

was sold at an undervalue, in breach of the Bank's duty and/or absence of good faith in its exercise of the power of sale. The Claimant claims specifically:

1. Damages for breach of duty and/or absence of good faith in the Defendant's exercise of its power of sale under a mortgage in relation to property registered at Volume 1071 Folio 840 of the Register Book of Titles and which was owned by the Claimant;
2. Interest pursuant to the Law Reform Miscellaneous Act;
3. Costs; and
4. Such further and other relief as this Honourable Court deems fit.

[2] In its Defence BNS, perhaps unsurprisingly, denies that it breached its duty as mortgagee in the exercise of its power of sale, as it took all reasonable steps to secure the best possible price for the property, and accepted the best reasonably obtained price from the market. BNS also counterclaims for the following on the basis that the proceeds of sale of the mortgaged property did not realize the debt owed to it:

1. The sum of US\$126,897.88 (being equivalent to JA\$17,327,461.00 at a rate of exchange of US\$1.00: JA\$136.5465) as at the 18th October 2019.
2. The sum of US\$240,641.04 being interest at a rate of 9.5% up to the 16th December 2016 (being equivalent to JA\$32,858,691.00 at a rate of exchange of US\$1.00: JA\$136.5465) as at the 18th October 2019.
3. Interest at a rate of 9.5% per annum or (US\$33.03 per diem) on the principle balance of US\$126,897.88 on the said sum from the 17th September 2016 to the date of payment.
4. Costs.
5. Such further and other relief.

BACKGROUND

[3] In September 2005, Ms. Francis obtained a loan from DB & G Merchant Bank Limited in the amount of Four Hundred and Fifty Thousand United States Dollars **(US450,000.00)**. DB&G Merchant Bank Limited was bought by Scotia Group Jamaica Limited and the name was changed to Scotia DBG Merchant Bank Limited. BNS took over all of the assets and liabilities of Scotia DBG Merchant Bank Limited including the DB&G loan/mortgage portfolio. The loan was for the purpose of purchasing 371.3938 acres of land known as Hodges Pen in the parish of Saint Elizabeth registered at Volume 1071 Folio 840 of the Register Book of Titles. The term of the loan was twelve **(12)** months at a rate of interest of 9.5% per annum. Interest was to be paid monthly, with lump sum payments of the principal. All outstanding principal and interest became due at maturity. The loan was secured by a First Legal Mortgage over the property.

[4] As a pre-requisite for the mortgage, Ms. Francis was required to obtain a valuation of the property. For this purpose, she commissioned Mr. John Bruce, a licensed real estate dealer. Mr. Bruce, in his valuation report dated 19th August 2005, determined the market value of the property to be One Hundred and Sixty-Seven Million Dollars **(\$167,000,000.00)** and a forced sale value estimated at One Hundred and Twenty-Five Million Dollars **(\$125,000,000.00)**.

[5] Ms. Francis failed to repay the loan in the time stipulated and in the first place successfully renegotiated the loan to a term of twenty-four **(24)** months. It appears she reached a further accommodation with the Bank, and made monthly payments as required until about 2011 when she fell into default. She subsequently engaged with the Bank making several proposals to service the loan. None of the proposals coming to fruition and BNS exercised its power of sale to recover the funds. BNS issued a statutory notice on 6th February 2013. Prior to the issuance of the statutory notice, BNS had obtained a valuation from Grayhard Real Estate Co. Ltd dated 10th September 2012. The valuator assessed the market value of the property as One Hundred and Eleven Million Four Hundred Thousand Dollars **(\$111,400,000.00)** and a forced sale value of Eighty-Nine Million Dollars **(89,000,000.00)**.

[6] Ms. Francis remaining in default, BNS instructed C.D. Alexander Company Realty Limited to sell the property by way of public auction. The reserve price was fixed at One Hundred and One Million Dollars (**\$111,000,000.00**). Notice of the auction was advertised in the Daily Gleaner on four (**4**) occasions, the last two being the day before and the day of the auction. The public auction was held on 10th September 2013, however, no bids were received. BNS executed a Multiple Listing Agreement with Remax Elite to sell the property by way of private treaty. The offer for sale by private treaty was also advertised in the Jamaica Gleaner. This listing, though initially for a fixed period, remained in place until the Property was sold.

[7] BNS received no offers to purchase the property until 17th December 2015 and 2nd January 2016, when it received offers of Forty Million (**\$40,000,000.00**) and Forty-Two Million Dollars (**\$42,000,000.00**) respectively. On the 21st of January 2016, BNS accepted an offer for Forty-Two Million Dollars (**\$42,000,000.00**) by way of private treaty. The property was transferred to Carlton Dunkley and Nadine Michele Dunkley on 13th April 2016.

ISSUES

[8] The issues that arise for determination are:

1. Whether BNS took reasonable steps to obtain the best price available for the mortgaged property at the date of the sale? In particular:

(a) Whether the advertisements BNS placed in the Jamaica Gleaner sufficiently and fairly described the property?

(b) Whether BNS obtained a valuation prior to accepting the offer to purchase?

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[9] Counsel on behalf of the Claimant, Mrs. Emily Shields, submits that BNS failed to obtain the best possible price for the property in order to satisfy the Claimant's indebtedness, and failed to exercise due skill and care when treating with the sale of the property by selling the property at a gross undervalue. BNS at the time of the sale had in its possession a 2012 valuation which assessed the market value of the property as One Hundred and Eleven Million Four Hundred Thousand Dollars (**\$111,400,000.00**) and a forced sale value of Eighty-Nine Million Dollars (**\$89,000,000.00**). However, the property was sold for Forty-Two Million Dollars (**\$42,000,000.00**). Reliance was placed on **Kennedy v de Trafford** [1897] AC 180 and **Fisher and Lightwood's Law of Mortgage 11th edition**.

[10] It was contended that BNS ought to have obtained a current valuation prior to agreeing to the sale of the property. To this effect reliance was placed on **Rudolph Daley v RBTT** (unreported) Supreme Court, Jamaica, Claim No. CL 1995 D 162. The Allison Pitter valuation, which was obtained after the sale price was agreed to, assessed the market value of the property at Seventy to Eighty Million Dollars (**\$70,000,000.00 - \$80,000,000.00**) and a forced sale value of Sixty-Four Million Dollars (**\$64,000,000.00**), more than the agreed sale price. However, BNS with this knowledge, did not request more money from the purchaser or further advertise the property. Counsel also submits that BNS failed to seek rectification regarding the disparity between the valuations. To this effect Counsel relied on **Joan Adams v Workers Trust and Merchant Bank** Suit No CLA 130/1989 and **Khiatani Jamaica Ltd v Sagicor Bank Jamaica Ltd** [2016] JMMC Comm 34.

[11] Counsel further contends that the advertisements for the sale of the property which were placed in the Jamaica Gleaner did not satisfactorily describe the property and point to its special value so as to attract purchasers. She relied on **Rudolph Daley v RBTT** (Supra) and **Khiatani Jamaica Ltd v Sagicor Bank Jamaica Ltd** (Supra).

[12] Further, it is Counsel's submission that in assessing any damages found to be due to Ms. Francis, the valuation of Mr. Shawn Gray-Logan of Grayhard Real Estate Co. Ltd should be preferred over the valuation of Mr. Connel Steer of Allison Pitter & Co. She

contends that (1) Mr. Gray-Logan is more familiar with parcels of land in the Luana/Hodges area due to the operation of his office in Santa Cruz, St. Elizabeth, (2) that he conducted appraisals for lands and sub-divisions very close to the subject land, and (iii) he was able to find suitable comparables based on the attributes of land.

[13] Mrs. Shields contends that Mr. Steer had concluded that the property's highest and best use was agricultural even before visiting the property. She further contends that he does not have the same familiarity with the area as Mr. Gray-Logan and was not familiar with the lots used as comparables. Additionally, he did not visit any of these comparables and neither was he able to locate his anchor/chief comparable. Counsel also argued that Mr. Steer's chief comparable was less than a third of the the size of the property and he could not explain how adjustments were made for the size of the property and the date of the sale. In light of the forgoing, Counsel submits that Mr. Steer's evidence should not be accepted as to the market value of the property at the time of the sale.

