

**IN THE SUPREME COURT OF BELIZE, A.D. 2018**

**CLAIM NO. 284 of 2017**

**YOLANDA TRETHERWEY**

**CLAIMANT**

**AND**

**SCOTIA BANK (BELIZE) LIMITED**

**DEFENDANT**

**BEFORE the Honourable Madam Justice Sonya Young**

Hearings

24.1.2018

Written Submissions

Claimant – 12.2.2018

Defendant – 19.2.2018

Decision

17.5.2018

Mr. Michel Chebat, SC for the Claimant.

Mr. Edwin Flowers, SC for the Defendant.

**Keywords: Mortgage – Sale of Property – Breach of Fiduciary Duty – Bad Faith – Undervalue – Committal – Breach of Undertaking – Registered Land Act (RLA) Cap. 194**

**JUDGMENT**

1. Ms. Trethewey had two existing loans (among others) with the Defendant bank (The Bank). These two loans were secured by two parcels of land – 1696 and 2307 both located in Placencia. Placencia sits on a peninsular in

Belize and has over the years developed from a fishing village into a popular tourist destination. It boast great beaches, small islands, luxurious hotels and an airport. Although it maintains its village charm all amenities of city life are readily available.

2. By late 2014 the loans were in arrears and the Bank begun preparations for their sale. Payments were subsequently made which brought the loans current and Parcel 2307 alone was withdrawn from auction as part of new arrangements agreed between the parties. A document evincing this agreement was signed. The loans again fell into arrears and in early 2016 Parcel 2307 was returned to auction. In December, 2016 Parcel 1696 was sold by the Bank for \$275,000 and Ms. Trethewey and her husband were evicted.
3. Ms. Trethewey says her journey with the Bank reads like a litany of bad faith. It appears that it may really have been (her husband) Mr. Trethewey's journey as he seems to have taken the lead in reality. In fact, Ms. Trethewey did not testify as her counsel asked that she be removed from the witness box and her witness statement struck out. This was consented to by counsel for the defence. She had informed the court while in the witness box that she was too anxious to continue.
4. She pleaded that since March 2016 Mr. Trethewey tried to have an issue corrected with the documentation of the loan secured by Parcel 1696 but the Bank never addressed the matter as promised. Apparently property not belonging to Ms. Tretheway had somehow been included in the charge. She claims that this error made 1696 unmarketable by her even though she had been offered BZ\$490,000 for its purchase in November 2016.

Notwithstanding, the Bank proceeded to sell 1696 although they had been informed of the said offer and knew that Ms. Trethewey was actively trying to sell same.

5. On 9<sup>th</sup> December, 2016, Mr. Trethewey communicated a proposal to the Bank in writing as they had been requested to do. This proposal concerned Parcel 2307. The Tretheweys wished, particularly, to preserve it for sentimental reasons. It was a gift from Ms. Trethewey's father. The proposal outlined a strategy to fully pay off the outstanding loan by 31<sup>st</sup> March, 2017. They say they received no response and again wrote to the Bank on 13<sup>th</sup> January, 2017. That same day they received a response with the debt balance. On the 7<sup>th</sup> February, 2017 he wrote again with a fresh proposal to pay \$4000 per month. On the 10<sup>th</sup> April, 2017, Parcel 2307 was sold by the Bank for BZ\$160,000. Further, despite the Bank's undertaking to the court not to transfer the property while these proceedings remained pending, the transfer was in fact concluded. The pleadings were not amended.
6. Ms. Trethewey alleges that the Bank has acted in bad faith in not only failing to correct the error on the document but failing to respond to her and/or her husband repeatedly. Even worse, it failed to take reasonable care to obtain the true market value of both parcels when exercising its power of sale. This, she says, all amounts to a breach of its fiduciary duty for which she ought to be compensated in damages.
7. She also seeks declarations and an order for both sales to be set aside and in the alternative the sums of \$184,000 and \$290,000 being the difference

between the sale price and the true market value for parcels 1696 and 2307 respectively.

