

IN THE SUPREME COURT OF BELIZE A.D, 2006

CLAIM NO. 446

(NORMA COY **CLAIMANT**
(
BETWEEN (AND
(
(SMALL FARMERS & BUSINESS BANK LTD. DEFENDANT

BEFORE THE: Honourable Madam Justice Minnet Hafiz

APPEARANCES: Darlene Vernon for the Claimant
Melissa Balderamos Mahler for the Defendant

JUDGMENT

INTRODUCTION

1. On or around the 22nd day of July, 1999, the Claimant borrowed the sum of \$15,300.00 from the Defendant to be repaid at the rate of 10% per annum by monthly payments of \$283.45, the total sum to be repaid in 6 years. The Claimant charged her interest in Parcel 1314, Block 23, Benque Viejo del Carmen Registration Section to secure her repayment of the said loan.
2. The Claimant defaulted and the Bank exercised its power of sale as Chargee and sold the property at an auction on the 24th day of August, 2005. The Claimant claims against the Defendant a declaration that the Defendant failed to take reasonable care to obtain the true market value of the Claimant's property when exercising its power of sale and damages as a result of the breach of its fiduciary duties.

PARTIES

3. The Claimant is the Borrower and Chargor by virtue of Charge dated the 22nd day of July, 1999 over Parcel 1314, Block 23, Benque Viejo del Carmen Registration Section.
4. The Defendant is a public company duly constituted under the Companies Act of Belize and having its registered office at Constitution Drive, Belmopan, Cayo District, Belize and is the Lender and Chargee by virtue of the said Charge.

PLEADINGS

5. The Claimant in her Amended Claim Form and Statement of Claim dated the 11th day of March, 2008 sought the following:
 - a. A declaration that the Defendant failed to take reasonable care to obtain the true market value of her property when exercising its power of sale;
 - b. Damages as a result of the Defendant's breach of fiduciary duties in failing to exercise good faith and to use such reasonable care, skill and diligence in the due execution of the power of sale and/or as a result of the Defendant's negligence or recklessness in breach of those duties;

Or in the alternative

- c. Payment of the sum of \$125,000.00 being the difference outstanding between the true market value and the sum of \$35,000.00 obtained by the negligent sale of the property.
6. The Defendant by virtue of Amended Defence and Counterclaim dated the 25th day of March, 2008, denied that it failed to take reasonable care in the exercise of its power of sale and denies any carelessness and/or negligence and/or recklessness on its part. The Defendant further denies

that there was a breach of an implied condition on the Charge or breach of fiduciary duty as alleged by the Claimant.

7. The Defendant states that it acted at all times in good faith and properly discharged its duties under the Charge and that it exercised all reasonable care in the sale of the property and took all reasonable precautions to obtain the best price reasonably obtainable at the time.
8. The Defendant Counterclaims against the Claimant for recovery of possession of the said Parcel 1314, Block 23 pursuant to section 78(2) of the Registered Land Act.

Brief Factual Background

9. In December of 1998, the Claimant approached the bank along with her common-law husband, Mr. Eloy Ayuso, for a loan of \$15,000.00 for the expansion of a poultry business and grocery store. In early 1999, the loan of \$15,300.00 was approved to be repaid at 10% per annum by monthly payments of \$283.45, the total sum to be repaid in 6 years.
10. By virtue of Land Certificate No. 8134/98 and dated December 1, 1998, the Claimant was the owner of Parcel 1314, Block 23, Benque Viejo del Carmen Registration Section. By virtue of Charge dated the 22nd day of July, 1999, the Claimant charged her interest in the said property to the Bank to secure the aforementioned loan of a principal sum of \$15,300.00 with interest at the rate of 10% per annum, repayable on demand.
11. Despite the Claimant's agreement to repay the loan by monthly installments of \$283.45 per month, she defaulted on numerous occasions due to illness of herself and her daughter.

12. The building that was on the Parcel 1314 was extended three times by the Claimant without informing the Defendant. A part of the said building encroached seven feet onto the property of the Claimant's daughter with her consent.
13. The Bank sent numerous notices to the Claimant to settle her loan but she failed to meet her payments. Thereafter, the Bank after placing advertisements in the newspaper and Gazette, exercised its power of sale and the property being Parcel 1314, Block 23 was sold by auction on 24th August, 2005 for the sum of \$35,000.00.
14. The Claimant then filed this action for a Declaration that the Defendant failed to take reasonable care to obtain the true market value of her property when exercising its power of sale.
15. **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 property.*
 - (2) *Whether the Claimant is entitled to damages or alternatively the sum of \$125,000.00.*

Submissions by the Claimant

16. Learned Counsel, Ms. Vernon submitted that the duty of a mortgagee is to obtain the best price or proper price obtainable and to act in good faith. She referred to the case of **Cuckmere Brick Co. Ltd. and Anor. v Mutual Finance Ltd. [1971] 2 W.L.R. 1207** which states that both on principle and authority, the mortgagee in exercising his power of sale owes a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it.
17. Counsel referred to the principle enunciated by Salmon J in **Cuckmere case** supra on the relationship of a mortgagee towards a mortgagor where he stated that a mortgagee when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price or true market value. Ms. Vernon further referred to the responsibility of the mortgagee as stated as Salmon L.J. at p. 1218.
18. Ms. Vernon further relied on the case of **Tse Kwong Lam v Wong Chit Sen and Others (1983) 3 All ER 54**. Counsel submitted that in this case the Court had to consider the duties of the mortgagee when exercising its power of sale in addition to the effect of advertisements which announced the bare facts of the auction and with minimum description of the property. Although the judge in this matter was dealing with the sale of a property in excess of £1.2 million, his Lordship found that certain duties were placed upon the mortgagee when exercising the sale in ensuring they had not breach their obligations to the mortgagor. At p. 60 of the said judgment Lord Templeman stated:

“the Mortgagee’s solicitors prepared particulars and conditions of sale which were dated 9 June. On the same day the sale was

advertised in three newspapers. There is no evidence that the 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. There was no evidence that anyone requested a copy of the particulars and conditions or asked to inspect the property...the mortgagee could have consulted estate agents about the method of sale and about the method of securing the best price. At the very least he could have consulted an estate agent about the level of the reserve price. The auctioneer was not informed of the reserve price until immediately before the auction and in evidence he very properly declined to comment on the reserve because he had not valued the property.*"

19. Learned Counsel submitted that this case is identical to the facts as placed before the courts by the Claimant. The Claimant alleges that the Defendant failed to adequately describe the property as being more suited for business purposes as oppose to residential purposes. That in addition to this the Defendant failed to engage a certified valuator in assessing the property and as the decision in **Tse Kwong Lam** case supra stated, the auctioneer was not called to give evidence in the matter at bar because he had not valued the property himself.