[14] It was further submitted that the Court is not obliged to accept the uncontradicted expert evidence of Mr. David Thwaites. She relied on **Griffiths v Tui (UK) Ltd** [2021] EWCA Civ 1442. Counsel submits that Mr. Thwaites evidence should be rejected on the following basis:

He did not visit the subject property at all;

He only read the reports that were provided to him and made an assessment based on what he was given;

He did not speak with or interview any of the people who did valuations on the subject property in an attempt to get a better understanding of the reasons for their values;

He incorrectly stated in his report that he did not know the approach used by John Bruce in his valuation...though the report clearly says the comparable method was used as comparable properties were analysed...;

He did not visit any of the three comparables used by Allison Pitter nor any of the three comparables used by Grayhard;

He preferred the Allison Pitter valuation and accepted the use of the Allison Pitter description of land which was described as 'rice land' and which was remote agricultural land - land inferior in many ways to the subject - including size and location;

In analysing the reports sent to him by the Defendant, he asserts that "applications for residential use would likely be denied...As is evident by the evidence, there is now actual happenings to the contrary - subdivision Approvals have been granted for portions of the land...;

He asserts in his report that based on the zoning of the area residential lots would not be accommodated, all the time supporting his argument by a quotation taken from Page 154 under Policy RAP7 of 'The Town and Country Planning Authority (St. Elizabeth Parish) Provisional Development Order, 2018. When a copy of Page 154 under Policy RAP7 of the 2018 Order was shown to Mr. Thwaites, he was forced to admit that his quotation is not present there. He says he used an online version of the 2018 document - he has yet to provide the online version on which he relies;

He prefers the valuation of Allison Pitter without demonstrating to the court any proper or sensible basis for so doing...;

David Thwaites' evidence makes a mockery of common sense and is to be discarded.

[15] It is the contention of Counsel Mrs. Shields that the measure of damages is the difference between the market value, as decided by the Court, and the sale price obtained by the mortgagee. Reliance was placed on **Joan Adams v Workers Trust and Merchant Bank** (supra) and **Andrea Ball v VMBS** [2017] JMSC Civ 171.

[16] Counsel submits that the Court ought to find that the 2012 Grayhard valuation with a yearly mark up of two percent (**2%**) was the market value at the time of the sale. Hence, the market value would be a minimum of One Hundred and Twenty Million Dollars (**\$120,000,000.00**). Consequently, Counsel submits that the difference between the market value (**JMD \$120,000,000.00**) and actual the sale price (**\$42,000,000.00**) is the measure of damages (**\$78,000,000.00**).

[17] In relation to interest, Counsel contends that interest should be calculated on the sum of Seventy-Eight Million Dollars (**\$78,000,000.00**) at three percent (**3%**) per annum from the date of the filing of the claim to the date of the judgment, and six percent (**6%**) from the date of the judgment to the date of the payment of damages.

[18] It was submitted that interest on the sum, owed by Ms. Francis to BNS, after the date of transfer of interest to the new owners should not be charged to Ms. Francis as interest continued to accrue due to BNS' breach of duty.

[19] Lastly, Counsel submitted that after setting off the sums owed by Ms. Francis to BNS, the balance should be paid to Ms. Francis in United States Dollars being that the loan was serviced and negotiated in United States Dollars.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[20] Counsel Mrs. Daniella Gentles-Silvera contends that BNS did not breach its duty to act in good faith when exercising its power of sale over the property. She submits that BNS is not a trustee of the power of sale for the Claimant, as such the Bank is entitled to exercise the power for its own benefit, which is to recover the debt owed. Further, BNS is not under any obligation to postpone exercising its power of sale in circumstances where the pursuit of a particular avenue may increase the market value of the property, or the market is depressed. The Bank may sell the property whenever it chooses to do so, as long as it is acting in good faith and has taken reasonable care to obtain the best possible price. In support of these submissions, Counsel relied on **Warner v Jacob** [1882] 20 Ch. D 220, **Cuckmere Brick Co. Ltd. and Another v. Mutual Finance Ltd.** [1971] 2 W.L. R 1207, **Tse Kwong Lam v Wong Chit Sen and Others** [1983] 1 W.L.R. 1349, **Silven Properties Ltd v Royal Bank of Scotland plc** [2004] 1 W.L.R 997 and **Rudolph Daley v RBTT Bank** (unreported) Supreme Court, Jamaica, Claim No. CL 1995 D 162.

[21] It is the further submission of Counsel that BNS did not ignore the Mortgagor's interest when treating with the property as BNS, for several years, had entertained numerous proposals put forward by Ms. Francis to pay off the debt. However, Ms. Francis neither complied with the terms of any agreement reached, nor obtained the necessary regulatory approvals, nor provide the relevant documentation in order to ground the proposals.

[22] BNS denies the contention that it acted without due skill and care when treating with the sale of the property. Counsel submits that BNS took all reasonable precautions in order to have the property sold at the true market value obtainable at the time of the sale. She submits that the sale of the property was advertised in the Jamaica Gleaner four (4) times between August and September 2013, three (3) times between January

and March 2014 and continuously advertised on real estate multi-listing sites from November 2014 to January 2016 when it was sold. She argued that BNS could not have been expected to wait to recover its debt. She relied on **Cornwall Agencies Limited v The Bank of Nova Scotia Jamaica Limited and Amalgamated (Distributors) Limited** [2016] JMCA Civ 49.

[23] Counsel also submits that in attempting to obtain the true market value of the property, BNS obtained an updated valuation report from Allison Pitter & Co prior to finalizing the sale. This is in keeping with **Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** [2020] JMSC Comm 34. She accepts that the property was sold for less than the forced sale value in the Allison Pitter report, however, Counsel contends BNS was not legally bound to sell the property for the forced sale value. Additionally, the bank had been trying to sell the property at the sale value of the three (3) valuations reports.

[24] Further, Counsel Mrs. Gentles-Silvera rejects the contention that BNS should have rectified the disparity between the three (3) valuation reports. She submits that BNS was not bound to consider the two earlier valuation reports done over twelve (12) and four (4) years ago. Counsel submits that the only valuation which was necessary was the report which was contemporaneous with the date of the sale, as such, the two previous valuation reports were irrelevant. To this effect she relied on **Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** (supra).

[25] In response to the Claimant's submissions concerning the inadequacies of the advertisements placed in the Jamaica Gleaner, Counsel Mrs. Gentles-Silvera contends that the advertisements did in fact contain the features stated in the Grayhard valuation report, save and except for specific adjectives which it was not bound to include. Further, she submits that the Claimant has proffered no evidence to the effect that the inclusion of these adjectives would have led to the sale of the property.

[26] In response to Counsel Mrs. Shields' submission that the new owners had subdivided a portion of the property and obtained a mortgage, BNS contends that the

mortgage was granted three **(3)** years after the Allison Pitter valuation and the terms of such are unknown. Further, the land was subdivided in 2021 and it is well accepted that the value of a property increases if it is subdivided as opposed to one plot of land. Lastly, the true market value of the lots cannot be ascertained as there is no evidence to suggest that any of the lots were actually sold. Additionally, the new owner obtaining a better value for the property could be attributed to the new owner being a better salesman. To this end she relied on **Moses Dreckett v Rapid Vulcanizing Co Ltd** (1988) 25 JLR 130 (CA).

[27] Mrs. Gentles-Silvera argues that the sale of a mortgaged property at an undervalue does not necessarily mean that the mortgagee did not act in good faith and did not take reasonable steps to obtain the true market value. She relied on **Waring (Lord) v London and Manchester Assurance Company Limited & Others** [1934] All E.R. 642, **N.M. & M Holdings Ltd v The Bank** (1993) 30 J.L.R. 422, **Cowell Anthony Forbes (Representative of Estate of Wilfred Emmanuel Forbes, deceased), Cowell Anthony Forbes v Miller's Liquor Store (Dist) Limited** [2016] JMCA Civ 1, **Moses Dreckett v Rapid Vulcanizing Co Ltd** (Supra) and **Cornwall Agencies Limited v The Bank of Nova Scotia Jamaica Limited and Amalgamated (Distributors) Limited** (Supra).