8. In its defence, the Bank asserts that as a mortgagee it at all times acted in good faith and properly discharged all duties to Ms. Trethewey. Reasonable care was exercised in the sale of the properties and all reasonable precaution was taken to secure the best price obtainable at the time. In fact, it extended itself to accommodate her many requests to preserve her property, but she in turn failed to fully honour her commitment throughout. Even after new conditions were agreed she complied with some but neglected others. Once the loans went into arrears none of her husband's many proposals to pay were ever fulfilled. They refute any liability in damages or that Ms. Trethewey is entitled to any of the reliefs sought.

**The Issues to be determined:**

9.
  1. Whether the Bank in exercising its power of sale failed to act in good faith and/or to have regard to the interest of the chargor.
  2. Whether Ms. Trethewey has suffered loss and is entitled to damages and in what quantum.
  3. Whether the Bank breached its undertaking to the court and if so whether Ms. Blades should be committed as an officer of the Bank.

**Whether the Bank in exercising its power of sale failed to act in good faith and/or to have regard to the interest of the chargor:**

10. There can be no doubt that a mortgagee is under a duty to ensure that the sale of the mortgaged property was made in good faith and all reasonable precautions have been taken to obtain the true market value. This is provided for by section 78(1) of the RLA which reads:

*“A chargee exercising his power of sale shall act in good faith and have regard to the interest of the charger, 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 charge thinks fit, with power to buy in at the auction.”*

11. As explained in Commonwealth Caribbean Property Law, 4<sup>th</sup> Ed at page 212: *“‘good faith’ connotes a ‘duty to act honestly and without a reckless disregard of the interests of the mortgagor’.*” This is not a simple allegation to prove. Strong and cogent evidence must be provided which demonstrates something more than gross carelessness on the mortgagee’s part.
12. In expressing the scope of the mortgagee’s duty, this court in *Scotia Bank (Belize) Ltd. v Delroy Fairweather and Carol Gentle, Claim No. 479 of 2016* quoted from *Selvin Jones v The Scotia Bank (Belize) Ltd., Claim No. 132 of 2012 at paragraph 11:*

*“I think the power of a mortgagee to exercise the power of sale of property under a mortgagee deed, where there has been default in paying the installments under the mortgage, has been brilliantly expounded by Lord Moulton in the Privy Council decision of **McHugh v. Union Bank of Canada 1913 AC 311**, that: “It is well settled law that is the duty of a mortgagee when realizing the mortgaged property for sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.” In **Cuckmere Brick Co. Ltd.** above Salmon CJ at page 643 says that: “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 sale.” The mortgagee in exercising a power of sale under a mortgagee deed is not in the position of an absolute owner selling his own property. The mortgagee has a duty to pay some regard to the interests of the mortgagor when he comes to exercise the power of sale. In exercising that power of sale, the mortgagee has a legal obligation, considering the facts and circumstances of the case, to act reasonably, and to take reasonable care to obtain the true market value or price for the property at the date of sale.”*
13. This duty, however, does not extend to waiting in anticipation of obtaining a higher price since a mortgagee is not a trustee. As enunciated in *Cuckmere Brick Co. v Mutual Finance Ltd (1971 2 All ER 633:*

*“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 mortgaged 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 interest 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.”*

14. Clear principles for the exercise of the power of sale were distilled in ***Meftah v Lloyd, TSB Bank (2001) All ER*** and was adopted in the Eastern Supreme Court (Antigua) case ***Bank of Nova Scotia v Emmanuel AG 2007 HC 50 paragraph 104*** as follows:

- “1. A chargee owes a duty of care to the charger in respect of the manner in which the power of sale is exercised.
2. The duty is to obtain what has been described as the true market value of the best price reasonably obtainable at the time.
3. In deciding whether the chargee has taken reasonable precautions to obtain the true market value, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong line.
4. In particular the charge may take into account such matters as when rival bidders are prepared to complete, and how secure funding is.
5. The chargee can sell when it likes, even though a better price might be obtained if it waits, and even if the result of an immediate sale may be that instead of there being a surplus for the charger the purchase price is only sufficient to discharge the mortgage debt.
6. The fact that the charge can sell when it likes does not mean that it can ignore the consequences that a short delay might result in a higher price, and it must fairly and properly expose the property in the market.”

