consulted regarding the choice of a valuator.

[48] The witness stated that due to the difference between the first and second valuations as well as observations made with respect to the detail of the first valuation report, TMD, the second valuator was asked to provide an explanation. Mr. Dixon who conducted the valuation is said to have stated that the property was in a state of disrepair. She then said "we were not satisfied and so we went for a second opinion". That the third valuation, it is said, gave a value which was close to that in the second valuation. When asked if DC Tavares Finson was on the list of valuators she said yes, but based on legal advice the defendant decided that it would not have been prudent to use the auctioneer as a valuator as there may be a conflict of interest. The witness did not recall whether the claimants had requested a copy of the second valuation report. Mrs. Fisher also stated that she did not recall either receiving or seeing a letter from the claimants indicating their dissatisfaction with the third valuation. In the end a decision was taken to use the third valuation as the value was higher than the second valuation. Evidence was also given that in June 2000 the property was valued at US$220,000.00 for the purpose of peril insurance

[49] In 2003 the defendant entered into an agreement for the sale of the property. Claimant was informed of this by letter dated the 14th October 2003. The Agreement for Sale is dated the 30th December 2003.

[50] The witness acknowledged that she had received a letter from the claimants dated the 27th May 2003 stating that they had learnt of the auction by way of the newspaper advertisement. In that correspondence, the first claimant also indicated that they had a buyer for the property and that the agreement for sale would soon be finalized and the deposit paid. The defendant in its response dated the 9th June 2003 acknowledged receipt of that letter and asked the claimants to send a copy of the

signed agreement for sale to them. It also enclosed copies of the Auction Notice and Private Treaty letters that had been sent to them previously. The claimants' request for a statement of account was sent to the accounts department.

[51] Mr. Barrett gave evidence that he is a licensed real estate valuator and the Chairman of REBA. He stated that on the 19th May 2003 he went to the property and conducted a valuation. He indicated that he carried out an inspection, took photographs and measurements. He then prepared a valuation report with the aid of Valuation Roll Report which gave the unimproved value of the property as Jamaican four million six hundred and fifty thousand dollars (J$4,650,000.00).

[52] In cross examination he stated that he has had a long standing relationship with the defendant. He was unable to state the precise length of time but stated that it was close to twenty years. With respect to the method by which he arrived at the valuation the witness indicated that he made enquiries as to the value of other properties in the San San area which he described as an established residential community. Such enquiries were limited to the value of land only. He also stated that there are hotels and a beach in that area and there was a good view of the golf course and a "breathtaking view of the sea" from the property. These factors he said would be considered in the valuation of the property. The witness stated that he did not obtain any information pertaining to the rental value of the property and was not privy to the valuation which was done by PMS. He indicated that in arriving at a valuation one should consider the value of similar properties in the area as well as the depreciated replacement cost of the property (the cost to build a similar structure in the area). In this case he said, he was unable to find any properties that had been sold recently and assessed its depreciated replacement cost at Jamaican eleven million dollars (J$11,000,000.00).

[53] Mr. Barrett went on to state that he would generally describe San San as a high income area but that it would take some time for the area in which the property is situated to be so classified. He excluded the claimants' property from the general make up of the San San area based on his observations of the house and its surroundings. The property was said to be unfenced and had no "proper driveway". He also indicated that as a valuator he would look to see if the land was well fruited as this would affect its

value by a small amount. His observations were that there were not many fruit trees on the property. He did not see the two water tanks that were situated on the property but was informed of their existence by the second claimant and valued them at twenty thousand dollars ($20,000.00). He stated that the value of the tanks was dependent on their depreciated value and he did not ascertain when they were built. Specifically he said, “I put in a figure. That was what I did in the circumstances”. He also indicated that he did not take the water pumps into consideration in assessing the value of the property.

[54] With respect to the pool, Mr. Barrett stated that in order to assess its value the depth would have to be ascertained. No measurements were taken by him. With respect to the trees on the property he stated that he could not identify them by name. He also indicated that he was unable to identify the boundaries of the property in the absence of the owners and did not see some sections of it.

[55] The witness explained that his assessment that the building was incomplete was based on his observation that certain areas were under construction. He also said that he was unable to inspect some areas as they were locked.

[56] Mr. Barrett also indicated that on the day in question he met the first claimant on the road and was directed to a lady on the property. It was suggested to the witness that he did not visit the property and this was denied.

The counterclaim

[57] The first claimant in her witness statement denied that the claimants are indebted to the defendant as they had received a statement dated the 31st December 2005 which reflected a nil balance. She also asserted that any loss which the defendant suffered was due to its own negligence and/or breach of fiduciary duty when it sold the property *“for significantly less than its true value*”.

[58] In cross-examination, she asserted that the defendant settled for a loss because of its desire to sell the property.