[28] It was also submitted that the expert evidence of Mr. David Thwaites and the evidence of Mr. Steer should be preferred over that of Mr. Gray-Logan because they are more qualified and have more years of experience in the field. Mr. Thwaites and Mr. Steer are Chartered Valuation Surveyors and are members of the Royal Institute of Chartered Surveyors. This involved completing a degree programme and job training, whilst, Mr. Gray-Logan has a diploma from the University of Technology ("**UTECH**").

[29] Further, Mr. Gray-Logan had stated that the property's highest and best use is residential class. Mr. Gray-Logan therefore selected comparables to the property which were zoned residential. Counsel Mrs. Gentles-Silvera however contends that Mr. Gray-Logan had not sought the advice of the Parish Council in order to ascertain whether the property had been approved for residential development. Ultimately, Counsel contends that it was because of this selection that Mr. Gray-Logan ended up with a "*erroneous higher valuation*".

[30] It was also Counsel's submission that Mr. Thwaites nor Mr. Steer needed to have physically visited the comparables in order to inspect them as they could be viewed on IMap.

[31] Lastly, it was submitted that in selling the Property the net proceeds of the sale were applied to the outstanding mortgage, however, there was still a sum owing to BNS and Ms. Francis should pay the principal and interest plus the contractual rate of interest of 9.5% on the principal balance to the date of judgment. In the alternative, Counsel submits that if the Court does not agree with its submissions, then Ms. Francis would be entitled to the difference in the sale price and the market value per the Allison Pitter report, however, a deficit would remain owing to the bank. To this end, Counsel submits the deficit should be deducted from the difference to be paid to Ms. Francis.

LAW

Duty of Mortgagee

[32] The submissions and cases relied on require the Court to first consider what is the duty owed by the mortgagee to the mortgagor when exercising a power of sale. For this purpose, it is convenient to start with the case of **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] 2 All ER 633 ("**Cuckmere Brick Co Ltd**") and the oft-cited statement of Lord Justice Salmon's that:¹

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: compare, for example, Kennedy v de Trafford with Tomlin v Luce ((1889) 43 ChD 191 at 194). The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.

¹ [1971] 2 All ER 633, pg 643

Lord Justice Salmon, after conducting a review of **Kennedy v De Trafford** (“**Kennedy**”) [1897] AC 180, **Tomlin v Luce** (1890) LR 43 Ch D 191 (“**Tomlin**”) and other cases, further stated:²

I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution 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.

These statements have been accepted in this jurisdiction as being the applicable law.

[33] In **Cornwall Agencies Limited v The Bank of Nova Scotia Jamaica Limited and Amalgamated (Distributors) Limited** [2016] JMCA Civ 49 (“**Cornwall Agencies Limited**”), Panton P, with whose judgment the other Judges of Appeal concurred, discussed the reasons for judgment of the law lords in **Cuckmere Brick Co.** and expressed a preference for the term, “*to take reasonable care to obtain a proper price*” as used by Lords Cross and Cairns instead of “*true market value*” used by Salmon LJ.

[34] At this juncture it is important for the Court to note that notwithstanding the mortgagee’s overarching duty of good faith, the mortgagee is not a trustee of the power of sale, and as such, can act in its own interest. Therefore, the mortgagee is not obliged to take actions to increase the value of the property or delay the sale of the property in hopes that the market improves. In **Cuckmere Brick Co** Salmon LJ further stated:³

*It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. **He has the right to realise his security by turning it into money when he likes. 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***

² **Ibid**, pg 646

³ [1971] 2 All ER 633, pg 643

exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor. [Emphasis mine]

The dicta of Salmon LJ was affirmed by Lord Templeman in **Tse Kwong Lam v Wong Chit Sen** [1983] 3 All ER 54, Lord Templeman held.⁴

*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 a better price or to adopt a piecemeal method of 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.*** [Emphasis mine]

[35] Earlier authorities on this subject were examined in **Silven Properties Ltd and another v Royal Bank of Scotland plc and others** [2004] 1 WLR 997 (“**Silven Properties Ltd**”), a case concerning the receiver's entitlement to sell the property without awaiting any increase in the property value. Lightman J stated:⁵

*A mortgagee 'is not a trustee of the power of sale for the mortgagor'. This time-honoured expression can be traced back at least as far as Jessel MR in **Nash v Eads** (1880) 25 Sol Jo 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed: see **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] 2 All ER 633 at 646–647, [1971] Ch 949 at 969. A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative restatement of this principle is to be found in **Raja (administratrix of the estate of Raja (decd)) v Austin Gray** (a*

⁴ [1983] 3 All ER 54, pg 59

⁵ [2004] 1 WLR 997, para 14

firm) [2002] EWCA Civ 1965 at [55], [2003] Lloyd's Rep PN 126 at [55] per Peter Gibson LJ. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: see *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839, [1990] 1 AC 536. It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 at 59, [1983] 1 WLR 1349 at 1355.

From this it can be asserted that the mortgagee may exercise the power of sale to its benefit even if the effect was to the disadvantage of the mortgagor. However, in exercising this power, the mortgagor must act in good faith and for a proper purpose.

[36] The final point is that a mortgagee who exercises his power of sale owes a duty to take reasonable precautions to obtain the true market value or a proper price for the property at the time of the sale. In **Silven Properties Ltd**, Lightman J puts it this way:⁶

When and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for the mortgaged property at the date of the sale, and not (as the claimants submitted) the date of the decision to sell. (Emphasis mine.)

The question what constitutes reasonable care continues to be the subject of discourse in cases.

[37] In **Daley, Rudolph v RBTT Bank (Ja) Ltd** (unreported) Supreme Court, Jamaica Claim no. CL 1995/D 162 ("**Rudolph Daley**"), judgment delivered 30th January 2007, instructive on the point. Sykes J (as he then was) said:⁷

A prudent person would always seek the best possible price at the time the power was being exercised. Proof that an attempt was made to have the best possible price at the time was often evidenced by (i) getting a current valuation if there is a sale by private treaty; (ii) advertise the property properly; (iii) seeing to it that the property is accurately described in the advertisement and (iv) where appropriate a properly conducted auction. This is by no means an exhaustive list and neither do they all apply at the

⁶ [2004] 1 WLR 997, pg 1005 para 19

⁷ Supreme Court, Jamaica Claim no. CL 1995/D 162, judgment delivered 30th January 2007, para 51

same time in each case, but it captures, in my view, what the case law regards as important bench marks against which any purported sale by the mortgagee is measured.

[38] A helpful summary of these principles can be found in the case of **Aodhcon LLP v Bridgeco Limited** [2014] 2 ALL ER (Comm) 928 (“**Aodhcon**”). In **Aodhcon** the issue was whether a bridging loan company had taken reasonable care to sell the property at the best price reasonably obtainable. **Aodhcon** was a special purpose company established to develop a property. It sought a bridging loan from Bridgeco to complete the redevelopment of the property and to enable it to repay its bank loan. Bridgeco obtained a mortgage valuation which indicated that, as of March 2010, the value of the property with vacant possession was One Million and Four Hundred Thousand Pounds (**£1,400,000.00**) or One Million and Two Hundred and Fifty Thousand Pounds (**£1,250,000.00**) on a ninety (**90**) day sale. Bridgeco advanced Seven Hundred and Fifty Thousand Pounds (**£750,000.00**) over a six (**6**) month term, secured by way of a first legal charge over the property. **Aodhcon** proved unable to sell the property and voluntarily delivered up possession to Bridgeco. In March 2011, Bridgeco exchanged contracts with a third party for a sale price of Eight Hundred and Fifty-Two Thousand Pounds (**£852,000.00**).

[39] **Aodhcon** argued that Bridgeco had breached its duty as mortgagee in possession to sell the property for the best price reasonably obtainable. In a helpful judgment, the court listed the relevant applicable principles:⁸ I have emphasized the portions particularly relevant to the matters under consideration.