20. On the question of onus, Ms. Vernon submitted that ordinarily, the party who asserts that the sale was done at an under-value or in breach of the duties owed to the mortgagor, that such party had the responsibility of putting the relevant proof before the Courts. This was established in **Cuckmere** supra at p. 1217 where Salmon L.J. stated:

"It has been argued that the judge approached this case the wrong way, namely on the basis that it was for the defendants to justify their acts and omissions. I cannot accept this argument... The Plaintiff's whole case at the trial was that a fair price had not been obtained because of the defendant's default and negligence. The Plaintiff naturally accepted that the onus was upon them to

establish the default of negligence of which they complained...[In] any event, I can find no justification whatever for disagreeing with the judge's view of evidence."

21. Learned Counsel submitted that in light of the above-statement it is acknowledged that the onus is on he who asserts and as the Claimant alleges that the Defendant has acted with negligence and bad faith, this must be shown satisfactorily to the court, and mere allegations without more, is not sufficient.
22. On the issue of breach, Learned Counsel submitted the several instances of breach have been adequately proven through the testimonies of the Claimant, Eloy Ayuso and Nelina Ayuso. That the statements made by them were never disproven by the Defendant and therefore the Claimant had proven satisfactorily the instances of breach and negligence.
23. Ms. Vernon submitted that in instances such as the decision of **Tse Kwong Lam** supra his Lordship acknowledged that where the party alleging breach of fiduciary duty to obtain the best price possible, and such party has placed evidence before the Court supporting such allegations, that the onus then shifts to the mortgagee to prove that he had done all that was required of him. See p. 61 of the said judgment.
24. Learned Counsel referred to the held at p. 62 of **Tse Kwong Lam supra** where the Court stated that where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between

the borrower and the purchaser for the sale to be set aside. Ms. Vernon submitted that the Defendant failed to show it took reasonable steps to obtain the best price and as the property was already sold to a third party, the Claimant is left to her remedy in damages.

25. On the question of what amounts to breach of fiduciary duties and negligence/sale at gross undervalue, Ms. Vernon referred to Black's Law Dictionary, 6th Edn. 1990, West Publishing Co., at p. 693 which defines 'good faith' as:

"Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice or benefit or belief of facts which render transaction unconscientious. In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation."

26. Ms. Vernon further relied on the Court of appeal decision of **Derrick v Trinidad Asphalt Holdings Ltd. and Anor (1980) 33 WIR 273** where the court found that the sale of the property in question was not at a gross undervalue as the mortgagee had acted upon the advice of a competent real estate agent. At p. 299 of the decision the Court found that sufficient evidence as to the value of the premises had been given to the mortgagor by a certified assessment valuator. Additionally, Kelsick J.A. at p. 300 went on to acknowledge that valuation is not an exact science and permitted of varying, but honest estimates, by different valuers which was a sufficient guide in aiding the court.

27. Ms. Vernon submitted that in this very decision his Lordship was satisfied of the fact that because a certified assessment was done by a certified valuator, the fact that the moneys received on the property was low did not of itself justify an inquiry. His Lordship went on to agree with the trial judge in holding at p. 300:-

“The trial judge held as a fact that the premises were sold at a fair market price after the first respondent had received advice which it considered to be honest and competent”.

28. Learned Counsel submitted that to further support the importance as to a proper valuation, the learned authors of **Halsbury’s Laws of England, 4th Edn., Vol 31** at p. 317, paragraph 660 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.”

29. Ms. Vernon submitted that in the present case no such steps were taken by the mortgagee. She said that as attested to by Mr. Arnold who was responsible for setting the reserve price on the property and ascertaining the value, that he was engaged as an accountant with the Defendant and is not a certified valuator or assessor. That he did not personally visit the property, that no pictures of the property were provided to him, that the bare minimum in terms of description was placed in the papers and further, the potential purchasers were never informed of the encroachment unto the adjoining property.

30. Learned Counsel submitted that these admissions in of itself show the instances of breach of the duties owed to the Claimant and shows the negligence committed by the Defendant. That, negligence in all the cases cited by their lordships in the authorities showed some lacking on the part of the mortgagee or his agent such as the omission in the advertising in the **Cuckmere** case supra or the mis-description by the mortgagees in **Tomlin v Luce (1889) 41 Ch.D. 573** . Ms. Vernon submitted that there were several instances of breach committed by the Defendant.

31. Additionally, Ms. Vernon submitted that in **Cuckmere**, at p. 970 Salmon LJ cited some of the earlier authorities which he expressed reflect the law as it is today. He stated in citing **National Bank of Australasia v United Hand-in Hand and Band of Hope Co. (1879) 4 App. Cas 391** the views of the Privy Council being:

“that a mortgagee is chargeable with the full value of the mortgaged property sold if from want of due care and diligence it has been sold at an undervalue.

32. Ms. Vernon further relied on **Farrar v Farrars Ltd. 40 Ch. D 395** where Lindley L.J. stated that:

‘If in the exercise of his power of sale the mortgagee ‘acts bona fide and takes reasonable precautions to obtain a proper price’ the mortgagor has no redress even though more might have been obtained if the sale had been postponed.

33. Learned Counsel submitted that by ‘taking reasonable precautions to obtain a proper price’ Lindley L.J. explained that he did not mean to imply that the mortgagee would be liable for mere negligence on his own part or on that of his agent, but simply that he must not “fraudulently or willfully or recklessly” sacrifice the interests of the mortgagor’. Therefore as stated

by Salmon L.J. in Cuckmere at p. 1220, when referring to bad faith and negligence, he stated recklessness as referred to in Farrars 'connotes something akin to bad faith and more than gross carelessness'. It means not caring whether or not the interests of the mortgagors are sacrificed. As a result he went on to conclude at p. 1221:

"I accordingly conclude both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line".

34. Ms. Vernon submitted that as supported by the definition given by Black's Law Dictionary, the Defendants have failed to pass the threshold in proving they were acting in good faith towards the Claimant and equally failed as a result of such breach, to obtain the best price obtainable.
35. Learned Counsel submitted that when one attempts to assess a property many things are taken into consideration inclusive of the actual structure of the building, the function of the property, the position of the property, the value of the structure separate and apart from the land itself. That as Mr. Arnold did not get an opportunity of assessing any of these things personally, he could not be in a position to arrive at a sale price and furthermore, the fact that he is not a certified valuator or assessor is additionally critical.
36. Learned Counsel submitted that Mr. Arnold's testimony on behalf of the Defendant does not do much to advance the Defendant's case. Further, Ms. Vernon submitted that the Claimant has shown through the

testimonies the many instances of negligence and breach of fiduciary duties owed to her by the Defendant.

