

**IN THE SUPREME COURT OF BELIZE, A.D. 2007**

**CLAIM NO. 140 of 2007**

**DEVELOPMENT FINANCE CORPORATION**

**CLAIMANT**

**AND**

**CAYO COMMUNICATIONS NETWORK LTD.**

**1<sup>st</sup> DEFENDANT**

**EDITH BEJERANO**

**2<sup>ND</sup> DEFENDANT**

**ENRIQUE DEPAZ**

**3<sup>RD</sup> DEFENDANT**

**ANN BELISLE**

**4<sup>th</sup> DEFENDANT**

BEFORE: Honourable Minnet Hafiz-Bertram

Claimant represented by Ms. D. Vernon of Shoman & Chebat

Defendants represented by Mr. Oswald Twist

**D E C I S I O N**

Introduction

This is a claim for \$23,810.60 being outstanding interest on Loan No. 510258 taken from the Claimant. The Defendants have Counter Claimed for the sum \$165,079.11 on the basis that when the Claimant exercised its power of sale, the first Defendant properties were sold at an undervalue.

2. On 11<sup>th</sup> April, 2008 when this matter came up for Pre-Trial, Mr. Kevin Arthurs of Shoman and Chebat who represented the Claimant and Mr. Twist who represented the Defendants agreed that the matter could be dealt with by written submissions and that there was no need for a trial. The Court therefore ordered that Written Submissions be submitted by

12<sup>th</sup> May, of 2008. Mr. Arthurs did not submit the Written submissions as ordered by the Court. After many months of delay the Court informed Ms. Darlene Vernon of Shoman and Chebat that the written submissions in this matter is long overdue. Ms. Vernon thereafter promptly submitted the submissions to the Court on 3<sup>rd</sup> April, 2009.

### Parties

3. The Claimant is a Body Corporate duly formed pursuant to section 3 of the Development Finance Corporation Act, Chapter 226 of the Laws of Belize carrying on business at Bliss Parade, Belmopan. (The DFC).
4. The 1<sup>st</sup> Defendant is a limited liability company registered under the laws of Belize with its registered office at No. 7 Prince Street, Belize City, Belize.
5. The second Defendant is the General Manager of the first Defendant. The third Defendant is a Director of the first Defendant and the fourth Defendant is the treasurer to the first Defendant.

### Claim

6. By Amended Claim issued on 4<sup>th</sup> April, 2008, the Claimant claims against the Defendants in the sum of \$23,810.60 being the outstanding interest on a Loan No. 510258.
7. At paragraph 2 of their Statement of Claim they stated that on the 13<sup>th</sup> day of June 1995, the Claimant, at the request of the Defendants granted to the Defendants, a loan in the sum of \$75,000.00 to complete a concrete bungalow building, purchase television reception, office furniture, broadcasting equipment, and start up working capital.

8. The Claimants said that security for the loan was given in the form of Promissory Notes dated the 20<sup>th</sup> day of September 1995, Deed of Mortgage dated the 21<sup>st</sup> day of May 1996, Charge dated the 2<sup>nd</sup> day of October 1995, and Bill of Sale dated the 2<sup>nd</sup> day of May 1996. The Defendants defaulted on the loan and by letters dated the 12<sup>th</sup> day of July 1996, 28<sup>th</sup> day of February 1998, 24<sup>th</sup> day of September 1998 and 27<sup>th</sup> day of May 1999 addressed to the Defendants, the Claimant demanded payment for the sum owed on the account. The Defendants failed to pay as demanded and the properties used as security were sold by virtue of the Claimant exercising their power of sale under the mortgage.

#### Defence

9. The Defendants at paragraphs 2 and 3 of their Defence say that on 13<sup>th</sup> June, 1995 they filled out an application for a loan from the Claimant but the loan was granted to the first Defendant. That the loan was accepted by the first Defendant and that the second and third Defendants merely signed as agents of the said company.
10. At paragraph 5 of the Defence, the second through fourth Defendants say that they did sign a promissory note dated 20<sup>th</sup> September, 1995 for a loan of \$75,000.00 but no loan was obtained by them. The Defendant say that a Deed of Mortgage dated 21<sup>st</sup> May, 1996, Charge dated 2<sup>nd</sup> October, 1995 and Bill of Sale dated 2<sup>nd</sup> May, 1996 was security given by the first Defendant to the Claimant and the second and third Defendants merely signed as agent on behalf of the first Defendant.
11. The Defendants at paragraph 14 of their Defence deny they owe the Claimant any sum as stated. They said that the parcels of land were

given to the Claimant as security by the first Defendant which was responsible for all liabilities to the Claimant. That the parcels of land were valued far in excess of what was owed and if proper efforts were made by the Claimant to advertise and sell, the proceeds from the parcels of land would have been sufficient to cover any debt owed to the Claimant with remainder left to the first defendant. They say that the Claimant breached its fiduciary duties to the first defendant in that it failed to try and sell and obtain the best price for the properties.

#### Counter claim

12. The second, third and fourth Defendants as agents for the first Defendant claim against the Claimant the sum of \$165,079.11 on the ground that the Claimant breached its fiduciary duties to the first Defendant by failing to properly advertise the sale of the said parcels of land and failing to obtain the true market value at the time of the sale of the said properties. They say the properties if properly sold would have fetched \$220,000.00.
13. The Defendants claim payment of the sum of \$165,079.11 being the difference of what was owed (\$54,920.89) and the price the properties would have fetched (\$220,000.00).

#### Reply to Counterclaim

14. The Claimants denied that the Defendants are entitled to any reliefs in their Counterclaim.

#### Witness Statements and Disclosures

15. The Claimant filed two witness statements in support of their claim, one from Eduardo Torres, Loans Recovery Officer of the Claimant and the other from Yvette Parham, Accountant from the Claimant, DFC. The

Defendants filed three witness statements from Enrique Depaz, Manuel Rodriguez and Edith Bejerano. Disclosures were filed by both parties.