- (i) If a mortgagee decides to sell the mortgaged property he has a duty, in equity, to take reasonable care **to sell for the best price reasonably obtainable, at the date of exchange of contracts** (subject to (iv) below);

⁸ [2014] 2 ALL ER (Comm) 928, para 151

- (ii) How this duty is to be discharged requires the mortgagee to make an informed judgment and, **because judgment is required, there are no steps which the mortgagee must definitely take;**
- (iii) Generally, it is for the mortgagee to decide on the manner of sale, if appropriate after having sought expert advice. **The property should be properly advertised; that is, advertised sufficiently frequently and sufficiently widespread to reach the appropriate pool of prospective purchasers;**
- (iv) The mortgagee is entitled to decide the length of time the property should remain available for sale, subject to this: the property must be fairly and properly exposed to prospective purchasers;
- (v) The mortgagee is not under a duty to improve the property for sale. The mortgagee is not under a duty to pursue or obtain a planning permission and, it seems to me, by parity of reasoning, the mortgagee is not under a duty, in a case such as this one, to remove incumbrances like the Grant from the property. **But a mortgagee is under a duty to bring to the attention of prospective purchasers potential advantages that might be achievable; so that, for example, prospective purchasers ought to be informed of the property's development potential;**
- (vi) Where the sale price is just above the sum required to discharge the mortgagor's outstanding debt, the court will scrutinise the sale with particular care;
- (vii) There is a recognition that the fact of repossession can taint the property so resulting in it only being capable of sale at a reduced price;
- (viii) **The mortgagee will not have breached his duty unless he is 'plainly on the wrong side of the line';**

(ix) **The mere fact that a higher price might have been obtained does not inevitably mean that the duty has been breached;**

(x) The burden of proving a breach of duty by the mortgagee rests on the mortgagor. [Emphasis mine]

[40] The court in **Aodhcon** made it very clear that the duty of a mortgagee when exercising the power of sale to take reasonable care to achieve the best price reasonably obtainable is not the same thing as a duty to obtain the best price reasonably obtainable. There was indeed a link between the breach of the duty and the duty to act in good faith as a breach of the duty to act in good faith would be a breach of the duty to exercise reasonable care to sell the property for the best price reasonably obtainable.

Duty of Good Faith

[41] The duty of good faith has been a central factor in these proceedings and bears some further consideration. A breach of the duty of good faith may arise where the sale of the property was tainted with some element of dishonesty or impropriety or based on the circumstances in a particular case. Lord Herschel, in **Kennedy**, in commenting on what may constitute discharging a duty of good faith indicated:⁹

My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J., in the Court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the

⁹ [1897] AC 180, pg 185

mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

[42] The dicta of Lord Herschell was applied in **Corbett v Halifax Building Society** [2002] EWCA Civ 1849 (“**Corbett**”). The facts of **Corbett** are that the bank had a provision in its in-house rules which states that “*under no circumstances may staff of the [1st defendant] ... or their families purchase a property in possession*”. The 2nd and 3rd defendants wished to purchase the property and so the 2nd defendant conceived a plan to purchase the property in the name of his uncle. His uncle purchased the property and sold it to the 2nd and 3rd defendants. On this basis the claimants alleged that the sale should be set aside on the basis of fraud or at an undervalue. The trial judge had set aside the sale on the ground that the sale was at an undervalue and the 2nd and 3rd defendants were not purchasers in good faith. The Court of Appeal allowed the appeal on the basis that the 2nd and 3rd defendants’ dishonesty in acquiring the property and the sale of the property at an undervalue were independent of each other. The 2nd and 3rd defendants had no notice of the undervalue and as such were not purchasers in good faith. Further, setting aside the sale after many years had elapsed would be inequitable. The foregoing case highlights that the dishonesty or impropriety alleged must be directly material to the ground calling the transaction into question.

[43] The court in **Corbett** also looked at circumstances which may contravene the duty of good faith though making the point that what should be done will depend on the particular case. Pumfrey J said:¹⁰

These duties are not inflexible. What a mortgagee or a receiver must do to discharge them depends upon the particular facts of the particular case. A want of good faith or the exercise of powers for an improper motive will always suffice to establish a breach of duty. What else may suffice will depend upon the facts. Tse Kwong Lam v Wong Chit Sen [1983] 3 All ER 54, [1983] 1 WLR 1349 is a very good example. The fact that the mortgagee had an interest in the purchasing company placed the mortgagee under an obligation to show that a proper price had been obtained. This was an obligation more onerous than would otherwise have been required. It is true that Lord Herschell in Kennedy v De

¹⁰ [2002] EWCA Civ 1849, pg 193

Trafford ([1897] AC 180, [1895–9] All ER Rep 408) expressed the duty on the mortgagee in terms much less onerous than the terms in which Salmon LJ expressed the duty in the Cuckmere Brick case. That does not make the two cases inconsistent with one another. The facts that constituted the mortgagors' complaints were different. And the duty in equity appropriate to have been owed by a mortgagee selling in 1888 is not necessarily of the same weight as the duty appropriate to have been owed by a mortgagee selling in 1967. Equity is at least as flexible as the common law in adjusting the duties owed so as to make them fit the requirements of the time.

It can be gleaned from the discussion above that the mortgagee, in treating with the sale of the property, must take into account the interests of the mortgagor. If not, then there may exist circumstances in which there has been a breach of good faith.

Undervalue as evidence of Bad Faith

[44] Taking into account the authorities cited above, it is also abundantly clear that the sale of the mortgaged property at an undervalue, though it may be a powerful indicator, is not, without more, evidence of bad faith. This was the view of the Court of Appeal in **Cowell Anthony Forbes (Representative of the Estate of Wilfred Emmanuel Forbes V Miller's Liquor Store (Dist) Limited** [2016] JMCA Civ 1 (“**Cowell Anthony Forbes**”) where the Court cited the dicta of Kay J from **Warner v Jacob** 20 Ch D 220, as expressed below:¹¹

“...a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.”

In applying the dicta of Kay J to the facts in **Cowell Anthony Forbes**, Brooks JA stated:¹²

In Waring, the property was sold by the mortgagee for £186,000 although it had been previously put up for auction with a reserve price of £220,000. The attempt at auction was unsuccessful. Crossman J rejected the contention that it had been sold at a gross undervalue.

¹¹ [2016] JMCA Civ 1, para 49

¹² *Ibid*, para 49-51

In the present case, the sale price in the agreement for sale with Duncarl was \$8,000,000.00. The premises had been sold to the Forbeses for \$5,000,000.00. Mr Miller gave evidence that the Forbeses had told him that they were trying to sell them themselves but were unable to secure an offer better than \$8,000,000.00. Less than a month after entering into an agreement with Duncarl, however, the premises were valued at \$12,000,000.00.

Having considered all this evidence, the learned trial judge held that there was no bad faith involved in the sale. She concluded, therefore, that the Forbeses' equity of redemption was extinguished. She said at paragraph 22:

"There was no bad faith on the part of [Miller's] and therefore no basis on which [Miller's] should be restrained from completing the sale of the property [to Duncarl]. The equity of redemption was therefore extinguished."

The finding was not unreasonable. As a result, there can be no interference with the learned trial judge's findings in respect of these issues and therefore the grounds in relation to them fail.

[45] In the case at bar, two issues arose as to whether the mortgagee obtained the best price available, (1) whether it advertised the property sufficiently? and (2) whether it obtained a current valuation to guide it in the sale?

Sufficiency of Advertisement

[46] A discussion of the role of advertising usually starts with the case of **Tomlin** which emphasised the importance of accurately describing the mortgaged property. In **Tomlin** the first mortgagee's agents were found liable for negligence as they had misdescribed the property. This emphasis on correct, clear and adequate advertising is further demonstrated by the cases reviewed below.

[47] In **Pendlebury v Colonial Mutual Life Assurance Society Ltd.** (1912) 13 C.L.R. 676 ("**Pendlebury**"), Griffith CJ gave the rationale for the necessity of some form of

advertisement of the property by the mortgagee when enforcing its power of sale. He stated:¹³

It is not disputed that some advertisement was necessary. In my opinion, the object of a sale by auction is to secure a fair price for the property offered by means of competition between probable purchasers. And the object of giving public notice of a sale by auction, whether by advertisement, bellman, posters or otherwise, is to bring the subject of the sale to the notice of such probable purchasers, and so to induce such competition as will be likely to secure a fair price.