Submissions by the Defendant

37. Mrs. Mahler submitted that there is an implied agreement in every charge that the Chargee will repay the sum borrowed plus interest at a specified time and in a specified manner. This is by virtue of **section 70 of the Registered Land Act, Chapter 194, Laws of Belize Revised Edition, 2000 which states:**

“There shall be implied in every charge, unless the contrary is expressed therein, agreements by the Chargor with the Chargee binding the Chargor –

(a) To pay the principal money on the day therein appointed and, so long as the principal sum or any part thereof remains unpaid, to pay interest thereon at the rate and on the days and in the manner therein specified;”

38. Learned Counsel submitted that this was expressly agreed between the parties pursuant to the Charge. Therein, the Claimant agreed to repay the principal sum on demand together with any interest then due.
39. Mrs. Mahler submitted that the Claimant in her evidence acknowledged that she agreed to repay the sum borrowed and acknowledged that she was in default. For example, while the Claimant agreed to pay \$283.45 per month, she made only one payment of \$100.00 in January of 2003 and no payments in 2004 or 2005. It was brought out in evidence that she defaulted on her loan obligations from as early as November of 1999.
40. Mrs. Mahler referred to **section 75 of the Registered Land Act** which provides for the remedies of the Chargee and submitted that in the Actual Charge, the Claimant acknowledged that she understood the effect of the

aforementioned section of the Act. Further, under cross examination, she admitted that she knew and understood that the Defendant had the right and could sell her property if she failed to repay her loan.

41. Learned Counsel submitted that the Defendant sent various demand letters to the Claimant, who failed to repay her loan as agreed. That the Claimant in her evidence claimed that she never received these letters. However, it was the evidence of the Defendant that these letters were hand delivered by Mr. Nicholas and bank representatives or were left at the Claimant's place of business. Mrs. Mahler submitted that by virtue of paragraph 3(5) of the Memorandum Accompanying Charge a demand for payment is deemed sufficiently served if left at the Claimant's last known or usual place of business.
42. Learned Counsel further submitted that while the Defendant claimed in her evidence that she did not know and was not aware that the Defendant was selling her property, in her Statement of Claim she states that she was informed by the Defendant in July or August, 2005 that the property would be auctioned. She submitted that this clearly shows that the Claimant was informed of the pending sale by the Defendant. Also, under cross examination, the Claimant admitted that she did not make any arrangements with the Defendant to remedy her defaults in the repayment of her loan.
43. Learned Counsel then referred to the duties of the Defendant as Chargee in exercising its Power of Sale as are set out in section **78 of the Registered Land Act** and submitted that there is no evidence by the Claimant that the Defendant acted in bad faith. On the contrary, the evidence showed that the Defendant acted in good faith, was lenient with the Claimant, afforded her ample time to repay her loan, and gave her numerous opportunities to do so. She had ample notice of her

indebtedness and the fact that she was required to settle her debt. The Claimant was given every opportunity of either paying off her indebtedness or of making some arrangement with the bank regarding her property.

44. Mrs. Mahler submitted that the Defendant served the Claimant with numerous demand letters, published in the Government Gazette its notice of intention to sell, and published in a local newspaper the details regarding the auction. It acted in accordance with the law and standard banking practices. The actual publications, the wording of such publications, and the number of times published complied in all respects with standard practices and the law.
45. Learned Counsel further submitted that there is no evidence by the Claimant that the Defendant acted in bad faith by setting its own reserve price, as alleged. Counsel submitted that the Registered Land Act gives the Defendant the power to exercise its power of sale subject to such reserve price and conditions of sale as the Defendant deemed fit. There was no duty by law on the Defendant to seek an independent appraisal or valuation of the property.
46. Further, Counsel submitted that the evidence shows that the Bank representatives undertook a physical assessment of the property prior to sale. Representatives from the Defendant visited the property and knew the extent of improvements thereon. Mrs. Mahler submitted that the Defendant, in arriving at a reserve price would consider various factors, including submissions made by customers as to improvements and demolitions, past prices of auctions in the area, the loan balance then due and owing, improvements and the type of structure on the property.

47. Counsel submitted that while the Claimant suggested negligence on the part of the Defendant, no such particulars were pleaded. Further, there is no evidence by the Claimant to prove that the Defendant failed in any duty to her in the exercise of its powers as Chargee or acted negligently in any way.

48. Learned Counsel, Mrs. Mahler referred to the **Supreme Court Practice 1999, page 327** which states:

“The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimize costs....”

Further Counsel referred to page 333 which states:

“Negligence – Particulars must always be given in the pleading, showing in what respects the defendant was negligent...”

49. Mrs. Mahler said that the Claimant alleges that the Defendant did not exercise reasonable care to obtain the true market value of her property when it exercised its power of sale, however, Counsel’s submission is that there is no such duty on a Chargee to obtain the true market value of charged property in the exercise of that Chargee’s power of sale.

50. Learned Counsel referred to **Volume 32, Halsbury’s Laws of England, 4th edition 2005 Reissue, para 659** which states that a *mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale.*

51. Learned Counsel also relied on **Becker and Others v. Bank of Nova Scotia [1986] LRC (Comm) 638 at Page 649 c** where it is stated that the Bank must show that the sale was made in good faith. Mrs. Mahler

further relied on the case of Cuckmere supra in which Salmon J considered the duty of the mortgagee.

52. Mrs. Mahler submitted that like the case at bar, the Bank of Nova Scotia in the Becker supra case advertised the property for sale and notified the borrower of its intention to sell. It was not a hasty sale. The Court found that there was no evidence and it could not be suggested that the Bank did not act in good faith.
53. Mrs. Mahler submitted that a bank is in the business of lending money and receiving interest on the loan. The sum of money owing to the Defendant had been tied up for several years and there was no suggestion that the Claimant was in a position to pay or attempted to pay when demanded either the interest accrued or the principal sum outstanding. The Defendant made every reasonable effort and took all the necessary steps to obtain a sale of the property and to obtain the best price reasonable obtainable at the time of sale.
54. Mrs. Mahler further relied on Silven Properties Ltd. v. Royal Bank of Scotland plc [2003] EWCA Civ 1409, [2004] 4 All ER 484.

Learned Counsel submitted that in the aforementioned action, the Claimants as mortgagors claimed damages against the Royal Bank of Scotland as mortgagee and against the Receivers as receivers alleging that in breach of duty they sold the mortgaged properties at an undervalue. Patten J. dismissed all the Claimant's claims against all the Defendants and refused permission to appeal. Chadwick LJ gave the Claimants permission to appeal limited to the claims against the Receivers. The court dismissed the appeal and found that the Receivers had no duty to delay the sale and were entitled, whether or not it was reasonable to do so, to sell the properties without delay as they were.