[59] The first claimant in his evidence in chief made no reference to the sum claimed by the defendant. In cross-examination he was referred to a letter dated the 29th July 2004 from DunnCox which was addressed to him and copied to his Attorneys-at-law, Robertson and Company. The letter states as follows:

> *"We write to advise you that we act on behalf of the Society in this matter. Our client has forwarded to us your letter dated 26th June, 2004 and requested that we respond thereto on its behalf.*
>
> *We note that you have requested a detailed Statement of Account indicating the funds owed by you to the Victoria Mutual Building Society a as 31st May, 2004. In response thereto, we enclose herewith for your perusal and records, a copy of the Society's Statement of Account dated 24th June, 2004. You will note that it indicates that the captioned property was sold for $10,500,000.00.*
>
> *We regret that we are unable to provide you with a copy of the Agreement for Sale between the Society and the Purchaser.*
>
> *As we are anxious to advise the Society as to how to proceed with this matter, kindly let us know, at your earliest convenience, how you intend to settle the loss of $1,239,899.61 which it has incurred."*

Mr. Murdock stated that he did not recall seeing this letter but had told the defendant to direct all correspondence to his Attorneys-at-law. He did however, indicate that he was informed that the defendant was seeking to recover the difference between the sum realized from the sale and that which was owed. Specifically he was told that this sum was one million two hundred and thirty nine thousand eight hundred and ninety nine dollars and sixty one cents (J$1,239,899.61). He went on to say: "*I did not get the understanding that the defendant wanted me to settle that sum. They wanted me to pay. It was just a claim. I would have to agree to the claim before I pay. I have seen the document but it did not come to me. I reviewed it with Mrs. Robertson. I noticed based on the document that there was a loss on the sale of $1,239,899.61. I thought that the Building Society was seeking to recover that money from me".*

[60] With respect to the sum claimed in the counterclaim, Miss Walter, on behalf of the defendant, indicated that the statement of account that was sent to the claimants indicating a nil balance was sent in error.

Defendant's submissions

[61] Mr. Panton submitted the duty owed by the Defendant to the Claimants, as mortgagee arose under the rules of equity by reason of the particular relationship between the mortgagee and mortgagor and not from any duty of care owed in negligence. Reference was made to the instrument of mortgage between the parties which contains a power of sale in support of this submission. It was further submitted that the duty owed by the Defendant to the claimants is to exercise the power of sale in good faith for the purpose of obtaining repayment. The defendant also had a duty to take reasonable precautions to secure a proper price.

[62] In this regard he referred to the case of ***Dreckett v Rapid Vulcanizing Co. Ltd*** [1983] 20, JLR, in which the Jamaican Court of Appeal adopted the reasoning in ***Cuckmere Brick Co.Ltd v Mutual Finance Ltd.*** [1971] Ch. 949 at 968 where Salmon L.J. said:

> *"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 it decided to sell it."*

Counsel also referred to the decision of the Privy Council in ***Downsview Nominees Ltd v. First City Corp Ltd.*** [1993] 3All ER 626 in which it was stated that the nature of the equitable duty owed by a person exercising a power of sale *"leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets"*. Lord Templeman, in giving the judgment of the court, commented that ***Cuckmere Brick*** case was "*authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition".*

[63] Counsel asserted that the sale was made in good faith and that the defendant had taken reasonable precautions to obtain the best price reasonably obtainable at the time. He argued that the second valuation of May 19, 2003, was obtained by the Defendant in its effort to diligently and reasonably exercise its power of sale, having regard to the huge divergence in the original valuations by PMS of November 1999 and March 2001 and that of TMD in April 2003. It was also stated that the Defendant took all reasonable steps to ensure that the property was exposed to the market for an adequate length of time when it advertised the property in the Daily and Sunday Gleaner for four dates in May 2003.

[64] Mr. Panton also submitted that a reserve price had been fixed in order to make the sale a success. He then referred to Mr. Murdock's evidence that although the Auction was attended by about 40 people there was only one bid of Jamaican One million dollars (J$1,000,000.00). He indicated that the Claimants had not produced any evidence that anyone was prepared to purchase the property at a higher price than that which was paid under the sale by private treaty. The Claimants he said could have obtained their own valuation report but there was no guarantee that this would have resulted in the property being sold at a higher price. Counsel also referred to the fact that the Claimants had advertised the property for sale in the Gleaner newspaper between January 19, 2003 and February 2, 2003 and that this had generated very little or no interest from the public.

[65] Mr. Panton proceeded to address the issue of whether the defendant acted in accordance with the provisions of the sections 105 and 106 of the Registration of Titles Act and clause 3 (i) of the Instrument of Mortgage. He stated that under the Act, in order for the power of sale to arise, the mortgagor must have been in default for one month or more in payment of the principal sum or interest or any part thereof. He referred to Section 105 of the Act which states:

> *"The mortgagee ….. may give to the mortgagor notice in writing to pay the money owing on such mortgage ….. by giving such notice to him or them, or by leaving the same in some conspicuous place on the mortgaged or charged land, or by*

sending the same through the post office by registered letter directed to the proprietor of the land at his address in the Register Book."

Counsel also referred to Clause 3(i) Instrument of Mortgage which provides:

> *"……. The power of sale …. conferred on the Society by the Act or any other statute or otherwise at all in reference to the exercise of the said powers of sale shall be conferred upon and be exercisable by the Society without any notice as prescribed by the Act or any other notice or demand to or consent by the Borrower in any of the following cases that is to say in case default shall be made for two calendar months in payment of any of the monthly payments covenanted to be paid … or of any fines or other monies which shall have become due or payable …*".

He submitted that once the required notice includes the prescribed time within which the mortgagor should comply with the demand for payment and was served in accordance with the Act, the Notice should stand.

[66] Specific reference was made to the notice dated March 17, 2003, which was sent by registered post addressed to the Claimants both at Berrydale and Lot 161 Capricorn House, San San in the parish of Portland. He asked the court to note that these letters were not returned undelivered by the Post Office. Mr. Panton also submitted that service by registered post is deemed to be effected at the time when the letter would in the ordinary course be delivered. He stated that it was curious that the claimants did not receive three previous notices sent by registered post to them but had received routine correspondence from the Defendant.