[48] This case concerned the auction of farm land which was worth Two Thousand Pounds (**£2000.00**) but was sold for Seven Hundred and Twenty Pounds (**£720.00**). It was claimed that the advertisement for the sale of the mortgaged property insufficiently described it. The claimant also contended that the advertisement was not circulated in the local newspaper and there were a number of material omissions in the advertisements i.e. no reference was made to the exact location of the property or the quality of the soil. The particulars of the advertisement included:

*Tuesday 14th June.
At half-past 2 o'clock.
AUCTION SALE
By order of the Mortgagees.
At the Rooms 432 Collins Melbourne.*

" J. T. Brown and Co. Auctioneers Wangaratta and 432 Collins Street Melbourne are instructed by the Mortgagees to offer for sale by Public Auction as above at half-past 2 o'clock in the afternoon All That piece or parcel of land being Allotment 21 in the Parish of Curyo County of Karkaroo and containing 640 acres and being more particularly described in Agricultural Lease

Volume 853 Folio 170439.

"This property is about seven miles from Curyo Railway Station is well fenced and watered, with useful buildings.

"Terms at sale."

¹³ [1912] 13 C.L.R., pg 683

The omitted attributes of the land included:

It appeared in evidence that the land to the north-west of Curyo (where the land in question is situated) is very good, while the land to the east of that township is very poor. Nor would a reader know whether the soil was good, bad or indifferent -red and loamy, or sandy. He would not know that the land was all cleared that the land was all cleared and had all been under crop, or that about 250 acres were actually sown with wheat (as the defendants say they knew), or that it was subdivided (as it was) into paddocks, or that it was within a mile of the Trust Water Channel, or the amount of the balance due to the Crown, which was a most important matter to a purchaser.

[49] The trial judge had found that the mortgagee had acted honestly. However, the High Court had reversed the decision based on the inadequacy of the advertisement. Griffith CJ found that the mortgagee should have advertised the property locally as the buyers were likely to come from the locality where the land was situated. These were country residents relying mostly on local papers for announcements of local interest. As to the content of the advertisement, he felt that where residents would have some knowledge of the whereabouts and advantages of the property, so much need not be specified. Regarding the situation and quality of the land, he asked the question, to what extent dwellers in Melbourne who may not be able to travel hundreds of miles to inspect a property could be expected to take an interest in it. Griffith CJ had this to say about the advertisement,¹⁴

The society and their chief officials being in possession of all this knowledge favourable to the prospects of a good sale, ignored it and adopted the means described, and nothing further or better, to bring purchasers. The question is not whether they ought to have advertised all that they knew and whether they should have resorted, not only to local newspapers, but to posters and handbills, for the attraction of purchasers. Let it be conceded that not all of this was to be expected of these mortgagees. But were they justified in silence as to all of the most material advantages of the property, and in adopting a means of notification which upon the evidence was only one of many, and ignoring every other means, including that which would appeal to any man of common sense, desirous of obtaining a fair price, as almost indispensable? Whatever may be considered a fair regard for the mortgagor's interest beyond the mere

¹⁴ **ibid**, pg 698

desire to repay themselves their advance, this course of conduct shows all too plainly that the interest of this helpless farmer weighed not a feather in the balance with the respondents.

That which took place at the sale brings this absence of regard into stronger relief. Not a word was said by the auctioneer to the meagre attendance as to the salient advantages of the property. That measure of information would not have cost a penny. The poor and curt advertisement was read by way of "a short speech." That was all.

He found the omissions in the advertisement to be as significant as the misstatements in **Tomlin**.

[50] In **Cuckmere Brick Co Ltd.**, the property was advertised as having planning permission to build houses, but no mention was made of a further permission to build flats. There was evidence before the court that the property would have attracted a higher price if the planning permission for flats had been included in the advertisement. On this basis the court found that the defendants failed to take reasonable precautions in relation to the sale.

[51] In **Hilstan Holdings Ltd v Barbados Development Bank And Another** [1979] 36 WIR 79 ("**Hilstan Holdings**"), a Barbadian case concerning the authority of a debenture-holder to appoint a receiver, Sir William Douglas CJ stated:¹⁵

In my view it is impossible to lay down any hard-and-fast rule as to how long and where a property should be advertised. The reasonableness of the advertisement must depend on all the circumstances surrounding the sale.

In that case the court was of the view that a delay in selling the property would cause greater deterioration to the unfinished buildings and further erosion and damage to the seawall, this would in turn result in the destruction of the whole property. In light of this view, it was held that five **(5)** advertisements over a period of five **(5)** weeks in the national newspaper was adequate.

¹⁵ [1979] 36 WIR 79, pg 90

[52] In **Tse Kwong Lam**, the mortgagee took possession of the mortgaged property and exercised its power of sale by arranging for the property to be sold by public auction. The mortgagee placed advertisements of the auction in three **(3)** newspapers circulating in Hong Kong for publication on June 9th, 16th and 24th. The property was described as:

54/90th parts of the building known as nos. 52 and 54, Cheung Sha Wan Road, registered in the Land Office together with the sole and exclusive right and privilege to hold, use, occupy and enjoy the numbered shops, offices and flats of (t)he building which remained unsold.

The particulars and conditions of sale were prepared by the mortgagee's solicitors and the conditions of sale stipulated that there would be a reserve price and that the vendor and/ or his agents reserved the right to bid generally or to withdraw the property at any time. Additionally, the purchaser was to pay 20 per cent of his purchase price on the date of the auction and the balance to be paid on or before July 23, 1966 and time was made of the essence. The Privy Council found that there was “*no evidence that this advertisement did more than give notice of the bare fact of the auction coupled with a minimum description of the property. The particulars and conditions of sale contained only the legal requirements*”. Based on the foregoing finding and other findings, the court held that where the mortgagee had an interest in purchasing the mortgaged property, the burden on the mortgagee to prove that all reasonable precautions had been taken to obtain the best obtainable price was more onerous.

[53] In **Meftah v Lloyds TSB Bank plc** [2001] 2 All ER (Comm) 741 (“**Meftah**”), a case which required an urgent sale of the property, the claimant contended that the mortgaged property was sold at an undervalue as it was not fully exposed to the open market. Further, he contended that the Financial Times advertisement, the press release, and the information pack failed to bring out the urgency of the sale. The informational pack available stated:

The Administrative Receivers wish to maximise the value of the business and its assets by securing an immediate sale. Parties who wish to pursue their interest should contact the above address [the Receivers' office at Kidsons Impey, Hove] as quickly as possible.

The court held that no criticism could be made of the manner in which the receivers had gone about the sale as the degree of exposure to the market must be evaluated in the light of the circumstances. **Lawrence Collins J** held:¹⁶

Where an urgent sale is necessary, limited exposure to the market is recognised as being justified. The property was advertised in the Financial Times and press releases were sent out to international, local and trade publications. The fact that the property was being sold was well known in the industry and received wide press coverage. 70 to 80 enquiries were received, and information packs were sent out.

I do not consider that any criticism can legitimately be made of the way in which the receivers went about the sale. It was suggested that they failed to ensure that third parties in the open market had impressed upon them the necessary degree of urgency that receivers perceived. It is true that there was no reference to urgency in the Financial Times advertisement or in the press release, but the information pack made the urgency clear, and no commercial organisation will be unaware that it is the essence of a sale by receivers that their aim is to sell as soon as possible. The only real expressions of interest came from those who were associated with Santa Pod or with drag racing or with motor sport. There is absolutely no reason to believe that the receivers would have had other indications of interest, or that the expressions of interest they did receive would have been at a higher level or more firmly financed if (as is alleged) the information pack had been more informative.

[54] The position of the Learned Judge in **Hilstan Holdings** was echoed by the Court in **Aodhcon**, where the claimant contended that the defendant sold the property at undervalue in breach of the duty of good faith. The court drew the following conclusions:¹⁷

*It is a matter for the mortgagee how that general duty is to be discharged in the circumstances of any given case. Subject to any restrictions in the mortgage deed, it is for the mortgagee to decide whether the sale should be by public auction or private treaty, just as it is for it to decide how the sale should be advertised and how long the property should be left on the market. **Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, in respect of which there can, almost by definition, be no absolute requirements. Thus (as the judge recognised at p 68F of his judgment) there is no absolute duty to advertise widely. As he correctly put it, at p 69A***

¹⁶ [2001] 2 All ER (Comm) 741, para 90-91

¹⁷ [2014] 2 All ER (Comm) 928, pg 954

'What is proper advertisement will depend on the circumstances of the case.'