- Mrs. Mahler submitted that even if the Court finds that the Defendant had a duty to obtain the true market value for the property, the Claimant has failed to show that the true market value was different from the sale price at the time of sale. Counsel submitted that the burden of proof rests with the Claimant and she has failed to discharge that burden.
55. Learned Counsel further submitted that the Claimant who alleged that the Defendant did not obtain the true market value for the property brought no evidence to prove what is the true market value or that the sale price did not reflect the proper value at the time of sale. That, no valuation report or appraisal was tendered into evidence by the Claimant or formed a part of the evidence on her behalf, by oral testimony or otherwise.
 56. Counsel further referred to the Claimant's evidence (para. 29 of her Witness Statement) which states that she believes the property is worth more than \$35,000.00. However, there is no evidence by her or any witness on her behalf of what that value is or the "true market value", which she claims is different from the sale price. She said that the Claimant only tendered some photographs (**Exhibits EA 2 a - d**), which showed an incomplete cement structure on the exterior and unfinished on the interior. However, there was no evidence as to when these photographs were taken or by whom.
 57. Learned Counsel submitted that the Defendant acted properly at all times and in good faith in exercising its powers under the Charge. Further, the Defendant acted in accordance with the law and complied in all respects with the requirements under the Registered Land Act.
 58. Mrs. Mahler further submitted that there was no duty on the Defendant to obtain the true market value of the Claimant's property when exercising its power of sale. The Defendant was empowered by law to sell the charged

property at such reserve price as it deemed fit. And, its only obligation in equity may have been to exercise its power of sale in good faith and to take reasonable precautions to secure a proper price or the best price reasonably obtainable at the time. Further, the Defendant took all reasonable steps and care to do so.

59. Learned Counsel submitted that even if the court finds that the Defendant had a duty to obtain market value for the Claimant's property, no evidence was adduced by the Claimant to support her contention that the sale price was not the true market value at the time of sale. Further, there is no evidence before the court that the Defendant has breached any duty under the law.

Determination

60. There is an implied agreement in every charge that the Chargee will repay the sum borrowed plus interest at a specified time and in a specified manner. See **section 70 of the Registered Land Act, Chapter 194**, referred to by Mrs. Mahler at paragraph 37 above.
61. The Claimant in her evidence acknowledged that she agreed to repay the sum borrowed and acknowledged that she was in default. The Claimant had agreed to repay the principal sum on demand together with any interest then due. See Actual Charge dated the 22nd day of July, 1999 (**Exhibit 'AP 3'**) and paragraph 1 of the Memorandum accompanying Charge (**Exhibit 'AP 4'**) where the Claimant agreed to do so.
62. There is no dispute that the Claimant defaulted on her loan. This was due to unfortunate circumstances and so the Claimant could not meet her

payments. Firstly, the Claimant fell seriously ill and later her daughter was seriously ill. The evidence also shows that her husband who was working at the time she obtained the loan lost his job shortly thereafter. The Bank, however is in the business of lending and expects to be paid, if not, it will exercise its power of sale according to the agreement between the parties. See the Charge and the Memorandum accompanying the charge. The first page of the Charge dated 22nd day of July, 1999 for Block 23 Parcel 1314 which was signed by the Claimant shows the following:

...And I/ the above named Chargor(s) hereby acknowledge that I understand the effect of section 75 of the Registered Land Act 1977.

63. **Section 75 of the Registered Land Act** provides for the remedies of the Chargee in the event of default. The Claimant has acknowledged that she understood the effect of this section. In cross-examination she accepted that the Defendant had the right to sell her property if she did not pay.

Issue 1: Did the Defendant breach its fiduciary duty to the Claimant by failing to obtain the best price or the true market value for the mortgaged property.

64. I will start by looking at the remedies that are available to the Defendant as Chargee 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.*

See also the **Law of Property Act, Chapter 190** at **section 69** which provides for the mortgagees power of sale without an order of the court.

65. **Section 75 of the Registered Land Act** shows that where there is default the Chargee may sell the charged property. But, before doing so notice may be sent to the Chargor. See also **section 82(1)** of the **Law of Property Act**, which states:

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;*

66. The power of sale therefore, should not be exercised unless notice was given requiring payment and it must be done after three month's of such notice. The question to be asked therefore, is whether the Chargee served the Claimant with the notice in writing to pay the money due as provided by **section 75 of the Registered Land Act** and section **82(2) of the Law of Property Act**.
67. The evidence of Adolfo Pate shows that the Claimant defaulted in her loan obligation from as early as November, 1999, and several letters were sent to her. On December 14, 1999 a Legal letter was sent to her informing her that her loan was over 60 days in arrears of \$1,084.50. On July 27, 2000 another legal letter was sent to the Claimant informing her that her loan was in arrears for over 60 days in the sum of \$2,152.10. Thereafter three demand letters were sent to her. The letters are dated October 18, 2000, October 5, 2001, and August 25, 2003, respectively. In the letters the Bank notified the Claimant of her default in payments for more than three months and demanded full payment of the balance of the principal and interest owed. The Bank also gave her notice that if the outstanding sums were not paid within three months from the date of the letters, her property would be sold. See **Exhibits "A.P. 7 – 9"**.
68. A letter dated November 15, 2002 was also sent to the Claimant informing her that she was in arrears of \$4,688.70 and she was urged to visit the office to discuss the loan. The Claimant was also informed that if she failed to make satisfactory payment towards the loan the property will be

offered for sale in the local newspaper and subsequently by public auction through the bank's appointed auctioneer. See **Exhibit "A.P. 10"**.

69. This evidence shows that the Claimant continued to default on her loan payments and the Bank made all efforts to get the Claimant to pay her loan.
70. The Claimant in her evidence said that she never received the letters. I don't find her evidence credible. I believe the evidence of Mr. Arnold Nicholas, Legal Officer of the Defendant that the letters were hand delivered by him and representatives from the bank or were left at the Claimant's place of business.
71. Further, I agree with the submission by Mrs. Mahler that by virtue of paragraph 3(5) of the Memorandum Accompanying Charge (**Exhibit AP 4**), a demand for payment is deemed sufficiently served if left at the Claimant's last known or usual place of business. I also believe the evidence of Mr. Nicholas that he visited the Claimant's premises on several occasions to discuss her loan situation. See paragraph 10 of his witness statement.
72. The evidence proves that the notices were sent in accordance with section **75 of the Registered Land Act**. The Bank in my view was very patient with the Claimant. But, she showed absolutely no interest in making the payments. She admitted in cross-examination that she did not make any arrangements with the Defendant to remedy her defaults. The evidence of Adolpo Pate is that as of January 28, 2003, the Claimant made no further payments to the Bank despite numerous promises to do so. That no payment was made for the years 2004 and 2005. See paragraphs 12 and 14 of his witness statement.

73. I find that since the Chargor did not comply with the notice, the Chargee had the right to sell the charged property.

Duty of Chargee

74. The next question for consideration is the duty of the Chargee/Bank in exercising its power of sale. The relevant statutory provisions in Belize are the **Registered Land Act, Chapter 194** and the **Law of Property Act, Chapter 190**.

75. 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)*

This section shows that the Chargee must act in good faith and may sell by public auction subject to a reserve price as the Chargee thinks fit.

76. 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 country.*

This section provides for publication in the Gazette and the newspaper.

77. The common law also shows that in all matters relating to power, the mortgagee must act in good faith and behave fairly towards the mortgagor. However, the mortgagee is not under any general duty of care to the mortgagor. For example he can choose when to sell even though this may be disadvantageous to the mortgagor.