**16. The issues for consideration**

- (1) *Did the Claimant breach its fiduciary duty to the Defendants by failing to obtain the best price or the true market value for the properties.*
- (2) *Whether the second, third and fourth Defendants were acting on behalf of the first Defendant when they signed the Promissory Notes.*

Claimant's submissions on the issue of breach of fiduciary duties

17. Ms. Vernon for the Claimant submitted that it is the duty of the mortgagor to obtain a proper price and to exercise the sale in good faith. Learned Counsel referred to the case of **Cuckmere Brick Co. Ltd. and Anor. v. Mutual Finance Ltd** (1971) Ch. 949 at p. 968

18. Learned Counsel submitted that the first Defendant was duly informed of the intended sale of the properties through the second and third defendants since the year 1998 and who whether directly or indirectly acceded or sanctioned such sale as indicated at the 4<sup>th</sup> paragraph of her witness statement in which she states:

*“the whole venture fell and the T.V. station was closed down after it was vandalized and the equipment stolen. The first Defendant could not meet its financial obligation to the Plaintiff..”*

19. Ms. Vernon submitted that since it is the Defendants who assert bad faith, the onus is on them to prove to the court the Claimant acted with bad faith. Counsel referred to the case of **Derrick v Trinidad Asphalt Ltd. and Anor. (1980) 33 WIR 273.** Learned Counsel submitted that in the case at bar the sale of the properties were done by certified auctioneers with no personal interest or otherwise in the properties. Further, the properties were sold after years on the market and after several previous attempts.
20. Further, Learned Counsel submitted that for the Defendants to prove gross undervalue they would first have to prove negligence either on the part of the mortgagee or his agent. Ms. Vernon submitted that submissions of valuation reports cannot of its own suffice to show negligence. The onus is on the Defendants to show that at the auction the Claimant could have received a higher market value for the property. Mere assertion is not enough.
21. Learned Counsel, Ms. Vernon further submitted that valuation reports and the market value are deemed two incompatible issues as it relates to the actual time a property is being sold. This is mostly due to the fact that it is the mortgagee who chooses when to sell the property and further he has no control as to the number of persons who attend and the status of the market at that time.
22. Ms. Vernon submitted that the Defendants have failed to show how the Claimant acted negligently or recklessly in exercising its power of sale. Counsel submitted that in today's depressed market and the fact that the Claimant had engaged certified and professional auctioneers in executing its power, there is no proof of negligence or of the properties in question being sold at a gross undervalue.

23. Learned Counsel further referred to **Halsbury's Laws of England, 4<sup>th</sup> Edn. Vol 32 at p. 317 paragraph 660** which states:

*“Although the mortgagee can choose the time of sale he should normally ensure that the property is exposed to the market for an adequate length of time, in appropriate publications and should obtain an open market valuation.”*

24. Counsel referred to the case of **Predeth v Castle Phillips Finance Co. Ltd. (1986) 2 EGLR 144** in which it was found that a period of three months was held to be sufficient time on the market. Ms. Vernon submitted that the three properties of the first Defendant were placed on the market since 1998 for sale by auction and the Claimant were not able to sell until 2005 and 2007 after being on the market for a period of 7 and 9 years respectively.

**Defendant's submissions on issue of breach of fiduciary duties**

25. Mr. Twist for the Defendants submitted that it is not denied that the Defendants borrowed from the Claimant the sum of \$75,000. and has failed to make the payments.
26. Learned Counsel submitted that the first Defendant is saying that had the three properties been sold for their true market value they would have been sufficient to cover the amount owed to the Claimant with a balance remaining which would have been due to the Defendant.
27. Mr. Twist also referred to the **Cuckmere** case supra which establishes the duty of a Mortgagee when exercising his power of sale.

28. Learned Counsel submitted that the Claimant is in breach of its fiduciary duties to get the best price for the properties and further request that the Claimant account to the first Defendant for the balance due had the properties been sold for their true market value.
29. Learned Counsel acknowledged that some efforts were made to sell the three properties, but submitted that notwithstanding this, there is absolutely no evidence whether based on those advertisements offers were made in writing.
30. Learned Counsel submitted that according to the case of **TSE Kwong Lam v Wong Chit Sen and others (1983) 1 W.L.R. 1349 at 1357-1360**, the following principles has to be followed:
  - (1) Evidence from a competent Real Estate Agent.
  - (2) Evidence that a reserve price has been set by the Auctioneer.
  - (3) Whether there had been competitive bidding.
  - (4) That the particular auction provided a true market value.
  - (5) Whether proper advertisement had been done.
31. Mr. Twist submitted that the Auctioneer failed to follow these guidelines and even where advertisement was done the disclosure revealed that it was not properly done.
32. Mr. Twist submitted that with regard to Lots 279 and 280 the sale was done by private bid and the property was sold for \$7,500.00. Learned Counsel submitted that there is no evidence by the Claimant as to how the private bid was done or who did it or why it was not done by public auction. Mr. Twist submitted that the evidence from the Defendant's valuer and witness Mr. Manuel Rodriguez, whose evidence is

uncontroverted state that the property was worth \$11,500.00. Mr. Twist submitted that the property should have at least been sold for \$9,000.00.