Ultimately the court held:¹⁸

*If a mortgagee decided to sell the mortgaged property he had a duty, in equity, to take reasonable care to sell for the best price reasonably 928 All England Law Reports [2014] 2 All ER (Comm) reasonable obtainable. How that duty was to be discharged required the mortgagee to make an informed judgment and there were no steps which the mortgagee had to take. **It was for the mortgagee to decide on the manner of sale, if appropriate after having sought expert advice. The property should be advertised sufficiently widely, and fairly and properly exposed to prospective purchasers.** [Emphasis mine]*

[55] Pellucid throughout the cases is that (1) what actions are sufficient will depend on the circumstances of each case and (2) the mortgagee's actions are not to be viewed in isolation but in the full circumstances of the case.

Valuation

[56] In **Diane Jobson v Capital & Credit Merchant Bank Limited** (unreported) Court of Appeal Jamaica SCCA 113/2002 judgment delivered on 29 July 2005 ("**Diane Jobson**"), the contention was that the land was sold at an undervalue and that the bank had not obtained a current valuation. Cooke JA indicated the purpose of the valuation. He stated:¹⁹

*It is my view that in the quest for objectivity the use of a reliable valuation **in most cases**, as in this, will provide an important criterion in determining what was the true market value of the mortgaged property. [Emphasis mine]*

[57] The **Aodhcon** case confirms that the focus should not be on value alone but on the sale in the circumstances as a whole, and whether the mortgagee took reasonable care to sell for the best price reasonably obtainable.

¹⁸ **Ibid, pg 928-929**

¹⁹ Para 14

[58] This brings the Court to a consideration of **James, Bruce v Jamaica Money Market Brokers Merchant Bank Limited** [2020] JMCC COMM 34, a case of this court on fairly similar facts. Palmer Hamilton J found that by the mortgagee failing to obtain a current valuation report when they exercised their power of sale in 2015, the mortgagee failed to ensure that the best possible price could be obtained for the property. As such the mortgagee did not act reasonably. Palmer J relied on the following dicta of Sykes J in **Rudolph Daley**:

...Where there is to be a sale by private treaty, as in this case, it seems that anything less than a current valuation by a reputable valuator is extremely unlikely to meet the test established by equity...In this area of law, it cannot be said that the sale of the property, in the absence of a current valuation, was conducted in the way that the sale by private treaty is ordinarily conducted in a supposedly arm's length transaction." The cases are pellucid that what is to be considered is all the circumstances, of which the valuation is but one factor and prudence will often dictate that one be obtained. In some instances, an up to date valuation will be necessary.

Sykes, J stated further at paragraph 86:

The bank failed in its duty to act as a mortgagee should when exercising the power of sale. The absence of a current valuation in a sale by private treaty is powerful evidence that the bank failed to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell... [my emphasis]

Respectfully, I would not apply the same rationale as my sister to the circumstances of this case. While I accept that the statement of Sykes J accurately reflects the law, I do not read the cases to indicate that in every circumstance where there is no current valuation, the mortgagee would have failed in its duty to take reasonable care to obtain the best price. The cases show that what is to be considered is all the circumstances, of which the valuation is but one factor. In some instances, an up to date valuation will be necessary and prudence will often dictate that one be obtained.

[59] I am guided in this position by the Judgment of the Court of Appeal in **Cornwall**, not referred to by Palmer-Hamilton J, also a case on fairly similar facts. Panton P recounted all the steps taken by the mortgagee in exercising its power of sale. He noted that the public auction held was "*disastrous*" and had "*no respectable or acceptable bid*". Consequently, the property was listed with multiple dealers and was sold, after a year's

wait, to the tenant of Cornwall Agencies, Amalgamated Distributors. He further highlighted that there existed no evidence of any other entity or individual which was willing to purchase the property at a higher rate. In concluding, Panton P noted that despite all efforts to sell the property at the market value, the mortgagee was unable to do so and as such, sold the property for the best price it could have reasonably obtained. Panton P clearly accepted that the mortgagee had done all that it could have done to secure the best reasonably obtainable price.

ANALYSIS

[60] I have taken the time to conduct this review of the law, even though there is general agreement to set the background against which the particular facts of this case must be examined.

[61] The main facts relating to the terms of the loan, the default, the advertisement, the auction, the years of MLS listing and the sale by private treaty for the price of Forty-Two Million Dollars (**\$42,000,000.00**) in 2016 were not in dispute. Also not disputed, was that none of the proposals by Ms. Francis to liquidate the debt were realized and she was not able to secure for herself a purchaser for the property.

Sufficiency of Advertisement

[62] For the ensuing discussion, I find it necessary to reproduce the following extracts, which appeared in the Jamaica Gleaner, in order to advertise the sale by public auction and private treaty.

**THE C.D. ALEXANDER COMPANY REALTY LIMITED
KINGSTON**

**FOR SALE BY PUBLIC AUCTION
TUESDAY, SEPTEMBER 10, 2013 AT 10:0 a.m. at
4 A MARESCAUX ROAD, KINGSTON 5
UNDER POWER OF SALE contained in a mortgage: -
LAND PART OF HODGES PEN, ST ELIZABETH**

Agricultural / Residential Development – Vacant lot
The lot is irregular in shape and has extensive main road frontages. The property is situated on the northern side of the Whitehouse to Black River main road, approx. 05KM east of its junction with the Whitehouse to Middle Quarters main road in an area known as Hodges Pen in the parish of St. Elizabeth. The road frontages and remaining area known as Hodges Pen in the parish of St. Elizabeth. The road frontages and remaining boundaries seem mostly unfenced.

**LAND AREA – 1503031 HA (371.3938 A)
BLDG AREA – 149.86 SQ.M.
VOLUME 1071 FOLIO 840**

All that parcel of land part of Hodges Pen in the parish of St. Elizabeth

**Particulars and Conditions of Sale from: -
THE C.D. ALEXANDER COMPANY REALTY LIMITED
LICENCE# 2013-DL/139
Telephone: 754-6151, 754-9991-2**

FOR SALE

OFFERS IN WRITING ARE INVITED FOR PURCHASE OF THE FOLLOWING PROPERTIES
BEING SOLD BY PRIVATE TREATY UNDER POWERS OF SALE CONTAINED IN A MORTGAGE

ST. ELIZABETH

LAND PART OF HODGES PEN, ST. ELIZABETH

VOLUME 1071 FOLIO 840

VACANT AGRICULTURAL / RESIDENTIAL DEVELOPMENT

LAND AREA – 150.3031 HA (371.3939A)

BUILDING AREA – 149.86 SQ.M

FINANCING AVAILABLE. INTERESTED PERSONS MAY CALL,

932-0240, 932-0559 OR 932-0415

Between 9:00 a.m. and 5:00 p.m. Monday to Friday

[63] Mr. Thwaites, the expert witness called by BNS, was of the view that this was sufficient information to excite a potential buyer. This was also the evidence of Mr. Steer. The contention on behalf of Ms. Francis was that the description did not accentuate the positives and ought to have included important features i.e. that it was close in proximity to a hospital, school nursery, beach, accessible to the main town shopping and strategically placed between two main roads. Ms. Francis, in her witness statement, had the following to say:²⁰

The Defendant in the advertisement used lines lifted from the Grayhard valuation most what I consider to be the perhaps unflattering portions related to the description of the property to include in the advertisement. The Defendant did not mention in the advertisement that the property "has good potential for agricultural or residential development given among other factors, its prime location along a main road, multiple accesses, favorable terrain, proximity to the south coast's main thoroughfare and to major town centers of Black River and Santa Cruz" - all of this information being contained in the said Grayhard valuation commissioned by the Defendant in 2012. I rely on the text of the said advertisement as published in the Jamaica Gleaner.

These features she argued, were contained in the Grayhard Report, available to BNS at the time.

[64] Save for her opinion, understandably skewed to her interest, there is no other evidence apart from Ms. Francis as to the sufficiency of the advertisement to provoke interest in potential buyers. Mr. Gray-Logan's evidence was centred on defending his methodology and his classification of the highest and best use of the property as residential/agricultural, a feature included in the advertisement.