78. See also **Volume 32, Halsbury's Laws of England, 4th edition 2005 Reissue, para 659** which states:

“A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale...He is not obliged to delay in the hope of obtaining a higher price...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.” (emphasis mine).

79. See also **Becker and Others v. Bank of Nova Scotia [1986] LRC (Comm) 638 at Page 649 c** which was relied on by Mrs. Mahler :

“What was the duty of the bank and the standard of duty in exercising its power of sale? The Bank must show that the sale was made in good faith and that the Bank had taken all reasonable precautions to obtain the best price reasonably obtainable at the time.” (emphasis mine).

80. See further the case of **Cuckmere Brick Co. v. Mutual Finance Limited** [1971] Ch. 949, cited by both Counsel, where Salmon L.J. in considering the duty of a mortgagee, at p. 966, states:

“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 exceptionally low. Providing none of these 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.”

81. Therefore, in my view, the mortgagee’s general duty is to act in good faith and in so acting, the mortgagee is in certain circumstances under a specific duty of care. That is, if he decides to sell he must take reasonable care to obtain **“the true market value”** or **“ the proper price”**. I disagree with Mrs. Mahler that a Mortgagee has no duty to obtain the true market value of the charged property in the exercise of its power of sale. By acting in good faith and taking reasonable precautions to secure a proper price the Mortgagee will obtain the true market value. The true market value is essentially the price the property will fetch on the open market at the particular time of sale.

82. See the case of **Cuckmere Brick Co. v. Mutual Finance Limited** supra for the principle enunciated by **Salmon L.J.** as thus:

“a mortgagee when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price or true market value”.

See also the case of **Silven Properties v Royal Bank of Scotland (2004) 1 W.L.R. 997** at para 19.

83. I agree with Ms. Vernon that the mortgagee in exercising his power of sale owes a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it.
84. See the case of **Cuckmere Brick Co. v. Mutual Finance Limited** supra for the principle enunciated by **Salmon L.J.** on the responsibility of the mortgagee, which was relied on by Ms Vernon in her arguments.

*“The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are “neighbors.” Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, **it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale”.***

85. The question to be asked therefore, is whether the Defendant acted in good faith when he exercised his power of sale? To answer this question the court has to look at the evidence to see what precautions were taken by the Defendant to secure a proper price.

86. Firstly, I will start with the evidence for the Claimant. The Claimant, Ms. Norma Coy, her common law husband, Mr. Ayuso and their daughter are the witnesses in this case. Their evidence is that they believed that the property could have been sold for more than \$35,000.00. Ms. Coy said that as collateral for the loan, her land which is registered property and containing 1000.49 s.y. and which at the time contained a 25' x 30' wooden structure with two bedrooms and an outdoor out-house, was used to secure the loan. Ms. Coy stated that from surplus from their shop sales, after meeting their loan obligations, her husband constructed a concrete extension measuring 25' x 25' to the west of the existing wooden structure which measured 25' x 30' and that the size of the structure after the extension measured 25' x 55' which includes both the wooden and cement structures and which were both used for residential purposes.
87. Ms. Coy further stated that shortly after, with the business still making profits, a second concrete extension measuring 25' x 55' was constructed on the north of the existing structure being the wooden structure and the first concrete extension. Thereafter the building measured 50' x 55' with the new addition. She stated that this extension was used to carry out business as 'GiGi's Sports Bar'.
88. Ms. Coy further said that in 2002, her daughter, Nelina, her husband and herself agreed that her daughter would obtain another loan to complete a third extension for the purpose of conducting a night club under the name of 'GiGi's Night Club' which would help to bring further income to them so that they could pay off all their expenses at a faster rate. She said that her daughter, Nelina Ayuso, obtained a loan of

\$10,000.00 from the Atlantic Bank Ltd from which a concrete extension to the property of 30' x 55' was constructed. She said that as a part of that construction, a septic tank was constructed under the structure. That the current size of the entire structure on her property now measured 80' x 55' instead of the 25' x 30' that it had when she originally mortgaged it with the Defendant. She further stated that because of the final extension, this caused a piece of the building to extend into Nelina's lot which she agreed to as she was the one who obtained the loan and would be running the night club.

89. Ms. Coy said that from the said loan, a concrete foundation was constructed under the wooden structure on the south and the north ends that was tied into the existing foundation of the 1st extension. She said that a wall of the same width and height of the wooden structure up to the roof was made on the north side of that building for they intended to upgrade the wooden structure to concrete. She said that was financially assisted by the loan obtained by her daughter. She stated that as it was her daughter who had personally obtained this loan, it was repaid with the assistance from her other daughter residing in the United States.
90. Further, she said that at no time did she witness or see anyone visit their home to do any assessment or valuation of the building or did any one visit them to ask about ownership of the property. Also, she stated that at no time did anyone visit their home and business to take pictures of the property.
91. Further she said that they did not inform the Defendant of the extensions and upgrade that was done to the property nor did the Defendant enquire as to whether any additional assets were placed on the property that would increase its value. She stated that she believed that the property

is worth more than \$35,000.00 and that if the Defendant knew that a nightclub and bar was being conducted on the property before they sold it, more moneys could have been gotten from the sale as other persons would have also been interested.

92. Mr. Ayuso and Ms. Nelina Ayuso have confirmed the evidence of the Claimant. Mr. Ayuso further added that the third extension extended approximately 7 feet into Nelina's lot which is on the north side and adjacent to his lot. This was done with the consent of Nelina as she was the one who would have managed the night club. Mr. Ayuso also stated that upon receiving a demand letter from the Defendant in early 2003, he visited Mr. Sabido at Small Farmers & Business Bank explaining his circumstance and offered to pay \$3,000.00 toward the debt and so stop the process of the intended sale which he refused stating that he can only stop the sale if he, Mr. Ayuso paid half the outstanding balance which balance had increased to \$20,000.00 due to administrative fees and interest.
93. Mr. Ayuso said that he received a letter from the Defendant stating that the house was sold for \$35,000.00 and the surplus of \$15,000.00 could be collected at the Small Farmers & Business Bank Ltd. Also, he said that the property valued more than \$35,000.00.
94. The Claimant's daughter, Ms. Nelina Ayuso in her witness statement stated that the third extension extended several feet into her lot which is on the north side adjacent to her family's lot. Ms. Ayuso stated that she did not object to the extension running into her property as she would have been in charge of the nightclub and bar along with her father.