33. Mr. Twist submitted that according to the evidence there was a public auction on 31<sup>st</sup> July, 2000 by one Kevin A. Castillo with regard to parcel 1003/1 and 2173/1 but there is no evidence of the Auctioneer or his qualification or what he did with regard to the Auction.
34. Learned Counsel submitted that the evidence shows that Parcel 2173/1 consisting of 9 acres was sold to Eliseo Salazar for \$35,000. He submitted that there is no evidence from the Claimant nor the Auctioneer that the principles enunciated in **TSE Kwong's** case supra was fulfilled. He submitted that the Defendants have uncontroverted evidence from Manuel Rodriguez that the property was valued at \$115,000.00.
35. Learned Counsel further submitted that with regards to parcel 1003/1 which was auctioned on 21<sup>st</sup> October, 2007 and sold on 25<sup>th</sup> October, 2007 to Russell Hyde, that it was a bad sale. Counsel submitted that the principles in **TSE Kwong's** case supra was not fulfilled. He said that the valuation done by Mr. Rodriguez showed the property was valued at \$35,000.00. Mr. Twist submitted that the Claimant failed to produce any evidence from the Auctioneer, Mr. Miguel Ellis and therefore Mr. Rodriguez evidence remain uncontroverted.
36. Mr. Twist submitted that the Claimant has failed in its fiduciary duties both at common law and statute. Counsel submitted that two of the properties fall under registered land and therefore section 78(1) of the Registered Land Act is applicable.

**Determination on first issue:**

*Whether the Claimant breached its fiduciary duty to the Defendants by failing to obtain the best price or the true market value for the properties.*

37. The parties have agreed to have this matter determined without a trial and to rely on the witness statements and the documents disclosed. My determination is therefore being made without the benefit of oral evidence and cross-examination.
38. There is no dispute that the Defendants borrowed from the Claimant the sum of \$75,000. and have failed to make the payments. The dispute is whether the property had been sold at the true market value. The Claimant has denied that the Defendant is entitled to the relief sought. The Defendant in their Defence pleaded that the Claimant breached its fiduciary duties to the first Defendant in that it failed to try and sell and obtain the best price for the properties. In the counterclaim the Defendants pleaded that the Claimant breached its fiduciary duties to the first Defendant by failing to properly advertise the sale of the said parcels of land and failing to obtain the true market value at the time of the sale of the said properties. The Defence and the Counter-claim can be conveniently dealt with together as the issue is the same.
39. There were three parcels of land used as security for the loan. Parcel 2173/1, Parcel 1003/1 and a Parcel of Land being Lots 279 and 280. Parcels 2173/1 in Santa Elena Cayo and Parcel 1003/1 in Society Hall fall under Registered Land. See Charge attached to the Amended Claim Form. Lots 279 and 280 does not fall under registered land. See Deed of Mortgage attached to the Amended Claim Form.

40. Parcels 2173/1 in Santa Elena Cayo and Parcel 1003/1 in Society Hall which fall under Registered Land is governed by the **Registered Land Act, Chapter 194, Laws of Belize, Revised Edition, 2000-2003**. The question to be asked is what are the remedies of the Chargee (Claimant) in the event of default.

Section **75 of the Registered Land Act** provides:

- (1) *If default is made in the payment of the principal sum or any interest or any other periodical payment or part thereof, or in the performance or observance of any agreement, express or implied, in any charge, and such default continues for one month, the chargee may serve on the chargor a **notice** in writing to pay the money due or to perform and observe the agreement, as the case may be.*
- (2) *If the chargor does not, within three months of the date of service of a notice served on him under subsection (1), comply therewith, the chargee may –*
- (a) ....
- (b) **sell the charged property.**

41. Also section **82(1)** of the **Law of Property Act, Chapter 190** of the Laws of Belize, Revised Edition 2000-2003 provides:

*82. (2) A mortgagee shall not exercise his power of sale under section 69 unless and until –*

- (a) *notice in writing requiring payment of the mortgage money has been served on the mortgagor ....., and default has been made in payment of the mortgage money, or part thereof, for **three months** after such service;*

42. Was the **notice** sent to the Defendants in compliance with section **75** of the **Registered Land Act** and section **82 (1)** of the **Law of Property Act**?

The evidence shows that there was compliance with this section. Mr. Torres at paragraph 7 of his witness statement said that the Defendants defaulted on the loan and by letters dated 12<sup>th</sup> day of July 1996, 28<sup>th</sup> day of February 1998, 24<sup>th</sup> day of September 1998 and 27<sup>th</sup> day of May 1999 addressed to the Defendants, the Claimant demanded payment for the sum owed on the account. The evidence proves that there was compliance with the law as the Defendants received several notices the first being in July of 1996 and the last one in May of 1999. No sale was made until 2001. (See **Disclosure 10 for the Demand letters**).

43. The Defendants pleaded that the Claimant breached its fiduciary duties by:

- (i) failing to properly advertise the sale of the properties and
- (ii) failing to obtain the true market value at the time of the sale to get the best price for the properties.

44. The question to be asked is what is the duty of the Claimant as Chargee in exercising its power of sale. This can be dealt with by both statute and common.

45. Section **78 of the Registered Land Act** provides:

*“(1) A chargee exercising his power of sale **shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease, or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction.**” (emphasis mine)*

46. Section 82(2) of the Law of Property Act, Chapter 190 states:

82. (2) A mortgagee shall not exercise his power of sale under section 69 unless and until –

.....  
(d) he has given at least **two months notice** of his intention to exercise his power of sale by publication thereof in three issues of the Gazette and of one newspaper circulating in the countr.

**Section 69** of the **Law of Property Act** mentioned above provides for the Mortgagees power of sale without order of court.