[65] Bearing in mind **Pendlebury** was decided over One Hundred (**100**) years ago, extensive information on the features of the property may not have been necessary. One has to consider the adequacy of the advertisement in the reality of these times.²¹ There have been significant advances in technology allowing access to information almost at

²⁰ **Witness Statement of Paulette Francis, para 15**

²¹ **See para 45 of Corbett v Halifax Building Society [2002] EWCA Civ 1849**

the touch of a button. Places once thought far-flung are now easily accessible with the advent of highways and drivable roads. Mr. Thwaites said he did not need to physically visit the property being familiar with the general locality and that the property could be located using Google Earth and IMap Jamaica. IMap is a product of the National Land Agency available to anyone online. There is even a YouTube video explaining how to use it.

[66] Given the acreage of the property, it would most likely attract a developer or large scale farmer who could easily familiarize themselves with the extended attributes of the land. The Court is comfortable in noting that Black River is the parish capital and would be known to most Jamaicans. In addition, in Jamaica, the parish capital is most times the main town and most of the amenities and facilities of the parish are located in or around the area. The communities of Whitehouse and Middle-Quarters are also popular locations. In addition, the advertisement indicated that particulars and conditions of sale were available from the auctioneer. It is noteworthy that one of the offers received was from an entity styled Hodges Aggregates and Powders Limited. Ms. Francis references *'a man from the stone quarry'* offering to purchase lots in her proposed subdivision. This person is likely to have been very familiar with the area. I do note that the advertisements for sale by private treaty were a bit more condensed. That is understandable as there is in the mix a real estate agent from whom further particulars would be available.

[67] I find that in the circumstances of this case the information contained in the advertisements offering the property for sale and by private treaty was sufficient to excite the attention of persons who may have been interested in purchasing the property. No issue was taken with the number of advertisements. That being said, I would still find the caution in **Pendlebury** that the advertisement should be as detailed as possible prudent.

Valuations

[68] The first valuation was carried out in 2005 for the purposes of obtaining the mortgage. Mr. Bruce determined the value on the basis that the highest and best use of

the property was for residential and commercial development. In his report he gave the following description of the Property:²²

SITE FEATURES AND DEVELOPMENT:

The site is irregular in shape and of level grade. Some sections are in ruinite, while others are clean. It is fully fenced with barbed wire throughout. There are many mangoes and Cashew trees and a few breadfruit and star apples. There are several shade trees. The site abuts the Black River to Savanna-La-Mar main road for about 1.5 kilometres, the Savanna-La-Mar to Santa Cruz, main road for about 1.5 kilometres and the Black River to Cambridge main road for about 0.5 kilometres. Electricity, municipal water and telephones are available. A ten inches water main circumscribes the site.

[69] The second valuation by Grayhard Real Estate C. Ltd. was done around 2012 after the loan had been in arrears and was requested by the Bank. Ms. Francis gave evidence that the bank requested the valuation to assess a proposal she made. The correspondence between the Bank and Grayhard requested the forced sale value and a synopsis of any recent sales of comparable properties in the vicinity.²³ The Grayhard report indicates it was requested to assess the open market value. It seems more likely, as Ms. Hines said, that it was requested by BNS in preparation for the issuance of the statutory notice to exercise its power of sale. The property was valued at One Hundred and Eleven Million Four Hundred Thousand Dollars (**\$111,400,000.00**) and a forced sale value of Eighty-Nine Million Dollars (**\$89,000,000.00**). This valuation described the attributes of the property as:

THE SITE

Location

The property is situated on the norther side of the Whitehouse to Black River Main Road, approximately 0.5kilometre east of its junction with the Whitehouse to Middle Quarters Main Road, in an area known as Hodges Pen, in the parish of St. Elizabeth.

Dimension

The lot is irregular in shape and has extensive main road frontages.

²² Valuation report of John Bruce, pg 4

²³ Ibid, pg 64

Land area is given as 150.3031 hectares. (371. 3938 acres)

Geography/Natural Features

The site is a combination of level to gently sloping and undulating terrain which is consistent with the general area. Additionally, research indicates that ponds are natural features of this property.

With the exception of a few areas having low grass cover it is mostly in thick natural vegetation.

The road frontages and remaining boundaries seem mostly unfenced.

Soil Profile

The major soil types found on this property are:

Silver Hill Clay Loam (#49)

Carron Hall Clay Loan (#94)

Cashew Clay Loam (#151)

Hodges Sand (#150).

NEIGHBOURHOOD ANALYSIS

Hodges. situated a few kilometres northwest of Black River is a mix neighbourhood comprising agricultural holdings, few light industries, large unimproved lots and affluent subdivisions with modern single and multi-stores detached dwelling houses on fairly spacious lots, many with elegant finishes and well maintained surroundings. The area displays a high level of civic pride resulting in a clean and attractive environment. The development pattern is stable as several lots appear to have been recently developed and others having ongoing construction. Shopping facilities, financial services, schools and public transportation are available in the nearby town centre of Black River.

[70] He concluded that its highest and best use was agricultural/residential development. This valuation had not been updated at the time the offer for sale by private treaty was made and accepted.

[71] A third valuation was carried out by Allison Pitter in 2016 around the time of the sale by private treaty. The documentary evidence accords with the evidence of Mr. Steer that he received oral instructions to carry out a valuation of the property some days before the written request. By the email correspondence sent 18th January 2016²⁴ formal authority to proceed was given, referencing prior discussions. Mr. Steer valued the

²⁴ Exhibit 49

property at Seventy to Eighty Million Dollars (**\$70,000,000.00 - \$80,000,000.00**) and a forced sale value of Sixty-Four Million Dollars (**\$64,000,000.00**). A written report was prepared and dated the 23rd January 2016. Mr. Steer considered that the land was mainly agricultural but about fifteen to twenty acres could be used for residential development. Ms. Hines agreed that at the time the offer was accepted, there was no current valuation in hand.

[72] The report of Mr. Bruce is clearly significantly based on his assessment of the highest and best use of the land and I would hesitate to rely on it as an accurate gauge of the market value at the time.

[73] When considering the importance of obtaining a current valuation report at the time of sale, the timelines in this case are not insignificant. This is the chronology as taken from the documentary evidence.

Chronology of Events

August 19 th 2005	Ms. Francis obtained the valuation report of Mr. John Bruce.
September 9 th 2005	Dated Mortgage Deed (Loan obtained from DB & G Merchant Bank Limited)
March 2008	DG & G Merchant Bank Limited changed its name to Scotia DBG Merchant Bank Limited.
In or Around 2011	Loan fell into arrears.
September 10 th 2012	BNS obtained Grayhard valuation report.
October 8 th 2012	BNS issued a demand letter.
March 2013	Proposal for development of the property.
February 3 rd 2013	Statutory Notice issued.

August 20 th 2013	Advertisement of public auction in Jamaica Gleaner.
August 27 th 2013	Advertisement of public auction in Jamaica Gleaner.
September 9 th 2013	Advertisement of public auction in Jamaica Gleaner.
September 9 th 2013	Development plan proposal denied because Ms. Francis failed to send any supporting documents or approvals.
September 10 th 2013	Advertisement of public auction in Jamaica Gleaner.
January 19 th 2014	Property listed for sale by private treaty in the Jamaica Gleaner.
March 9 th 2014	Property listed for sale by private treaty in the Jamaica Gleaner.
March 12 th 2014	Property listed for sale by private treaty in the Jamaica Gleaner.
August 4 th 2014	Ms. Francis advised that she would make a £20,000 lump sum if BNS accepted her proposal to pay off debt within 24 months period.
August 4 th 2014	BNS communicated that it would be willing to discuss waiving interest if a lump sum is paid.
August 13 th 2014	Proposal to pay loan over a 24 months period.
August 19 th 2014	BNS advised that it would give consideration to the proposal if she sent a letter to substantiate the basis for the consideration.
November 30 th 2014	BNS signed a Multiple Listing Agreement with ReMax Elite for placing the property

	on multiple listing service between November 30 th 2014 – June 30 th 2015.
July 2 nd 2015	Proposal to pay loan over a 12 months period.
July 6 th 2015	Counter offer to pay minimum payment each month or each quarter with final payment at the end of 12 months period.
November 16 th 2015	Per signed agreement with BNS and Ms. Francis, BNS agreed to stay the sale of the property for 12 months on the condition that Ms. Francis would pay USD\$100,000.00 within fourteen days after signing the agreement and USD\$5,000 on the 1 st of each month thereafter.
December 13 th 2015	Ms. Francis informed that she was unable to make payment per the proposal.
December 14 th 2015	Ms. Wade asked for clarification as to when payment would be made
December 17 th 2015	Offer to purchase property for \$40,000,000.00.
December 21 st 2015	Follow up on the status of the payment and advised of an offer to purchase the property.
January 2 nd 2016	Offer to purchase property for \$42,000,000.00.
January 11 th 2016	Advised that BNS would proceed with accepting the offer for sale if payment was not made.
January 12 th 2016	Follow up email re information communication.
January 21 st 2016	BNS accepted offer to purchase.