95. Ms. Ayuso said that she believes that if the Defendant had known that she was conducting the business of a nightclub and bar on the property together with the fact of all the extensions made to the wooden structure that they could have gotten more moneys for the property when it was sold.
96. All three witnesses gave evidence of the extensions on the mortgaged property and also of the encroachment of the building unto the adjoining land which according to Mr. Ayuso is about seven feet.
97. The evidence from the Officers of the Bank show the precautions taken to secure a proper price for the property. The evidence of Adolfo Pate, the General Manager of the Small Farmers & Business Bank is that in December of 1998, Ms. Norma Coy approached the bank along with her common-law husband, Mr. Eloy Ayuso, for a loan of \$15,000.00 for the expansion of a poultry business and grocery store. He said that in early 1999, a loan of \$15,300.00 was approved to be repaid at 10% per annum by monthly payments of \$283.45, the total sum to be repaid in 6 years. He said that by virtue of Charge dated the 22nd day of July, 1999, Ms. Coy charged her interest in her freehold property to the Bank to secure the aforementioned loan of a principal sum of \$15,300.00 with interest at the rate of 10% per annum, repayable on demand. He stated that at the time of the loan, the said property comprised a wooden house only.
98. Mr. Pate stated in his witness statement that despite Ms. Coy's agreement to repay the loan by monthly installments of \$283.45 per month, she defaulted on numerous occasions. That from as early as November, 1999, Ms. Coy defaulted in her loan obligation. He said that demand letters were sent to her on December 14, 1999, July 27, 2000, October 18, 2000, October 5, 2001 and August 25, 2003.

99. Further, by letters dated October 18, 2000, October 5, 2001, and August 25, 2003, the Bank notified Ms. Coy of her default in payments for more than three months and demanded full payment of the balance of the principal and interest owed. The Bank also gave her notice that if the outstanding sums were not paid within three months from the date of the letters, her property would be sold.
100. Mr. Pate stated that as of January 28, 2003, Ms. Coy made no further payments to the Bank despite numerous promises to do so. That on January 6, 2004, Mr. Ayuso visited the Bank and discussed the future repayment of the loan. He indicated that he was getting a loan from Atlantic Bank to repay Small Farmers and that he expected to have it repaid in full by February 15, 2004. However, no payments were made for the years 2004 and 2005.
101. Mr. Pate then went on to show what was done when the Bank exercised its power of sale. He said that by Gazette Notices dated July 17, 2004, July 24, 2004, and July 31, 2004, the Bank published its intention to sell Ms. Coy's property. He said that these Gazette Notices met the normal banking practices in regards to such notices. Further, no bids or offers were made for the purchase of the property. See **Gazette Notices: Exhibits AP 12, 13, and 14.**
102. He further stated that by Amandala Notices dated August 7, 2005, August 14, 2005, and August 21, 2005, the Bank advertised the date, time, and place of the auction. See **Amandala publications: Exhibits AP 15, 16, and 17.** He said that these advertisements met the normal banking practices regarding auction notices.

103. Mr. Pate's evidence is that on August 24, 2005, the property was sold at auction to Dr. Lesbia Lissette Cocom for the sum of \$35,000.00. Also, that two lower bids were refused. He said that at the auction and at all times in its dealings with Ms. Coy, the Bank acted in good faith. That the sum of \$15,720.76 was credited to Ms. Coy's loan account. Further, he stated that by letter dated August 29, 2005, Ms. Coy was notified of the outcome of the auction.

104. Mr. Pate then stated that by Transfer by Chargee in Exercise of Power of Sale dated September 5, 2005, the Bank transferred the Parcel 1314 to Dr. Cocom. That by Land Certificate No. 9400/2005 and dated October 12, 2005, Dr. Cocom was registered as proprietor of the said Parcel. Also, by letter dated November 7, 2005, the Bank notified Ms. Coy again of the outcome of the sale, asked her to vacate the property within thirty (30) days of the date thereof, and informed her that a residue of monies were held on account for her. However, Ms. Coy refused to vacate the premises.

105. There is also the evidence of Arnold Nicholas who is the Legal Officer of the Small Farmers & Business Bank whose evidence confirms that of Mr. Pate and in addition stated that he visited Ms. Coy's premises on October 5, 2001, November 15, 2002, August 25, 2003, and in July of 2004 to discuss her loan situation with her. Also, that by letter to him dated October 25, 2004 and copied to Mr. Pate as Manager of the Bank, Mr. Eloy Ayuso indicated that he wanted to negotiate the loan balance and asked for the Bank's permission to pay \$300.00 per month until the loan and arrears were paid off. However, no payments were made by Ms. Coy or Mr. Ayuso for the years 2004 and 2005.

106. Mr. Nicholas stated that the auction was held on August 24, 2005 by Auctioneer Rafael Perez and that he, Mr. Nicholas was present at the said auction. He said at the time of the auction, the property comprised a wooden house and portions of structures that occupied Parcels 1248 and 1313, adjoining parcels.
107. Mr. Nicholas stated that the Bank had assessed the value and had set a reserved price of between \$35,000 to \$45,000 for the sale of the property. A bid of \$20,000.00 was received but refused by the auctioneer and another bid of \$30,000.00 was also received and refused.
108. Mr. Oscar Arnold, Assistant Manager/Accountant of the Defendant/Bank stated in his witness statement that in 2005, the Bank engaged Mr. Rafael Perez to sell the property in Benque Viejo charged by Ms. Norma Coy to the Bank. He said that at that time, the property comprised a wooden house and portions of structures that occupied two adjoining parcels, being Parcels 1248 and 1313.
109. Mr. Arnold said that the auction was held on August 24, 2005 by Auctioneer Rafael Perez. Further, the Bank had assessed the value and had set a reserved price of between \$35,000 to \$45,000 for the sale of the property. That a bid of \$20,000.00 was received but refused by the auctioneer and another bid of \$30,000.00 was also received and refused.
110. Mr. Arnold in his evidence in chief said that the Bank looked at several factors to determine a reserve price. He said the factors are improvements or demolition that were made on the property, the type of structure, past prices on auctions of properties in the same area and loan balances. Further, he said that about a month or a month and a

half before that a 30 x 40 full concrete property which had galvanized roofing and tiled interior had been sold for \$21,000.00. That this was an indication as to the buying prices at the time in the area.

111. As for the Claimant's property, Mr. Arnold said that he took several things into consideration, that is, the building has a wooden structure, a concrete structure that had no plastering and a portion of the property extended on an adjoining property. He said that he had to take into consideration the structural integrity of the building and how the electrical and the plumbing would be affected if the bank sold the property. The reason being that the Bank had an interest only in the property that was mortgaged and not the adjoining property. He said that in essence the structure or the extension that was made would somehow have to be split or damaged.
112. Mr. Arnold said that with respect to the type of structure that is on the property, the field officers from the Bank would visit the property. He said that in this case the Credit Manager who is charged with loans for the area and also the Legal Officer visited the property on several occasions.
113. Mr. Arnold said that he took all the factors mentioned above into consideration in arriving at a reserve price and he informed the auctioneer of the reserved price.
114. In cross-examination by Ms Vernon, Mr. Arnold said that he did not ever personally visit the property belonging to the Claimant. He said also, that no pictures of the property was given to him showing the extension on the property. He was asked if anyone did a valuation or assessment of the property and he said that a valuation was not done. He said that a physical assessment was done. Mr. Arnold said that he did not personally know the location of the boundary markers for the property, except as seen on the plan. But, that the field officers who made the