47. According to section 78 of the **Registered Land Act**, the Claimant must show that the sale was made in good faith and have regard to the interests of the chargor. I agree with the submissions of both Ms. Vernon and Mr. Twist that the duty of the mortgagee is to obtain a proper price and to exercise the sale in good faith. See the case of **Cuckmere** supra cited by both Counsel.
48. This principle in the **Cuckmere case** supra was applied in a Belize case, **Dickson v Playa Del Sol Ltd.** BLR Vol 1 (1994) page 370. See page 374 for principle.
49. See further the case of **TSE Kwong Lam v Wong Chit Sen and others** supra, where Lord Templeman at page 59 said:

*“In the view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a Company in which he is interested. The mortgagee and the Company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time.”*

50. Further, in **Halbury's Laws of England, Vol. 32, 4<sup>th</sup> Edition (reissue)** at paragraph 659, referred to by Ms. Vernon, it states:

*“ 659. Duty of mortgagee on exercise of power of sale.*

*A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent or until after the pursuit of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase the likely sale value in favour of such a sale. He can decide if and when to sell on the basis of his own interests. **He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price.** The duty is not breached by a mortgagee's assessment of the market value of the mortgaged property which falls within an acceptable margin of error...” ( emphasis mine)*

51. Also, in **Cuckmere case** supra Salmon L.J. at page 965:

*It is well settled law 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 realize 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 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 interest, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interest, which of course he could not do were he a trustee of the power of sale for the mortgagor.*

52. It is clear from the authorities that a Mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. A mortgagee is at all times free to consult his own interest alone whether and when to exercise his power of sale once that power is accrued. The most recent authoritative restatement of this principle is to be found in **Raja v. Austin Gray (2002) EWCA Civ 1965.** However, the Mortgagee owes a duty to exercise that power in good faith. Did the Claimant act in good faith in this case? To answer this question, the Court has to look at the precautions or steps that were taken by the Claimant to secure a proper price. The Witness Statement of Eduardo Torres, Loans Recovery Officer of the Claimant and the witness statement of Yvette

Parham, Accountant of the Claimant show the steps taken to obtain a proper price.

53. Mr. Eduardo Torres in his witness statement said that the loan was secured with Promissory Notes dated 20<sup>th</sup> September, 1995 duly executed by Edith Bejerano, Enrique Depaz and Ann Belisle in favour of the Claimant for the sum of \$75,000.00. (See Disclosure No. 3).

54. At paragraph 5 of his witness statement he said that the Defendants executed a Legal Charge dated the 25<sup>th</sup> October, 1995 and Supplemental Deed of Mortgage dated the 21<sup>st</sup> day of May, 1996, in favor of the Claimant using the following three properties as collateral:  
(See Disclosures No. 4 for Legal Charge dated October 2, 1995, No. 5 for Supplemental Mortgage dated 21, 1996 and No. 6 for Bill of Sale).

- a) A parcel of land being lots 279 and 280 containing 926 square meters, situated in Bullet Tree Falls Village, Cayo District, held by the Minister's Fiat Lease No. 457 of 1995, being the Leasehold property of Cayo Communications Limited.
- b) A concrete building and lot being Parcel No. 1003/1, Block 24, containing one acre, situated in Roaring Creek Village, Cayo District held by Certificate of Lease 503 of 1995, being the Leasehold property of Cayo Communications Limited.
- c) A parcel of land, being Parcel No. 2173/1, Block 23 containing 9 acres situated in the Santa Cruz Area, Santa Elena Registration Section, Cayo District, held by Certificate of Lease No. 4017 of 1995 being the leasehold property of Cayo Communications Limited.

55. Mr. Torres said that the Defendant defaulted on the loan and by letters dated 12<sup>th</sup> day of July 1996, 28<sup>th</sup> day of February 1998, 24<sup>th</sup> day of September 1998 and 27<sup>th</sup> day of May 1999 addressed to the Defendants, the Claimant demanded payment for the sum owed on the account. (See Disclosure 10 for the Demand letters). (The question of the notice was dealt with above).
56. Mr. Torres said that the Charge which is Disclosure No. 4 contains a proviso for the sale of the first Defendant's properties in the event there is a default in the repayment of the loan. He said the Defendant failed to pay the monies and on the 13<sup>th</sup> December, 1998, the first publication for three consecutive weeks, advertising the Defendant's properties for sale by way of Public Auction was published in the Government Gazette, The Belize Times Newspapers and the Amandala Newspapers (Issues of November 28/98, December 5/98 and December 12/98). (See Disclosures 7, 8, and 9 for Advertisements).
57. Mr. Torres said that on the 30<sup>th</sup> day of July 2000 an auction sale was held but none of the defendant's properties were sold as there were no bids. On the 12<sup>th</sup> day of March, 2001, a bid was submitted and it was approved. Therefore the property was sold privately to Mr. Arnulfo Manzanero for \$7,500. The property sold was the property located in Bullet Tree Village. (See paragraphs 11 and 12 of his witness statement).
58. At paragraph 13, Mr. Torres said that on the 27<sup>th</sup> day of February 2001, 12<sup>th</sup> day of December 2001, 4<sup>th</sup> May 2004 and 28<sup>th</sup> day of September the other two properties were auctioned but they were not sold. That on 27<sup>th</sup> day of April 2005 the properties were advertised for sale and the property being 9 acres situated in the Santa Cruz Area was sold to Eliseo Salazar for \$35,000 and that this was the highest and best offer.