[67] Reference was also made to section 106 of the Act which states:-

> *"If such default in payment, shall continue for one month after the service of such notice, or for such other period as may by such mortgage or charge be for that purpose fixed, the mortgagee ..... may sell the land mortgaged by public auction or by private contract ....."*.

Mr. Panton stated that at the time of the auction the claimants were in default for approximately fourteen months and by time of the sale by private treaty over twenty months. In those circumstances, it was submitted, the defendant was within its rights to exercise the power of sale.

[68] With respect to the counterclaim, reference was made to the first valuation in 1999 and that done in March 2001 for the purposes of peril insurance. Mr. Panton submitted that whilst the defendant had a duty to take reasonable precautions to obtain the best price reasonably obtainable at the time of sale it was not bound to wait until a more advantageous sale could be effected. He argued that the claimants had failed to provide any evidence that the defendant sold the property at an undervalue.

[69] Specific reference was made to the fact that the property had been purchased by the claimants for Jamaican nine million six hundred thousand dollars (J$9,600,000.00) in 2000. This according Mr. William A. Burck the Attorney-at-law with carriage of sale, in his letter of April 17, 2000 represented a 20% increase over the purchase price paid by Walmsley and Jones (the original owners) six years earlier. In November of that year the first valuation report was prepared which gave a value of United States six hundred and eighty three thousand three hundred and thirty three dollars and thirty four cents (US$683,333.34).

[70] Reference was also made to the letter of counsel Mrs. Neita-Robertson dated the 28th April 2003 addressed to the defendant in which it was stated “the purchase price of the property was JA$9,800,000 or US$245,000”. Mr. Panton also pointed out that the claimants had not produced any valuation report to substantiate their claim.

[71] He asked the court to note that the second and third valuations conducted in April and May 2003 valued the property at Jamaican ten million twenty thousand dollars ($10,020,000.00) and thirteen million six hundred and fifty thousand dollars ($13,650,000.00), respectively, which represents an increase over the price paid by the Claimants in 2000.

[72] With respect to the contents of the three valuation reports counsel asked the Court to note that although the first valuation report makes reference to the various fruit trees and lumber it did not state their value. He also referred to the replacement cost of the building as stated in the three reports and submitted that the divergence in value is minimal. With respect to the value of the building the valuations are for Jamaican seven million five hundred and sixty thousand dollars (J$7,560,000.00), seven million five hundred thousand (J$7,500,000.00) and eight million dollars (J$8,000,000.00) respectively.

[69] It was submitted that the area of significant divergence was in the value placed on the land. He pointed out that the eLand Jamaica Valuation Roll Report used by Mr. Barnett valued the land at four million six hundred and fifty thousand dollars ($4,650.000.00). That document indicates that it was last amended on April 27, 2002.

[70] Counsel submitted that since the proceeds of sale were insufficient to cover the total amount of the claimants' indebtedness at the date of the sale it was entitled to recover the shortfall in the amount of one million two hundred and thirty nine thousand eight hundred and ninety nine dollars and sixty one cents (J$1,239.899.61).

[71] In this regard he referred to Clause 2(v) of the mortgage instrument which states:

> "2. *IN CONSIDERATION of the principal monies lent and advanced by the Society to the Borrower (the receipt of which sum the Borrower hereby acknowledges), the Borrower HEREBY COVENANTS with the Society at all times during the continuance of this security as follows:*
>
> *(v) To pay to the Society all costs, charges and expenses incurred or to be incurred by the Society in and about this security or in relation to any default hereunder or in the protection of its interests or enforcement of its rights hereunder with interest at the rate aforesaid from the time the same shall have been incurred".*

He argued that since Mr. Murdock was aware of the contents of the Defendant's Attorney's letter of July 29, 2004 which indicated the remaining balance on the account

and asked him to settle outstanding debt in relation to the sale of the security he could not rely on the statement of account which indicated that no funds were outstanding.

[72] No submissions were made by counsel for the claimant with respect to the service of notices on the claimants.

[73] He asked that the court in its consideration of whether the property was in fact valued at United States six hundred and eighty three thousand three hundred and thirty three dollars and thirty four cents (US$683.333.34) to take into account the fact that the sole bid at the auction was in the sum of one million dollars ($1,000,000.00).

Claimants' Submissions

[74] The claimants submitted that the defendant when exercising its powers of sale had a duty to take reasonable precautions to obtain the true market value of the property at the date on which it decided to sell it. Counsel referred to the case of ***Cuckmere Brick Co. v. Mutual Finance Ltd,*** at pg. 966 in which Salmon L. J. stated as follows:-

> *"…. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are "neighbours". Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale".*

Reference was also made to the case of ***McHugh v. Union Bank of Canada*** (1913) AC. 299 at 311, in which, Lord Mailton stated:-

> *"It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold."*

[75] It was also submitted that as in the ***Cuckmere*** case the judge should examine the evidence of the valuators on whom the defendant relies in the context of them being interested witnesses. In that case the witnesses were described as being *"…concerned to justify the decisions for which they were responsible and no doubt to obviate any question of personal liability to the Defendants. Consequently, though not, perhaps, unnaturally their partisanship was, I thought, reflected in their evidence. Mr. Manples in particular indulged in a degree of advocacy which would have been better left to Mr. Dewhurst, and both of them were inclined to denigrate the Plaintiff's site and to pooh-pooh the evidence of the Plaintiff's experts".* The court was urged to find that Mr. Dixon (TMD) and Mr. Barnett (REB) were agents of the defendant and their evidence was geared towards defending their reports and assisting the defendant. It was also submitted that the valuation reports relied on by the defendant constituted a *"negligently gross undervaluation of the claimants' property".*

[76] Counsel also submitted the Defendant either by its own actions and/or through its agents was negligent in the exercise of its power of sale and breached its duty of care to the Claimants to obtain a true market value of the property and to sell at a fair and proper price.