- visits knew the boundary. He said that he arrived at the reserve price by looking at the plan, information from the field officers and other factors as mentioned before in his evidence. Mr. Arnold denied that he came up with an arbitral figure without taking any factors into consideration. He further said that he found out that the house was extended onto the adjoining land when Mr. Sabido, the Bank's credit officer visited the property.
115. It was suggested to Mr. Arnold by Ms. Vernon that when the property was advertised for sale, if it was described as being formally used as a business and a night club that it would have attracted more people to the sale. Mr. Arnold disagreed with the suggestion.
116. Ms. Vernon also made a suggestion to the witness which I consider to be crucial to this case, that if the Bank had informed potential purchasers that the building encroached the adjoining lands this could have lowered the value of the property they were purchasing. Mr. Arnold in response said that no measurements were taken to determine how far the building encroached. Further, the Bank at the time of the auction was only exercising its right over the portion of the property that was mortgaged to them.
117. Learned Counsel then suggested to Mr. Arnold that because the Bank did not know how far the property extended onto the adjoining property that this shows that no proper assessment was done before sale. Mr. Arnold reiterated that the Bank had to take into consideration that if there is a division or split of the property this would have an impact on the value of the property. He said that the structural integrity of the building will be destroyed, the beams that tie the property together would have to be destroyed, the plumbing and the electrical. Ms. Vernon agreed with Mr. Arnold's answer to this suggestion. However, Learned Counsel's

concern was whether potential purchasers were informed of this problem. Mr. Arnold said that the purchasers were not informed of this problem.

118. Mr. Arnold also explained what he meant by 'portions of structures' in his witness statement. He said that this meant that portions of the structure occupied two adjoining parcels. Further, he disagreed that the reserve price set by him was low and that it was an arbitrary figure.
119. In re-examination Mr. Arnold said that the balance that was owed on the loan was about \$12,000. and interest about \$3,000. Mrs. Mahler then informed him that the balance according to the Member Status Report which was tendered into evidence shows that it was about \$15,000. Mr. Arnold then agreed with Mrs. Mahler that he sold for \$35,000. which is more than two times the loan balance owed by Ms. Coy.
120. I believe the evidence of the Claimant and her witnesses that they did three extensions to the wooden house. The court also believes the evidence of the Defendant's witnesses that they were aware of these extensions. Further, I believe that the Credit Manager and the Legal Officer visited the property several times. The house is certainly far bigger than it was when it was mortgaged to the Bank, but, there is a fundamental issue which seem to escape the minds of the Claimant and her family. The Bank who has the power of sale can sell only that which was given to them as security. The family arrangements to extend the house onto Nelina's property who agreed to have this done because of the Sports Bar and Nightclub, seems straightforward except that they have forgotten or just don't care that the Bank had security only on the Claimant's property. Unfortunately, the Claimant defaulted on her loan and the Bank sold the security given to them. The Bank could not sell the property belonging to Ms. Nelina Ayuso on whose property the building encroached.

121. The evidence of the Defendant is that the property encroached on two adjoining lots. The evidence of Mr. Ayuso is that the house extended about 7 feet into Nelina's lot. There was no evidence from the Defence as to the length of encroachment on the other properties. On a balance of probabilities, I accept the evidence for the Claimant that the building encroached only on one property, that is, it extended about 7 feet onto Nelina's property. The question to be asked is what is the effect of this extension since the Bank can only sell what was given to them as security. In my view, there is only one simple answer to this predicament. The building would have to be destroyed since all extensions were done in concrete. I agree with the evidence of Mr. Arnold that the structure or the extension that was made would somehow have to be split or damaged. This is because the purchaser has no right to Nelina's property and could not be given title to Nelina's property.

Undervalue

122. Was the property sold at an undervalue? I disagree with Ms. Vernon that because Mr. Arnold is not a certified valuator and because he did not personally visit the property he could not be in a position to arrive at a sale price. There is no obligation on the Chargee to engage a certified valuator or assessor. This can be done by the Chargee himself as provided by **Section 78 of the Registered Land Act** where it is provided that the chargee in exercising his power of sale must do so subject to such reserve price and conditions of sale as the chargee thinks fit. As for Mr. Arnold not personally visiting the property, I find his evidence credible that he was given information by the Credit Manager and the Legal Officer about the property and the extensions done and also the encroachment on the adjoining property. He also had the file showing the description of the

property. In my view, the factors used by Mr. Arnold in arriving at the reserve price shows no evidence of bad faith. He looked at similar properties in the area and also the structural integrity of the building as this would have to be broken down. Learned Counsel, Ms. Vernon also acknowledged that the value of the property will diminish as a result of the encroachment. This can be seen from Counsel's suggestions to the witness, Mr. Arnold in cross examination that if the Bank had informed potential purchasers that the building encroached the adjoining lands this could have lowered the value of the property they were purchasing.

123. Though the Claimant sees the extensions of the building as an improvement, this in effect could have prejudiced the mortgage security as the wooden building which was on the property when it was mortgaged could suffer damage in the event of a split of the building. There is no evidence before this court if the Purchaser was aware of the encroachment of the building on the adjoining land. But, had the Bank published this information, this would have had a negative impact on the sale. It is not for this court to decide the fate of the Purchaser in the event Ms. Nelina Ayuso request that the Purchaser remove her building from her property. This is a matter for the Bank and the Purchaser.

124. In my view, the Bank has taken all the necessary precautions to secure a true market value. I find the Bank has acted in good faith as they were faithful in their duty or obligation to secure a proper price. The property was exposed on the market for an adequate length of time and a reserve price was set taking into consideration several factors as seen above by Mr. Arnold's evidence. As in the case of **Becker and others v Bank of Nova Scotia** supra the Bank has shown that the sale was made in good faith. See also the case of **Farrar v. Farrars Ltd.** supra cited by Ms. Vernon where it is stated that 'by taking reasonable precautions to obtain a proper price' Lindley L.J. explained that he did not mean to imply

that the mortgagee would be liable for mere negligence on his own part or on that of his agent, but simply that he must not “*fraudulently or willfully or recklessly*” sacrifice the interests of the mortgagor’. As stated by Salmon L.J. in *Cuckmere* at p. 1220, when referring to bad faith and negligence, he stated recklessness as referred to in **Farrars** ‘*connotes something akin to bad faith and more than gross carelessness. It means not caring whether or not the interests of the mortgagors are sacrificed.*’ I find no evidence in this case that the Bank fraudulently or willfully or recklessly sacrificed the interest of the Claimant. Rather, the evidence before the court is that the Bank took reasonable precautions to obtain a proper price or true market value when it exercised its power of sale.

Description of property in advertisements

125. Ms. Vernon submitted that there was failure to adequately describe the property in the publications as being suited for business purposes as opposed to residential purposes.