59. Mr. Torres said at paragraphs 15 and 16 that on the 27<sup>th</sup> day of April 2005, 2<sup>nd</sup> day of November 2005, 26<sup>th</sup> day April 2006, 11<sup>th</sup> day of August 2006 and 14<sup>th</sup> day of September 2007 the only property left securing the loan was further auctioned. That on the 25<sup>th</sup> day of October 2007 the property was sold on auction to Russel Hyde for \$29,500.00. He said that this was the highest and best offer.
60. Mr. Torres said that all proceeds from the auctions were deposited to account 730081 being Cayo Communications Network Limited and that the total monies collected from sale of the three properties were \$7,500.00 + \$35,000.00 + \$29,500.00 = \$ 72,000.00.
61. Mr. Torres stated that by way of letters dated the 29<sup>th</sup> day of March 2001, and November 8, 2007 the Claimant informed the Defendant that the proceeds from the sale was applied to the first Defendant's account and that it was inadequate to liquidate the total debt with the Claimant.
62. Ms. Yvette Parham, Accountant of the Claimant said that she maintained the financial records of the Claimant which includes posting of payments and credits as it relates to loans. Ms. Parham's witness statement confirms the evidence of Mr. Torres.
63. Mr. Torres has shown that the Claimant acted in good faith by the precautionary steps taken to protect the mortgagor/Defendant. I therefore, disagree with Mr. Twist that there was a failure to properly advertise the sale of the parcels of land. The statute and the authorities show that the Mortgagee must act in good faith. The witness statements of both Mr. Eduardo Torres and Ms. Yvette Parham and the Disclosures show that the Claimant advertised the properties for sale, and also advertised for **sale by public auction in two widely circulated newspapers** and the **Government Gazette**. Mr. Torres evidence proves that on the 13<sup>th</sup>

December, 1998, the first publication for three consecutive weeks, advertising the Defendant's properties for sale by way of Public Auction was published in the Government Gazette, The Belize Times Newspapers and the Amandala Newspapers (Issues of November 28/98, December 5/98 and December 12/98). (See Disclosures 7, 8, and 9 for Advertisements). The Disclosures of the said advertisement states:

**FOR SALE**

**BY ORDER OF MORTGAGEE**

*"The Development Finance Corporation of Bliss Parade Belmopan, hereby gives notice of its intention to exercise its power of sale as mortgagee under Deed of Mortgages or Charge between those hereinafter named and the said Corporation which mortgages are recorded at the General Registry in Belize City, or the Lands Registry and the said Development Finance Corporation will at the expiration of two months from the date of the first publication of this notice sell the properties described in the schedule hereto. .." (emphasis mine).*

All three parcels of land were properly described in the advertisements.

64. Two of the Disclosures described the sale as:

**"PUBLIC AUCTION SALES: PROPERTIES"**

The name of the Auctioneer is mentioned, a description of the properties and the place of the public auction. Disclosure 7 shows two advertisements for Public Auction Sales. One is by Licensed Auctioneer Kevin A. Castillo and the other by Licensed Auctioneer Miguel A. Ellis.

65. I therefore, further disagree with Mr. Twist that where advertisements were done the disclosure revealed that it was not properly done. The properties were properly described, stating the location, size and that it is leasehold land. In terms of Parcel 2173/1 it was stated in the advertisement that a bungalow structure was on the land.

66. These advertisements were done in November and December of 1998. Before these advertisements, the Defendants were sent letters dated 12<sup>th</sup> day of July 1996, 28<sup>th</sup> day of February 1998 and 24<sup>th</sup> day of September 1998. On the 30<sup>th</sup> day of July 2000, the first auction sale was held but none of the defendant's properties were sold as there were no bids. The evidence also shows that there was no haste to sell and that the Defendants had ample opportunity to settle their debts.
67. Mr. Twist in his submissions said that there is absolutely no evidence whether based on the advertisements, offers were made in writing. The evidence is that advertisements were done in compliance with the law and the sale was made after those advertisements. The onus is on the Defendants to show that there had been some impropriety and the offers were not made as a result of the advertisements. See the case of **Derrick v Trinidad Asphalt Ltd. and Anor.** supra cited by Ms. Vernon where the principle is that where the Defendants assert bad faith, the onus is on them to prove to the court that the Claimant acted with bad faith.

### **Best Price**

68. I further disagree with Mr. Twist that there was a failure to obtain a true market value or the best price of the properties. The onus is on the Mortgagor/Defendants to show that the Mortgagee/Claimant has breached the duty to take reasonable precautions to secure a proper price. In my view, the Defendants have not discharged this burden.

69. On the 12<sup>th</sup> day of March, 2001, seven months after the public auction a bid was submitted and it was approved for the Parcel of land being Lots 789 and 780, the unregistered land. This was over two years and two months after the advertisement. Mr. Twist submitted that there is no evidence by the Claimant as to how the private bid for the said Parcel was done or who did it or why it was not done by public auction. I disagree as there is evidence which shows that there was an auction however, there was no bid. The evidence by Mr. Torres is that the property was sold privately to Mr. Arnulfo Manzanero for \$7,500. This was the first and only offer in March 2001. This was the first time that DFC had an opportunity to recover some of its outstanding loan of the \$75,000.00 plus interest which it lent to the Defendant since 1995. DFC like the Banks is in the business of lending money and receiving interest on the loan. Many years passed and there is no evidence to show that the Defendants made any effort to pay back the loan that was given to them including the interest.
70. The Defendants put three Valuation Reports into evidence prepared by their witness, Mr. Manuel Rodriguez. In his witness statement he said that he is a Land Economist and hold a Diploma in Land Economy and Valuation surveying from the College of Arts, Science and Technology. He said that on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants he inspected parcels 279/280, parcel 1003/1 and parcel 2173/1 to ascertain the true market value at the time of the sale of the properties. **See the valuation reports marked M.R. 1, M.R. II and M.R. III.**
71. The evidence of Mr. Manuel Rodriguez is that Lot 789 and 780 is valued at \$11,500.00. Mr. Twist submitted that the property should have at least been sold for \$9,000.00. The sale price for the property was \$7,500.00. In my respectful view, it is not on the low side. The market conditions must be taken into account. That is, at the auction there was no bids.

Further, only one bid was made many years after by Mr. Manzanero. There was no other purchaser. This shows the property was not attractive to buyers.