[77] With respect to the counterclaim, counsel also relied on the ***Cuckmere*** case at page 972, where Cross L. J. said:

> *"There is no doubt that a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property between the date of his taking possession of it and the date of the sale …. It seems quite illogical that the mortgagee's duty should suddenly change when one comes to the sale itself and that at that stage, if only he acts in good faith he is under no liability, however negligent he or his agent may be."*

It was submitted that any loss suffered by the defendant was due to its own negligence or breach of fiduciary duty when it sold the claimants' property at an undervalue. Counsel argued that the sale was rushed and as a result the defendant failed to ensure

that the price they accepted was sufficient to cover the claimants' indebtedness. Mrs. Neita-Robertson stated that if the property had been sold at the true market value, the defendant would have had more than enough funds to settle the account with a significant balance to be paid to the claimants.

[78] The issue of the effect of the statement of account indicating a nil balance was also addressed. It was argued that the claimants were entitled to rely on that statement and as such the defendant was not entitled to the sum claimed.

[79] Counsel submitted that in order to resolve the matter, the court could either order an inquiry into the difference between the sale price and the true market value at the time as was done in ***Tomlin v. Luce 1889 Ch D 573*** or accept the evidence of Mr. Robert Anderson who as a Real Estate Investor with knowledge of the property that it was valued at United States three hundred and eighty thousand dollars (US$380,000.00) in March, 2009.

The law

[80] The claimants' entitlement to damages is dependent on whether the defendant properly exercised its power of sale and if so, whether it took reasonable care to obtain the true market value of the property.

Exercise of Power of Sale

[81] The exercise of a mortgagee's power of sale is governed by sections 105 and

106 of the Registration of Titles Act. They state 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, interest or annuity 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 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 or annuitant, or his transferees, may give to the mortgagor or grantor or his transferees notice in writing to pay the amount 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 or annuitant, or his transferees, may sell the land mortgaged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for such loss occasioned thereby, 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 happened, or 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 unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power".*

[82] In this matter clause 3 (i) which deals with the exercise of the mortgagee's powers of sale states:

> *"…the whole of the principal monies, interest and other sums remaining payable under this mortgage shall immediately become due and payable by the Borrower to the Society and shall be recoverable by the Society with interest thereon at the rate and in manner chargeable on the principal monies under this mortgage and interest payable upon interest which is in arrears shall accrue ……and the Powers of Sale …and all other powers, rights and remedies conferred on the Society by the Act or any other statute or otherwise at all in reference to the exercise of the said powers of sale shall be conferred upon and be exercisable by the Society without notice as prescribed by the Act or any notice or demand to or consent by the Borrower in any of the following cases that is to say in case default shall be made for two calendar months in the payment of any of the monthly payments covenanted to be paid under Clause 2 (iii) hereof …"*

This clause appears to be an attempt to modify the provision of the Act with respect to notice.

[83] There is no dispute that the claimants were in arrears and that section 106 of the Act conferred on the defendant the power to sell the property if the claimants were still in arrears one month after service of the notice. The first issue which needs to be resolved is whether the relevant notices were served on them. The defendant's evidence is that their letter dated the 17th March 2003 was sent to both claimants by registered post on the 2nd April 2003. The letter reads as follows:

> *"Without prejudice to its rights under the instrument (s) of Mortgage Deed/s dated May 1, 2000 securing the captioned mortgage loan, the Victoria Mutual Building Society ("the Society") hereby requests that you immediately pay to the Society at 8-10 Duke Street, Kingston, the moneys secured by the mortgage (s), as follows:*
>
> *PRINCIPAL (Present indebtedness to 17/03/2003) $135,838.84 USD*

ARREARS (12.7 Months to 17/03/2003) $32,140.01 USD

AND THE SOCIETY HEREBY ADVISE YOU that if your default in payment of these moneys continues for one month after the date of this letter, the Society will put up for sale at public Auction in exercise of the Powers of Sale contained in the mortgage (s) on May 27, 2003 at 10:30 a.m. by D.C. TAVARES & FINSON CO. LTD., 1 BELMONT ROAD, KINGSTON 5.

The first advertisement for sale will appear in one of the Daily Newspapers on May 4, 2003…."

[84] The List of Registered Letters obtained from the General Post Office reveals that registered mail was sent to the claimants individually on the 2nd April 2003 both at Berrydale and 161 Capricorn House in Portland. There is no evidence that any of the four letters were returned unclaimed by the post office.