One example of the Gazette Notices, in particular “A.P. 14” states:

“The SMALL FARMERS & BUSINESS BANK LIMITED of South Ring Road, Belmopan, City, Cayo District hereby gives Notice of its intention to exercise its power of sale as Mortgagee under the Deed of Mortgage or Charge between those hereinafter named and the said Small Farmers & Business Bank Limited which Mortgages are recorded at the Land Titles Unit in Belmopan, or the Lands Registry and that the said Small Farmers and Business Bank Limited will at the expiration of two (2) months from the date

of the first publication of this Notice sell the properties described the Schedule hereto.

All offers to purchase the said properties must be made in writing to Small Farmers and Business Bank Limited at its office on South Ring Road, Belmopan City, Cayo District.

SCHEDULE

.....

6. All that parcel of land being Block 23, Parcel 1314 situated in Benque Viejo del Carmen, Cayo District containing 1000.49 square yards together with all buildings and erections being thereon the freehold property of Norma Coy.

126. One example of the advertisement in the Amandala newspaper, in particular, Exhibit "A.P. 17" states:

PUBLIC AUCTION SALE: PROPERTIES

BY ORDER of the Mortgagees, Messr. Small Farmers and Business Bank Limited, Licensed Auctioneer Rafael Perez will sell the following properties at the time and place specified:

CAYO DISTRICT, Small Farmers and Business Bank, Belmopan Office, Wednesday, 24th August, 2005 at 10:00 a.m.

.....

All that parcel of land being Block 23, Parcel 1314 situated in Benque Viejo del Carmen, Cayo District containing 1000.49

square yards together with all buildings and erections being thereon the freehold property of Norma Coy.

127. These advertisements show the Block Number, Parcel number, the size of the parcel and that it is a freehold property of Norma Coy. It also states that it will be sold with all buildings and erections. The advertisement does not state whether it is a business premises or a residential premises.
128. The evidence before the court is that it is the practice in Belize to do the advertisements in this format. A potential purchaser would call and get the details or visit the property. There is no evidence before the court if the Purchaser knew of the encroachment but this is to the detriment of the Purchaser and not the Claimant.
- In my view, there was no failure to adequately describe the premises. The advertisement showed the land to be freehold, the size of the land was stated and also that it had buildings and erections. I find this description to be adequate under the circumstances.
129. The case of **Tse Kwong Lam v. Wong Chit Sen and Others (1983)** **3 All ER 54** cited by Ms. Vernon can be distinguished from the case at bar. In that 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. 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.

Hence the reason why the Judge said that the particulars and conditions of sale contained only the legal requirements and that there was no evidence that anyone requested a copy of the particulars and conditions or asked to inspect the property. It was found that the estate agents were negligent in not advertising the land as having planning permission for the erection of flats. The Court found that had this been done the land could have fetched more than the sale price. In the case at hand, there is no evidence which shows that if the property had been advertised as formally used as a Bar and Night club it would have attracted a higher sale price. In any event, the Bank could not consider the extensions which includes the Night Club because of the encroachment on another property.

No engagement of certified valuer

130. Ms. Vernon also submitted that the Defendant failed to engage a certified valuer in assessing the property. Learned Counsel also referred to the **Tse Kwong Lam** case supra and submitted that the Auctioneer was not called to give evidence in the case at hand because he had not valued the property himself.
131. There is no dispute that a certified valuer was not engaged in assessing the property in the case at hand. As mentioned above section **78 of the Registered Land Act** provides that a chargee exercising his power of sale shall act in good faith and may sell by public auction subject to a reserve price and conditions of sale as the chargee thinks fit. There is no obligation on the chargee to engage a certified valuer. The case of **Tse Kwong Lam** supra as shown above must be distinguished from the case at hand as the Mortgagee was in a close relationship with the purchasing Company and there was no competitive bidding and further the Mortgagee fixed the purchase price. It was for these reasons

the Mortgagee had to show that he took reasonable precautions to obtain the best price.

132. In the case at hand, there was a licensed auctioneer employed to do the sale. He was given the reserve price set by Mr. Arnold and further there was competitive bidding. The auction held on August 24, 2005 by Auctioneer Rafael Perez had been properly advertised. Further, the Bank had assessed the value and had set a reserved price of between \$35,000 to \$45,000 for the sale of the property. He was not instructed to just put the property under the hammer. Two lower bids were refused. The property was sold for more than double than was owed. The Mortgagee did not sell the property hastily at a knock down price sufficient to pay off the mortgage debt.

Negligence

133. The Claimant also claimed damages as a result of the Defendant's breach of fiduciary duties in failing to exercise good faith and to use such reasonable care, skill and diligence in the due execution of the power of sale and/or as a result of the Defendant's negligence or recklessness in breach of those duties. I agree with Mrs. Mahler that in the case of negligence the particulars must be pleaded showing in what respects that the Defendant was negligent. There was no particulars of negligence pleaded in this case. In any event, there is no evidence of negligence in this case as in the **Cuckmere case** supra where the agent did not mention that there was planning permission for the lands to be sold or as in the case of **Tomlin v Luce** supra where there was mis-description by the mortgagees of the property.

Second Issue: Whether the Claimant is entitled to damages or alternatively the sum of \$125,000.00.

134. The Court found that the Defendant/ Bank acted in good faith and took all reasonable precautions to obtain the best price for the property at the time of the sale. Thus, the Claimant is not entitled to the damages sought. I find that the Claimant is not entitled to damages or alternatively the sum of \$125,000.00.
135. Further, for sake of completeness, the Claimant failed to prove to the Court that it is entitled to the payment of \$125,000 which is, as stated in her Claim, the difference outstanding between the true market value and the sum of \$35,000. as obtained from the sale. The Claimant has not brought any evidence to show what is the true market value. Even if the Claimant had produced a valuation report showing a market value this would not have been conclusive evidence that the Bank did not act in good faith. The Court would have had to examine the report to see if was an honest estimate and also bearing in mind that valuation is not an exact science. See **Derrick v Trinidad Asphalt Holdings Ltd. and Another** supra cited by Ms. Vernon. Also see the case of **Becker supra** where Kerr, J.A. said *“For a particular purpose a man may obtain from liberal valuers a generous appraisal of his property but the true test of its present worth is what it will fetch in the market place.”*

Conclusion

136. The evidence shows that the Bank made every effort to get the Claimant to settle her debt. The Bank sent to her numerous notices reminding her of this fact. The Bank advertised the property for sale in the newspaper and the Government Gazette. There was no hasty sale. A licensed auctioneer was employed to do the sale by public auction. A reserve price was set by the Bank by taking several factors into consideration. In my view, the evidence proves that the Bank acted in good faith. I find that the Bank acted in good faith and took all reasonable precautions to obtain the best price for the property at the time of the sale. For these reasons the following is ordered:

137. ORDER

The Declaration is refused that the Defendant failed to take reasonable care to obtain the true market value of the Claimant's property when exercising its power of sale.

The Claimant is not entitled to the damages sought.

Cost for the Defendant to be agreed or taxed.

.....

MINNET HAFIZ
SUPREME COURT JUDGE

Dated this 30th day of July, 2009.