72. In my view, the Claimant took all reasonable steps to obtain the sale of this property. They did the advertisements and did the public auction. I find that the acceptance of the bid of \$7,500.00 was reasonable and the best price at the time of the sale. I find no evidence of bad faith by the Claimant at the time of the sale of this property.
  
73. As for Parcel 2173/1, Mr. Twist submitted that this Parcel consisting of 9 acres was sold for \$35,000. and that there is no evidence from the Auctioneer whether the principles in **TSE Kwong's** case supra was fulfilled. Further, he submitted that Mr. Rodriguez valued the property at \$115,000. The evidence shows that advertisements were done and there was a public auction. The Claimant's evidence is that the \$35,000. was the best price. This means that there were other lower bids which were not accepted.
  
74. **TSE Kwong's** case supra cited by Mr. Twist can be distinguished from the case at hand. On the facts of this case, the Mortgagee was in a **close relationship with the purchasing company** and had been subject to such a conflict of duty and interest as to make it necessary to show that he had taken reasonable precautions to obtain the best price. In the case there was no competitive bidding because the Company purchased the property from the Mortgagee at a price that was fixed by the Mortgagee. It was because there was no competitive bidding that the Mortgagee in this case had to shoulder the burden of proving that the mortgagee took all reasonable steps to obtain the best price reasonably obtainable.

75. In *per curiam*, it was stated that a mortgagee who wishes to secure the mortgaged property **for a company in which he is interested** ought to show that he protected the interest of the borrower by taking expert advice as to the method of sale, as to the steps taken to make the sale a success and as to the amount of the reserve.
76. In the case at hand, there is no evidence that the Mortgagee had a close relationship with the buyers of the properties. There is, however, evidence that there were two Licensed Auctioneers appointed to do the auction, Mr. Kevin Castillo and Mr. Miguel Ellis and there is no evidence of bad faith by these auctioneers.
77. **Section 78** of the **Registered Land Act** provides that the chargee in exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell by public auction subject to such reserve price and conditions of sale as the chargee thinks fit. In my view, it is for the chargee to determine the price as he thinks fit. No burden is placed on the chargee to obtain an independent valuation.
78. Further, there is no obligation on the chargee to employ a Real Estate Agent as in **TSE Kwong's** case *supra*. In the sale of Parcel 2173/1, a licensed Auctioneer was used to conduct the auction and there is no allegation of negligence on the part of the Auctioneer.
79. Section 78 also provides for a reserve price to be set by the Mortgagee. There is no evidence before the Court as to whether a reserve price was set by the Claimant in accordance with this section. This decision is being written without the benefit of oral evidence and so the Court is left with whatever is stated in the witness statements. The court will not speculate

as to whether there was a reserve price or not. In any event, even if there was a failure to set the reserve price, in my view, this alone will not amount to a failure to act in good faith as there is no evidence to show that the mortgagee participated or that there was any impropriety in relation to the auction or any negligence in the advertisements of the property such as misdescription.

80. There is evidence in this case as shown above that proper advertisements had been done and also there was competitive bidding as the best price offered was accepted. This shows that the auction produced the true market value.
81. The evidence is that Parcel 23/2173/1 which consist of 9 acres is Leasehold. It was given to the Lessee, Cayo Communications Network Limited for a term of 30 years commencing 9/9/94 at a rental of \$500.00 per annum. The conditions of the lease was not disclosed. See Lease Certificate which is attached to Mr. Rodriguez's report. The pictures as shown in the report shows that the land is undeveloped.
82. Mr. Rodriguez looked at the highest and best use of the land. He said that subdivision into housing plots would likely able produce the greatest net return over a period of time. Mr. Rodriguez used the Comparative Approach and the Residual Valuation to arrive a value for the land. The Reports are very impressive but, I am not satisfied with the comparables used as they were all freehold land and the subject property is leasehold. In his comparison, Mr. Rodriguez deducted \$3,000. for cost of acquiring same from the Government of Belize though he did not explain how he arrived at that figure. He arrived at a figure of \$5,500. for one lot. He did not say whether the comparables used were developed land. However, it is to be noted that none of the comparables is a 9 acre land and Mr.

Rodriguez did not say how much it would cost to acquire this 9 acre parcel from the Government of Belize.

83. In his Residual Method which he explained is utilized when a land has development potential, Mr. Rodriguez said that of the 9 acres that 35 lots is available for disposal. He used the figure of \$5,500. x 35 lots which amounted to \$192,500. and deducted \$68,191.18 for expenses and Profit by a Developer to develop the land and arrived at a total of \$115,000.
84. With all due respect to Mr. Rodriguez, I am not satisfied with the method used to arrive at the value of \$115,000. The property should have been valued as is at the date of sale. The mortgagee is entitled to sell the mortgaged property as it is. The highest and best use of the land is speculative. Planning permission would have had to be obtained and also finances for development of the land. No developer gave evidence as to how much it would cost to develop the land.
85. Likewise for **Block 20 Parcel 1003/1**, Mr. Rodriguez looked at the Highest and Best Use of the Property. He said that an expanded residential development would be likely to be able to produce the greatest net return over time. He used a Comparative Approach and a Cost Approach and arrived at \$35,000. He looked at 4 comparables land next to the property but said only two were used and that only one of the sale was considered *bona fide*.
86. This is also a lease land for a term of 30 years from 30/5/94 at a rental of \$5.00 per annum. The building on the land is not usable as it has no windows or doors and it needs general refurbishment. The Report shows that 25% was deducted for vandalism. Mr. Rodriguez deducted \$2,500. from the comparables used as cost for acquiring same from the

Government. He did not say how much it would cost to acquire Parcel 1003/1 from GOB.