[85] Section 52 of the Interpretation Act states:

" (1) Where any Act authorizes or requires any document to be served by post, whether the expression "serve", "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(2) Where an Act authorizes or requires a document to be served on any person without directing it to be served in a particular manner the service of that document may be effected either-

(a) by personal service; or

(b) by post in accordance with subsection (1); …"

[86] By virtue of ***Rule 6.6 (1)*** of the ***Civil Procedure Rules, 2002*** the claimants would have been deemed to have received that correspondence twenty one (21) days after posting. That is, by the 26th April 2003. The property was sold by private treaty on the

30th December 2003 although a deposit was paid to the defendant in October 2003 and up to that time no further payments had been received by the defendant in relation to the claimants' account. In any event, more than twenty one days had elapsed since the service of the notice on the claimants.

[87] Prior to the above notice being sent, the defendant's evidence is that between the 2nd August 2000 and the 17th February 2003 a total of eleven (11) Mortgage Arrears Notices were sent to the claimants. Copies of these notices were included in the Agreed Bundle of Documents. The second notice which is dated the 16th August 2000 sets out the amount owed and states "Please make the mortgage payment your priority and avoid our having to take further action to recover payment". The fourth, sixth, eighth and eleventh notices dated the 16th July and 16th August and 17th September 2001 and the 17th February 2003 respectively are couched in slightly stronger terms in that they state "Please avoid our having to proceed in scheduling the abovementioned security for sale by public auction". These notices were addressed to the first claimant at Berrydale, Fellowship P.O. in the parish of Portland which is the address that the claimants state they receive their mail.

[88] On the 2nd July 2001 a letter was allegedly sent by the defendant addressed to the first claimant in which it was indicated that the property would be put up for sale by public auction. The defendant after having had some discussions with the first claimant withdrew the property from public auction. This information is contained in a letter addressed to Robertson and Company dated the 13th November 2002. The letter also states:

> *"Based on our discussions with Mr. Lorenzo Murdock, we advised him that we needed some evidence that he was in discussions with National Commercial Bank regarding refinancing of his indebtedness to us. We received a letter from the Bank stating that they were processing an application for a loan to the Murdocks. In the absence of a firm commitment from the Bank, the Society, at its sole discretion, decided to withdraw the property from the Public Auction. We therefore, would not proceed to Private Treaty.*

Notwithstanding the above, the account is presently US$20,574.60 being 9.4 months in arrears and we cannot indefinitely hold strain. We ask that you see to it that this matter is settled expeditiously as we will have no further option than to reschedule the property for sale by public auction if we do not receive a firm commitment from the Bank in thirty (30) days time…"

[89] By letter dated the 29th January 2003 the first claimant was informed that the defendant would be getting the property appraised in an effort to fix a reasonable price in preparation for sale by public auction. The first claimant was requested to bring the account up to date in order to avoid such action being taken. That letter was addressed to Mr. Murdock at Berrydale in the parish of Portland. This was followed by a letter from the first claimant to the defendant dated the 7th February 2003 requesting a statement of account. The letter also states: *"We know our mortgage situation is very bad at the moment. As for this, we are still trying to seek financial help to save our home".*

[90] On the 21st February 2003 the defendant wrote to the first claimant at Berrydale advising him that due to the arrears on the account they were preparing to put up the property for sale. The immediate settlement of the arrears was again requested.

[91] The Privy Council in ***Jobson v. Capital and Credit Merchant Bank Limited and others*** Privy Council Appeal No 52 of 2006 delivered on the 14th February 2007 considered the effect of a provision in the instrument of mortgage which seeks to modify sections 105 and 106 of the Act. In that case clause 10 of the mortgage provided that the mortgagee could exercise its powers of sale *'…without any Notice or demand to or consent by the Mortgagor NOT ONLY on the happening of the events mentioned in the laws BUT ALSO whenever the whole or part of the Principal Sum or the whole or part of any monthly instalment of interest shall remain unpaid for THIRTY DAYS after the dates hereinbefore covenanted for payment thereof respectively …"* The appellant paid the first instalment and nothing more. The bank sent her a notice that she was in arrears and that it would exercise its powers of sale unless she paid those arrears within ten days. The trial Judge found that she did not receive the notice which was purportedly sent by hand. The property was sold for approximately one hundred thousand dollars ($100,000.00) less than its valuation.

[92] In considering the issue of whether the mortgage instrument could modify the statutory requirements of sections 105 and 106 of the Act the Privy Council sought to ascertain the general purpose of the Act. Lord Hoffman examined the recital of the said legislation and was of the view that the legislature was concerned with "an efficient system of conveyancing rather than social legislation designed to give mortgagors degree of protection against mortgagees which they did not have at common law or equity". The recital states:

> *"Whereas it is expedient to give certainty to the Titles to Estates in land, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive."*

Reference was also made to the New Zealand case of ***Public Trustee v. Morrison*** (1894) 12 NZLR 423 in which the court held that parties could in fact, contract out of the provisions of a section which was similar to that in the Jamaican Act.

[93] The court was of the view that the parties' freedom to modify the provisions of the Act was limited by the need to ensure that the Act achieved its purpose of providing for a 'simple and less expensive" system of conveyancing. Their Lordships made the point that the form which is contained in the Eighth Schedule includes a place for "any special covenant". Reference was also made to the case of ***National Bank of Australia v. The United Hand-in-Hand and Band of Hope Company Regd.*** (1879) 4 App Cas 391 in which the court held that a clause which modified the time frame for the service of a notice of demand was a special covenant within the meaning of the Act.