15. ***Silven Properties Ltd. v Royal Bank of Scotland PLC [2003] EWCA Civ 1409 [2004] 4 All ER 484 paragraph 18*** solemnly advises:

**“If the mortgagor requires protection in any of these respects, whether by imposing further duties on the mortgagee or limitations on his rights and powers, he must insist upon them when the bargain is made and upon the inclusion of protective provisions in the mortgage. In the absence of such protective provisions, the mortgagee is entitled to rest on the terms of the mortgage and (save where statute otherwise requires) the court must give effort to them.** The one method available to the mortgagor to prevent the

*mortgagee exercising the rights conferred upon him by the mortgagee is to redeem the mortgage. If he redeems, there can be no need or justification for recourse by the mortgagee to the power of sale to achieve repayment of the debt due to him secured by the mortgagor.”*

**The Evidence:**

16. The Bank’s evidence, through Harlesha Blades, was that Ms. Trethewey had defaulted on her loans. The first loan, secured by Parcel 1696 was made in August, 2007 for \$416,000. The second, was in April, 2010, where Parcel 2307 secured a loan of \$270,000. These loans were agreements freely entered into and which both parties were well aware would govern the process. The Tretheweys knew that the properties would be sold if they did not pay accordingly.
17. Ms. Trethewey does not deny defaulting. Rather, through her witness, Mr. Trethewey, she cites instances of them making payments to bring arrears current and offering proposals to pave the way forward. Most of these proposals relied on anticipated asset sales abroad and loans from family and friends. At no point does Mr. Trethewey, ever say they presented the sum required to redeem the mortgage. Even when they made their proposal in December, 2016, which they say was never responded to, they never said they presented any money whatsoever to the Bank or were discouraged in any way, by the Bank, from doing so. I could find no bad faith in the Bank’s failure to respond to their December, 2016, proposal. Especially since they received a response in January, 2017, when they pressed.
18. Mr. Trethewey’s reference to money sent to service the loans which was left in the account and not applied for two months, could at best attract, at the mortgagee’s discretion, a deduction in late fees and the full interest but

certainly it does not attain the standard of bad faith even when considered in light of all the other evidence presented.

19. The Defendant says that when the loan fell into arrears, they issued a demand letter to the Tretheweys on the 14<sup>th</sup> October, 2014. The Trethewey's claim never to have received same. There is also correspondence to the Tretheweys of a similar nature dated 5<sup>th</sup> December, 2014 and a notice of intention to sell both parcels, and two unrelated parcels, dated March 17, 2015. The first two letters came from the Bank's attorney, while the latter, from the Bank itself. The Tretheweys deny receipt of them all. I do not believe this to be true. Allow me to explain.
  
20. Mr. Trethewey says they applied for a bridge loan. However his application date seemed off. He says it was in mid-2015, but an internal email presented by the Bank shows it was around March, 2014 and the application was rejected as the accounts were already in arrears. Whether or not The Tretheweys were informed by an employee of the Bank that the bridge loan would be approved is really of no moment here. It has nothing to do with the exercise of the power of sale. Nor would the Court consider the Bank's refusal or failure to notify them of its refusal as a show of bad faith. The Tretheweys knew the loan had to be formally approved and they knew of the state of their loans with the Bank, they were already heavily indebted. They also knew that if the bridge loan had been approved they would have been notified. They were not novices to the banking process. Perhaps at best the Bank needs to review its internal procedures and client relations protocols, but a show of bad faith this is not.