87. Adjustments were made to the comparables used and no explanation was given as to how Mr. Rodriguez arrived at the adjustments. In any event, the property was sold at auction for \$29,500. It is my view that this is not an unreasonable figure as compared to \$35,000. Further, there is no evidence of bad faith by DFC and the evidence is that the price was the highest and best offer.
88. Furthermore, the evidence shows that the properties were difficult to sell. As can be seen from the Report the property at Roaring creek was vandalized and it had no doors and windows and needed general refurbishment. The 9 acre property in Benque was undeveloped and it would need financing to develop same. Therefore, in my view the true value is what was obtainable in the market at the time of sale. The value by Mr. Rodriguez is theoretical. The only real evidence is the offer made by the buyers whose bids were accepted.
89. In the **Cuckmere** case supra Salmon L.J. at page 960 said that:

*Valuation is not an exact science. This is so even if there exist any exactly comparable figures, which is rarely the case. Here, there were none. Neither the plaintiffs' nor the defendant company's advisers knew of any similar sites sold in Maidstone with planning permission for flats during the relevant period.*
90. Likewise in the case at bar, Mr. Rodriguez did not show any comparables in relation to the properties in question.

91. Ms. Bejerano evidence is that there was gross undervalue. She said that according to the valuation done by Mr. Rodriguez, the parcels of land at the time of the sale was valued as \$161,500.00. She said the total sale of the properties amounted to \$72,000.00 and therefore this shows that the properties were sold at a gross undervalue. She said that if the three parcels had been sold for their true market value at the time of the sale the amount received would have been sufficient to cover the loan principal, interest and other cost with a balance due to the 1<sup>st</sup> Defendant. She said that the Plaintiff breached their fiduciary duties as mortgagors to sell the properties for their true market value.
- 92 I agree with Ms. Vernon that for the Defendants to prove gross undervalue they would first have to prove negligence either on the part of the mortgagee or his agent. I agree with Learned Counsel also that submissions of valuation reports cannot of its own suffice to show negligence.
93. The onus is on the Defendants to show that at the auction the Claimant could have received a higher market value for the property. The Defendants have not discharged this burden. The Defendants failed to show that for some identifiable reason the auctions conducted by Licensed Auctioneers failed to realize a proper price or the market value at the date of the auction and that the bid for Lots 789 and 780 was made in bad faith.
94. The evidence shows that the sale by the Claimant (Mortgagee) was *bona fide* and that they took precautions to obtain the best price reasonably obtainable at the date on which they sold. There is no evidence that the Mortgagee manipulated the auction in this case. The principle enunciated by Salmon J. in the **Cuckmere** case is that the mortgagee can accept the

best bid even if it is low providing that he is not responsible for any of the adverse effects. There is no evidence in this case that the auction has been manipulated by the mortgagee or that there was any impropriety.

95. I find that there is no evidence that the Claimant breached its fiduciary duty to the Defendants by failing to properly advertise the properties and to obtain the best price or the true market value for the properties. There is no evidence that the properties were sold at an undervalue. The true market value is essentially the best price on the market at the time on the open market. In my view, DFC took reasonable precautions to obtain the best price reasonably obtainable at the time of the sale. I hold that the DFC acted in good faith and made every reasonable effort and took all the necessary precautions to obtain sale of the properties. For these reasons, the Claimant is entitled to the sum claimed. The Counter Claim is dismissed.

Second Issue:

*Whether the second, third and fourth Defendants were acting as agents of the first Defendant when they signed the Promissory Notes.*

96. Ms. Edith Bejerano, Managing Director of Cayo Communications Network in her witness statement said that on 21<sup>st</sup> June 1995 a loan of BZ \$75,000. was approved to the first Defendant which was secured by a charge over parcels No. 279/280, 1003/1 and 2173/1. She said that she and the third Defendant, Enrique Depaz signed the charge on behalf of the first Defendant. Also the loan was secured by a promissory note signed on behalf of the first Defendant for \$75,000.00 and individually by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

97. Ms. Bejerano said that the purpose of the loan was set to set up cable T.V. network on parcel 1003/1 situated in the Village of Roaring Creek, Cayo District. She said that the first Defendant erected a concrete bungalow building valued at \$31,000.00 on parcel 1003/1 and purchased equipment valued at some BZ \$24,000.00. She said that \$20,000. was used in promotion, training and advertisement.
98. Ms. Bejerano said that the whole venture fell and the TV station was closed down after it was vandalized and the equipment stolen. She said that the first Defendant could not meet its financial obligations to the Claimant and the Claimant sold the properties at a gross undervalue and thereafter sought to recover from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants the balance on the principal, interest and other cost.
99. Mr. Enrique Depaz in his witness statement said that he signed the legal charge, a promissory note and other documents on behalf of the 1<sup>st</sup> Defendant. He also adopted Ms. Bejerano's witness statement as his own.
100. Disclosure 3 shows that on 20<sup>th</sup> September 1995, Ms. Edith Bejerano, Mr. Enrique Depaz and Ms. Ann Belisle, each signed promissory notes, promising to pay to the DFC \$75,000 plus interest by ninety-six (96) equal consecutive monthly installments of seven hundred and eighty one dollars and twenty five cents (\$781.25) commencing on the 28<sup>th</sup> day of February, 1996 and continuing every month until full payment.
101. Ms. Bejerano has admitted that they could not meet their payments. This is not in dispute. However, in the Defence, it was pleaded that the loan was accepted by the first Defendant and that the second and third Defendants merely signed as agents of the said company.