[94] In this matter clause 3(i) has modified the provisions of section 106 of the Act and as such the defendant was entitled to exercise its power of sale without notice to the claimants once the account was in arrears for two months. The defendant chose to serve a notice on the claimants and has maintained that proper service was effected on them. In the case of ***Zachariah Sharief v. National Commercial Bank Limited,*** Suit No. C.L 1990 / S109 delivered on June 13, 1994 it was held that the provisions regarding the manner of service are directory and not mandatory. In that case the notices were not sent to the correct address but the court found that based on the

recorded telephone conversation between the bank and the claimant the said notice had in fact come to the attention of the claimant. Patterson, J. in his judgment said:

> *"The general object and paramount importance of the provisions of sections 105 and 106 must be … to ensure that the mortgagor is notified of the mortgagee's intention to exercise his power of sale and to allow the mortgagor time to fore-stall the sale. The mortgagor must be presumed to know he is in arrears, and the notice in writing, it seems to me, is intended to remind him of his obligation and to call upon him to repay the money in accordance with the demand within the time mentioned therein. The manner of service of the notice is not of general importance, and it may be by any of the means set out in the Act or in the deed itself, … it may be by some other means, provided that in such a case, it is clearly shown that the notice did come to the knowledge of the mortgagor. The date of the service of the notice of demand is important because it is from that date that time begins to run against the mortgagor for the exercise of the mortgagee's power of sale …"*

[95] In this matter separate notices were sent by registered post to the claimants at two addresses. There is no evidence that they were returned undelivered. In addition, the claimants' evidence is that they had no difficulty receiving mail addressed to them at Berrydale. It appears from the evidence that the only mail which they allege was undelivered is that concerning the arrears and the notice that the defendant would be exercising its power of sale. I have also noted that when the first claimant was asked whether she received or knew of the defendant's letter dated the 23rd August 2001 in which the defendant set out the terms on which property would be withdrawn from public auction, she stated that the letter dated the 6th September 2001 from Mr. Murdock to the defendant could have been a response to a telephone call as it made no reference to that sent by the defendant.

[96] Having assessed the evidence in relation to this issue, I reject the evidence of the claimants that they were not served with the relevant notice. I find on a balance of probabilities that they were notified by registered post of the arrears and the impending exercise of the defendant's power of sale.

[97] Having found that the notice was served it must be determined whether the claimants were in arrears at the time of the exercise of the power of sale and if so, for how long. There is no dispute that the claimants were in arrears at the time when the notice was served and that they made no subsequent payments. The auction took place approximately one month after the notice was served. The sale by private treaty was effected about six months after service. In these circumstances, I have found that the defendants acted in accordance with section 106 of the Act and have not breached the contract between themselves and the claimants when it exercised its power of sale.

Duty of the mortgagee when exercising its power of sale

[98] It is settled that whilst a mortgagee is a trustee of the proceeds of sale, he is not a trustee of the power of sale. As such, the mortgagee is entitled to exercise that power in his own interest. He is also free to exercise the power at any time and is under no obligation to sell at a particular time in order to reduce any loss which may be sustained by the mortgagor. This principle was accepted by the court in the case of ***Tomlin v. Luce***, (supra) where Kekewich, J. said:

> *A mortgagee is not in any proper technical sense a trustee of his power of sale or of any like powers for the mortgagor, and to say that he occupies a fiduciary position towards the mortgagor is if true, wanting in precision. A power of sale is given to a mortgagee in order to enable him to realize his security, and he necessarily exercises it to that end. But he is not the owner of the estate, and therefore cannot sell as an absolute owner might, regardless of all other persons than himself. He owes a duty to the person entitled to the equity of redemption…What is the limit of this obligation? Granted all conditions calling the power of sale into operation have been fulfilled, a mortgagee is entitled to select his own time and mode of sale, and the Court will not interfere with his discretion except under circumstances which prove oppression or otherwise impeach the honesty of the transaction".*

[99] This principle was accepted in the case of ***Cuckmere Brick Co. v. Mutual Finance Ltd.*** (supra) where it was expressed in the following terms:

"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor, and where there is a conflict of interest, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale in exercising his power of sale. However, the mortgagee was not merely under a duty to act in good faith, i.e honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell".

[100] It is also established that the burden of proof is on the mortgagor to establish that the subject property was sold at less than the "*true market value"* at the time of the sale. However, according to the case of ***Bank of Nova Scotia v. Rosegreen and others*** Claim No. C.L. 1998/B240 (delivered on November 10, 2008) *"The onus is on the mortgagee to show on a balance of probabilities that the sale was bona fide and that he took precautions to obtain the best price reasonably obtainable".* In essence the mortgagor must show that the property was sold for less than the market value and the mortgagee in order to defend the action must establish that even if that is so, he took reasonable steps to obtain the best price in the circumstances.

[101] In this matter the claimants have launched their quest to establish that the property was sold at an undervalue by reference to the disparity between the first valuation and that relied on by the defendant at the time when it exercised the power of sale (the third valuation). They have also urged the court to accept the evidence of "a potential purchaser" Mr. Robert Anderson as to the value of the property. It is however clear from Mr. Anderson's own evidence that he has no training in real estate valuation. It was also revealed in cross examination that he did not take any definitive steps towards purchasing the property as he was hoping to acquire same for a lesser price than which was being asked for by the claimants. I find that his evidence does not assist the claimants in the advancement of their case.

[102] I will therefore have to assess the evidence of the valuators and the defendant's officers in order to determine whether it acted reasonably when it relied on the value ascribed to the property by REBA, the third valuator.