January 23 rd 2016	BNS obtained Allison Pitter valuation report.
April 13 th 2016	Property transferred to Carlton Dunkley and Nadine Michele Dunkley.
September 2017	BNS wrote to Ms. Francis to inform her of the amount in which she remained indebted to the bank after the proceedings from sale had been credited to the loan.

[74] At the time the statutory notice was issued Ms. Francis had been in arrears of payment on the principal to the tune of Four Hundred and Forty-Four Thousand Three Hundred and Fifty-Seven United States Dollars (**USD 444,357.00**)²⁵ for over three (**3**) years and some seven (**7**) years from the initial term agreed. A clear inference can be drawn that BNS was working with her to settle her indebtedness. Therefore, at the time BNS accepted the offer, not only had the loan been unpaid for some ten (**10**) years but BNS had been actively trying to sell the property for over three (**3**) years. There were no offers save for the two offers in December 2016 and January 2016. Ms. Francis herself never once presented an interested purchaser.

[75] The critical question was whether there was sufficient proof of an available market which if approached would have given a better price. The property was listed at auction for One Hundred and Eleven Million Dollars (**JMD \$111,000,000.00**), however, there were no bids. It was listed by private treaty at Eighty-Nine Million Dollars (**\$89,000,000.00**), no offers were received. BNS reviewed the account and a credit decision was taken to reduce the listing price to Fifty to Fifty-Five Million Dollars (**\$50,000,000.00 - \$55,000,000.00**), still no offers were received at that price. Having finally received an offer, a valuation was sought and Ms. Hines gave evidence that BNS conducted a credit analysis and concluded that market for the property at the price listed was not effective. There was also a depreciation risk due to devaluation as the loan was denominated in

²⁵ See exhibit 35 with which Ms. Francis agreed

USD if BNS did not accept the offer. Also, interest continued to accrue while no payments were being made by Ms. Francis. This evidence was not contested.

[76] The following commentary by Jonathan Klein (Sitting as a Deputy Judge of the Chancery Division) in **Aodhcon** commends itself to me as the correct approach. He stated:²⁶

In this case, in their closing submissions both parties urged on me that I should consider the Red Book Market Value of the Property as one factor in my overall consideration of the more general question: did Bridgeco take reasonable care to sell for the best price reasonably obtainable? At first, I was uncertain that that was the correct approach and, instinctively, I favoured the approach which, as it turns out, was favoured by HH Judge Weeks QC in Miller but, after reflection, I think both parties were right to urge me to consider Red Book Market Value as one factor in a wider consideration of what happened

[77] The cross examination of Mr. Thwaites by Counsel Mrs. Shields suggested that, BNS, having obtained the Allison Pitter valuation, the bank ought to have declined the offer it received, cannot be supported. There was no duty on BNS to sell the Property at a price commensurate with any valuation. As said in **Diane Jobson**²⁷,

It is impossible to fix a stated selling price to be the true market value. The considerations of a purchaser may well include factors which are personal to such purchaser and have nothing to do with any market forces.

[78] In her witness statement Ms. Francis contended:²⁸

Nothing at all has been disclosed to me by the Defendant as to how they sought to or rectified the disparity in the valuations done by two of the companies used by them and the one used by me before I obtained the mortgage. Nothing explains the basis on which the Defendant thought it appropriate to accept sums so far below any of the valuations it received for the subject property as the sale price.

[79] Though each valuator differed in the highest and best use category, the differences in their opinions of the market value at the end of the day are irrelevant. What is relevant

²⁶ [2014] 2 ALL ER (Comm) 928, para 156

²⁷(unreported) Court of Appeal Jamaica SCCA 113/2002 judgment delivered on 29 July 2005, para 14

²⁸ Witness Statement of Paulette Francis, para 24

is what the potential buyer was willing to pay. After ten **(10)** years, it was Forty-Two Million Dollars **(\$42,000,000.00)**. That was the true market price or proper price. No doubt BNS would also have liked to secure more, even to fully liquidate the debt, as much as Ms. Francis wanted the market price to clear her entire indebtedness. As Panton P put it, *“(t)he simple fact which cannot be ignored is that there was no evidence of any other entity or individual that showed an interest in purchasing the property at a higher rate.”* In all the circumstances, despite the absence of a current valuation at the time BNS accepted the offer to purchase, BNS cannot be said to be *“plainly on the wrong side of the line”*. It is for this reason that I have declined to conduct an investigation into the merits of the valuation reports as against each other. Such an exercise, in my view, would only be merited in an assessment of damages not required here.

[80] Moreover, I am unable to find any legal support for the proposition that BNS was obliged to *“rectify”* the disparity in the valuations carried out in the years of 2005, 2012 and 2016 respectively. Though Mr. Thwaites expresses a preference for the Allison Pitter valuation, it is clear that the differences in values was in part due to the different methodologies used, and each valuator’s choice of the highest and best use of the land. Mr. Steer called it the *“hope value”*. This terminology shows how inexact and subjective such decisions are. Ms. Hines also gave evidence that she was not surprised by the changes in the market values given what was happening in the world. She cited the financial crisis in the years 2005 to 2009 and the worldwide recession. Ms. Francis also cites the *“massive recession”*, banks going bankrupt and the falling value of her assets as contributing to her inability to service the loan.

[81] As to the question of bad faith, it is patently not the case that BNS acted in disregard of Ms. Francis’ interest. As shown in the chronology, BNS engaged with Ms. Francis over several proposals made for alternate payment arrangements. She agreed that BNS considered all her proposals. She agreed that she did not take necessary steps like obtaining planning approvals with regard to her proposal to develop the property. She was notified of and was aware of the sale by public auction. Up to a month before the sale by private treaty, the Bank was willing to execute a forbearance agreement on payment by Ms. Francis of the sum of One Hundred Thousand United States Dollars

(USD\$100,000.00). The payment never materialized. Even if BNS failed to notify her of the offer for sale by private treaty (on this issue Ms. Francis is inconsistent in her evidence) and the private listing, they were not bound to do so.²⁹ I find in all the circumstances, BNS did not breach its duty of good faith towards Ms. Francis.

Conclusion

[82] The Court appreciates the anguish of Ms. Francis suffering the loss of the property having been sold for far less than the market value stated in even the lowest of the valuations, especially when the debt remained unliquidated. To make matters worse, the new owners seem to be reaping a financial windfall. However, she has not shown in this case that the Bank, though selling at an undervalue, was in breach of any of the duties of a mortgagee exercising its power of sale. For the reasons given, Ms. Francis has failed to satisfy the Court on a balance of probabilities that BNS failed to take reasonable care to obtain the best possible price.

Counterclaim

[83] There is no dispute as to the terms of the loan and the sum outstanding. BNS is entitled to judgment on the counterclaim.

Postscript

[84] I must express my appreciation for the studied diligence of Counsel in their submissions which I have taken into consideration, even when not expressly referred to.

ORDERS

[85] On these premises the Court makes the following Orders:

²⁹ **Goldcel Nominees Pty Ltd v Network Finance Ltd [1983] 2 VR 257**

1. Judgement for the Defendant on the Claim.
2. Judgment for the Defendant in the Counterclaim as set out below:
 - (a) The principal balance of US \$126,897.88
 - (b) Interest up to 16th September 2022 in the amount of US \$301,052.91
 - (c) Interest thereafter on the principal balance based on the per diem rate of US \$33.03 to the date of judgment.
 - (d) Interest thereafter at the judgment rate of 3% per annum to the date of payment.
3. Costs of the Claim and Counterclaim are awarded are awarded to the Defendant.