102. I disagree with Mr. Twist submissions that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants signed the individual promissory notes as agents of the 1<sup>st</sup> Defendant and therefore could not in their personal capacity be held liable based on the principle in **Solomon v Solomon (1897) AC 26** that persons who own or manage the Company have to act on its behalf. It is clear from the evidence that the Legal Charge dated October 2, 1995, Supplemental Mortgage dated May 21, 1996 and Bill of Sale was signed on behalf of the Company. The same cannot be said for the Promissory Notes.
103. I agree with Ms. Vernon submissions that the Defendants attempts to argue that they were only agents and not liable personally cannot be sustained. Learned Counsel relied on the case of **Atlantic Bank Limited v. George Foreman and Belize City Bus Company Ltd.** ( unreported Belize case) Action 128 of 1976.
104. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants signed the Legal Charge, Supplemental Mortgage and the Bill of Sale on behalf of the first Defendant. See Tab 4, 5, and 6 of the Disclosure which shows that Enrique Depaz signed as Chairman and Edith Bejerano signed as Managing Director of Cayo Communications Network Limited and the common seal of the Company was affixed to the Legal Charge dated October 2, 1995, Supplemental Mortgage dated May 21, 1996 and Bill of Sale. This is not in contention. The Documents show that they were signing for the Company.
105. The issue in contention is the Promissory Notes which was signed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. See Disclosure 3 of the Claimants bundle. Ms. Bejerano in her witness statement said that a promissory note was signed on behalf of the first Defendant for \$75,000.00 and individually by

the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant. It is not denied that there were individual promissory notes by them.

106. There are three individual Promissory Notes dated 20<sup>th</sup> September, 1995 by Edith Bejerano, Enrique Depaz and Ann Belisle. All three notes have the same particulars except for the name of the person and the address of the said person. The Promissory Note of one of the parties states:

*“BELIZE*

*PROMISSORY NOTE*

*I, Edith Bejerano of No. 6 Eduardo Juan Street, Santa Elena Town, Cayo District, Belize, Businesswoman, promise to pay to the DEVELOPMENT FINANCE CORPORATION the sum of Seventy Five Thousand Dollars (\$75,000.00) with interest thereon at the rate of Thirteen (13%) per centum per annum by Ninety-Six (96) equal consecutive monthly installments of seven hundred and eighty one dollars and twenty five cents (\$781.25) each commencing on the 28<sup>th</sup> day of February, 1996 and continuing thereafter on the last day of every month in each year until payment in full.*

*Interest at the rate of Thirteen (13%) per centum per annum shall be payable monthly commencing on 30<sup>th</sup> September, 1995, and shall continue on the last day of every month in each year until full payment is effected.*

*AND in default of any instalment to pay to the DEVELOPMENT FINANCE CORPORATION on demand the whole balance then unpaid with interest as aforesaid plus all cost and expenses incurred by the DEVELOPMENT FINANCE CORPORATION in*



110. In the case of **Atlantic Bank Limited v. George Foreman and Belize City Bus Company Ltd.** supra Moe, C.J. had to determine whether the Defendant was personally liable on the Promissory Note. In this case the Plaintiff prepared a note and gave it to the first Defendant to sign. It was the Plaintiff's understanding that the first Defendant was signing as Managing Director of the second Defendant, and it appeared to the Plaintiff that the Defendant regarded himself as so signing. The Chief Justice was asked to take into account the evidence that the first Defendant was Managing Director of the Defendant Company and that when he signed the Note, he signed as such. The Chief Justice said that the question was whether the first Defendant had excluded his personal liability, i.e. put his name on the note only as agent. The Judge said that the only evidence he had on the point is what the document says that the Defendant was signing as Managing Director of the Defendant company. He said that the evidence explains who he was, no more than the Managing Director of the Company. He went on to say, *"But, it does not show he was excluding his personal liability. The evidence I am left with does not show that he qualified his signature, i.e. that he made it clear he was not undertaking any personal liability."* In the circumstance he held that the first Defendant is liable as the maker of the Note.

111. In the case at bar, there is no evidence whatsoever that the 2<sup>nd</sup> through 4<sup>th</sup> Defendants excluded their personal liability. I therefore, find that they are personally liable for the outstanding interest on the loan.

112. Further, I disagree with Mr. Twist submissions that all three of the Defendants could not have incurred the same liability. The Defendants signed the promissory notes in their personal capacities. By making a promissory note the maker undertakes that he will pay it according to its

tenor, and is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. **See Halsbury's Laws of England, Fourth Edition, Volume 4 para 476.**

113. I disagree also with learned Counsel, Mr. Twist's submissions that the Claimant having sought to invoke the condition of the legal charge cannot now proceed to enforce a partial enforcement on the promissory note. There is no condition in the promissory note to this effect.

114. There was default and so they are liable for whatever balance is outstanding on the interest. The second through fourth Defendants are personally liable for whatever is outstanding along with the first Defendant. Ms. Yvette Parham, Accountant of the Claimant said that she maintained the financial records of the Claimant which includes posting of payments and credits as it relates to loans. Ms. Parham's evidence confirms the evidence of Mr. Torres. Further, at paragraph 18 she stated that the Borrower's Ledger Card Bearing No. 730081 with the Defendant's name reflects an outstanding interest balance in the sum of \$20,704.87 which is owed on the account. See Disclosure 11 for a copy of the Borrower's Ledger Card. I note that at the time the Amended Claim Form was issued the interest stood at \$23,810.60.

115. I therefore, hold that the Defendants are liable for the outstanding interest balance in the sum of \$23,810.60.

116. **Order**

Judgment is for the Claimant in the sum of \$23,810.60 being the outstanding interest on Loan No. 510258.

Interest at 13% per annum from 4<sup>th</sup> April, 2008 to date of payment.

Cost for the Claimant in the sum of \$3.000.

The Counterclaim is dismissed.

.....  
MINNET HAFIZ  
SUPREME COURT JUDGE

Dated 6<sup>th</sup> July, 2009.