[103] The claimants have in my view, quite reasonably questioned the wide disparity between the valuation done at the outset when they were seeking funds from the defendant and that used when it was exercising its power of sale. The evidence of Mrs. Fisher is that when she received the second valuation she noted the disparity and sought an explanation from Mr. Dixon. She also commissioned the third valuation. The witness stated that the value of the property as stated in the third valuation was slightly higher than that in the second valuation. In those circumstances the defendant is said to have proceeded to exercise its power of sale on the basis of the third valuation.

[104] The first attempt at sale was by public auction. A reserve price was fixed in accordance with the forced sale value but only one bid was received. That bid did not meet the reserve price and the property was withdrawn. The defendant then proceeded to sell the property by way of private treaty.

[105] I will attempt to highlight the areas of the three valuation reports that warrant consideration although the second report was not relied on by the defendant. The first report describes the land in the following terms:-

> *"Well fruited with coconuts, mangoes, naseberry, Pimento, Nutmegs, Passion Fruits, Lime, Soursop, Breadfruit and common lumber scattered throughout. From the villa site the land slopes approximately 10 degrees on all sides to well defined boundaries, landscaping is visible as there is a well kept lawn with flowers and well grown hedges. The holding has an excellent view of the sea to the north, east and west. It also has a view of the San San Golf Course, San San Beach, Fairy Hill, Drapers and the surrounding areas of San San…There is a private asphalted driving road 12 × 300 feet that leads to the holding".*

The condition of the building is described as very good and structurally sound. It is also stated that the building was recently refurbished and is of a split level design and comprised of four bedrooms, one master bedroom and five bathrooms. The report notes that there is a swimming pool with a pump room, steel tank, concrete tank and a pump house. The size and /or capacity of the pool and the tanks are also stated. The replacement cost for the purpose of the peril insurance was stated to be as follows:

"Dwelling *US$194,444.45 or J $ equivalent*

Other areas *US$25,000.00 or J $ equivalent".*

[106] The second valuation describes the building as *'a single floor building with an incomplete basement in fair condition……in need of repairs".* One of the two bedroom areas in a section described as a basement is stated to be incomplete. The replacement cost for the building is stated to be Jamaican seven million five hundred thousand dollars (J$7,500,000.00) and the pool and concrete tank Jamaican five hundred and twenty thousand dollars (J$520,000.00). The estimated remaining useful life of the building is stated to be thirty (30) years.

[107] The third valuation describes the premises as a single storey split level residence in fairly good condition. Its estimated remaining useful life is stated to be fifty-nine (59) years. One of the bedrooms was not inspected and the report states that it is *"understood"* to be incomplete. The windows and doors in that area were stated to be *"totally boarded up".* The report refers to two water tanks and states their capacity. Reference is also made to the swimming pool. It was noted that the ceiling in the veranda area and the wooden railings at the stairway were rotting. The valuation was stated to be as follows:-

"Building *$8,000,000.00*

Two tanks *20,000.00*

Swimming pool *1,000,000.00*

Land *4,650,000.00".*

The replacement cost was stated to be Jamaican eleven million four hundred thousand dollars (J$11,400,000.00).

[108] It is obvious that the second valuation is the least detailed of the three and in any event the defendant chose to rely on the latter. Mr. Barnett was cross examined in relation to his report. He admitted that he had been associated with the defendant for close to twenty years. He stated that in arriving at his valuation for the property he made

enquiries as to the going price for properties in the San San area. However that information related to land and not to the buildings in the area. He also stated that the San San area was generally a high income one but that it would take some time for the area where the property was situated to attain that status.

[109] He indicated that there was no proper driveway and the property was not fenced. He stated that he had tried but did not get any information on the going rental for properties in the area. He also stated that he was unaware that in 2003 a property in the San San area was sold for United States seven hundred thousand dollars (US$700,000.00). The witness indicated that the presence of fruit trees would add to the value of the property but stated that he did not see many on the property. Specifically he stated that he saw no mango, naseberry, pimento, nutmeg, soursop, breadfruit, passion fruit or common lumber trees. He admitted that he did not see the tanks but that he saw the claimant on the road who indicated that he could not be there but that there was a lady at the premises who could assist him. The first claimant is said to have informed the witness about the water tanks. He stated that the value of the tanks would be their depreciated value and information on their age would be relevant to the valuation and that he did not obtain that information. He said *"I put in a figure. That was what I did in the circumstances".* He also indicated that the pumps would have added value to the tanks and that he did not take them into consideration. He stated that the property was approximately two acres and the value of one acre in that area was four million one hundred and fifty thousand dollars ($4,150,000.00).

[110] With respect to the pool he stated that the valuation was based on its size. He stated that he did not measure its depth as he had no one to assist him. The witness also said that a value of five hundred thousand dollars ($500,000.00) could have been an under valuation. He indicated that he saw the pump house but that it was *"nothing fantastic".*

[111] Mr. Barnett indicated that he did not have access to all of the areas which were to be assessed for the purpose of the valuation. He stated that the lady who assisted him was unable to give him information with respect to the boundaries of the property.

[112] The witness was also questioned rigorously in relation to the layout of the premises. It was also suggested to him that he did not visit the premises. It is my view that his credibility in relation to this issue has not been shaken and I accept his evidence that he visited the premises.

[113] In re - examination he stated emphatically that he would not have valued the land at Jamaican eighteen million eight hundred thousand dollars (J$18,800,000.00). Mr. Barnett also stated that he had spoken to the first claimant on the telephone before visiting the property and he had promised to be there on the date of the valuation.

[114] Based on the evidence of this witness it appears that sufficient care was not taken by him to ascertain the true market value of the property. However the claimant has not provided the court with a valuation report to counter that which was relied on by the defendant. Instead they have asked the court to rely on the opinion of a lay person who invests in real estate, had purchased property in the area and had an interest in purchasing the property

[115] In order to assess whether the property was sold at an undervalue I must start at the beginning. The property was purchased by the claimant for the sum of United States two hundred and forty five thousand dollars (US$245,000.00) or Jamaican nine million eight hundred thousand dollars (J$9,800,000.00) in April 2000. This amount according to the vendors' Attorney-at-law, Mr. William Burck represented a twenty percent increase in value when compared to the sum for which it was originally purchased some six years before. In May 2000 that same property was appraised for United States six hundred and eighty three thousand three hundred and thirty three dollars and thirty four cents (US$683,333.34). That figure is more than two and one half times that for which it was sold one month prior to the valuation. The second valuation was done on the 29th April and the third on which the defendant relied was done in May 2003. The values stated are Jamaican ten million twenty thousand dollars (J$10,020,000.00) and thirteen million six hundred and seventy thousand dollars (J$13,670,000.00) respectively. These values in my view are in keeping with the known sums that had previously been paid by various owners to purchase this property. It is the first valuation which seems to be out of the ordinary.

[116] It is not disputed that all three valuators were licensed and on the face of it competent to do the job for which they were retained. The defendant is not a valuator and its commissioning of the third valuation for the reason stated, is in my view, evidence that it was seeking to obtain the true market value of the property at that time. In addition, the second and third valuations showed an increase in the value of the property since the date of its purchase.

[117] In the circumstances I find that the defendant took reasonable care to obtain the true market value of the property at the time of the sale. I also find on a balance of probabilities that the claimant has failed to establish that the defendant acted negligently or in breach of its contract with the claimants in the exercise of its power of sale. The claimants have also failed to establish that the property was sold at an undervalue.

Account and inquiry

[118] An account and inquiry will normally be ordered where it is necessary for the working out of the judgment. Having found that the property was not sold at an undervalue there is no need for an inquiry to be held.

The counter claim

[119] The defendant's counterclaim is based on clause 2 (v) of the instrument of mortgage which states:

> "2. *IN CONSIDERATION of the principal monies lent and advanced by the Society to the Borrower (the receipt of which sum the Borrower hereby acknowledges), the Borrower HEREBY COVENANTS with the Society at all times during the continuance of this security as follows:*
>
> *(v) To pay to the Society all costs, charges and expenses incurred or to be incurred by the Society in and about this security or in relation to any default hereunder or in the protection of its interests or enforcement of its rights hereunder with interest at the rate aforesaid from the time the same shall have been incurred.*

The rate of interest as prescribed in the schedule is fourteen percent (14%) per annum.

[120] At the time of the sale by private treaty the statement of account as at the 1st June 2004 indicate that the claimants owed sum of eleven million nine hundred and thirty four thousand seven hundred and forty five dollars and seven cents (J$11,934,745.07). That document also shows that the sale price of ten million five hundred thousand dollars ($10,500,000.00) and interest of one hundred and ninety four thousand eight hundred and forty five dollars and forty six cents ($194,845.46) was credited to the account. This was enclosed in a letter from DunnCox addressed to the claimants in which they were informed that the sum of one million two hundred and thirty nine thousand eight hundred and ninety nine dollars and sixty one cents ($1,239,899.61) was still outstanding.

[121] The claimants on the other hand, have sought to rely on the statement of account issued by the defendants which indicates that as at the 31st December 2005 there were no sums outstanding on their account. The defendant has asserted that this statement was issued in error.

[122] I must bear in mind that the claimants have not asserted that they made any payments towards the settlement of the balance which was stated in the defendant's letter. I also bear in mind the evidence of Mr. Murdock which clearly indicates that he was informed of the amount which was said to be outstanding. His evidence is that he that he thought that the defendant was trying to recover that sum. The claimants have argued that they are entitled to rely on the later statement.

[123] The question arises as to whether it was reasonable for them to assume that the debt was settled without any action being taken by them. In this regard, I bear in mind the evidence of the first claimant who seems to have clearly understood that the defendant wished to recover the shortfall. It is my view, that in light of the fact that this was a commercial transaction it was not reasonable for them to make the above assumption. In addition, they have not presented any evidence to the court that this *"error"* caused them to act to their detriment. I have also assessed the credibility of the witnesses on this issue, the claimants and Mrs. Patricia Fisher. In light of the payment history of the claimants, the evidence of the first claimant and their denial of receipt of

vital pieces of correspondence sent by registered post, I am not convinced that the claimants believed that no sums were outstanding on their account.

[124] I have therefore concluded that the defendant is entitled to recover the sum outstanding in addition to any interest which may have accrued.

[125] The matter is disposed of as follows:-

i. Judgment is awarded to the defendant on the claim;

ii. Judgment is awarded to the defendant on the counterclaim in the sum of $1,239,899.61 plus interest at the rate of 14% per annum from the 30th December 2003 to today;

iii. Costs to the defendant on the claim and counterclaim to be taxed if not agreed.