21. In any event, I am convinced that Mr. Trethewey is mistaken as to the date of his application since he also testified that in the very same May of 2015 he journeyed to Canada and arranged for a wire transfer from his mother's account "*to pay up the mortgage.*" If he had in fact been assured of that bridge loan in May, 2015 why was he then concerned about wiring funds quickly and what arrangement did he need to make with the Bank if he was unaware that the accounts were in very bad shape. I am of the view that the Tretheweys received all correspondence and on realizing that a sale was imminent sought funds elsewhere.
22. Mr. Trethewey's email to the Bank, dated 23<sup>rd</sup> May, 2015, speaks to cancelling the auctions of the properties. Surprisingly, he does not inquire of, or refer to, the bridge loan application at all. Not a single piece of correspondence is exhibited which shows Mr. Trethewey or his wife enquiring about that bridge loan. Mr Trethewey struck me as astute and capable. Yet, he does not, in that letter, complain that a demand had never been made by the Bank before their property was being auctioned.
23. Under cross-examination he accepted that the application for the bridge loan was made in 2014. The court adds that this must have been before the Bank begun taking steps to enforce its power of sale and reiterates that it can have no bearing on the exercise of same.
24. The Claimant in her submissions says the Bank took no steps to correct the mistake with the documentation relating to Parcel 1696 until they had obtained an offer for the purchase of the property. She postures that, in further demonstration of their bad faith, the Bank caused her to believe that the property could not be sold. The evidence, revealed, contradicts this.

25. Mr. Trethewey testified that it was he who brought the issue of the error to the Bank's attention by email on 4<sup>th</sup> May, 2016 and he exhibits that email. In it he asked that the issue be straightened out as soon as possible. He says nothing of the existence of a possible purchaser. Ms. Blade's own email to Mr. Trethewey on December 02, 2016, states at paragraph two:

*"The other two parcels which you advises (sic) are not yours were not placed on auction, and at the time we received the offer on Parcel 1696 in August, we referred to our attorney to confirm if indeed Parcels 1689 and 1695 are not yours before we closed the sale."*

26. There is no doubt in my mind that Ms. Blades only took action to clarify the matter when she received an offer. An offer, which the Bank alleges, it eventually accepted for the sale of Parcel 1696. However, I can find no evidence whatsoever to support Ms. Trethewey's assertion that the Bank caused her to believe that the property could not be sold. Her own witness, Mr. Trethewey, admitted under cross-examination that due to the error with the title he did not want to involve potential buyers with *"that mess."* That is as bold an exercise of one's own prerogative as any I have recently encountered.

27. Moreover, it was not until November that I see Mr. Trethewey informing the Bank of this potential purchaser. He states: *"we had spoken to them earlier this year but explained that the title was compromised and that the Bank was supposed to 'fix' the problem."* Again, this seems to be Mr. Trethewey making assumptions and taking decisions without actually being informed of the true circumstances by the Bank. It must also be noted that although this letter says they received the offer earlier that year the Claimant's pleadings state that the offer was received in November, 2016. This court finds it difficult to believe any such offer even existed. This is particularly so in light of the

fact that the price allegedly offered exceeded the expert's value of the land by some \$30,000.

28. In any event, I see absolutely no reason why the offer could not have been communicated to the Bank in writing, as the Bank requested, whether or not some action needed to be taken by the Bank to correct the charge. The sale to the potential buyer may have been postponed but certainly the Bank would have been properly notified. Again, I cannot find this to be an act of bad faith on behalf of the Bank.
29. What I do find is that Mr. Trethewey neglected the mortgagee's request for written notification of the specifics of the offer, while knowing full well that the sale of the property was imminent and the loans were in arrears. Under cross-examination he explained that he did not comply because by then he "*had little faith in the Bank.*" How then could he honestly purport that it was the Bank which was at fault.
30. Counsel for the Claimant then submits that the Bank delayed in giving its permission to have Parcel 2703 appraised so that it had been sold by the time the appraisal was complete. This appraisal, he says, was imperative for securing alternative refinancing. Nowhere in the evidence presented by Mr. Trethewey does he state if or when his application for permission was made or what efforts he or anyone on his behalf made to have that application attended to. The Bank denies that any such permission was in fact needed. This submission is without factual basis and will not be considered further.
31. The court now turns its attention to the sale itself and whether it was conducted in bad faith and at an undervalue.

**The Sale:**

32. The Claimant submits that neither of the properties were sold at public auction; the reserved price and reductions were not informed by an appraisal, the sales were rushed and the price for which they were sold were below their fair market value.

**The Auction:**

33. From the evidence of Mr. Kevin Castillo, the auctioneer, both parcels were advertised by him on fourteen occasions and placed on the auction block numerous times. He exhibits a few copies of the newspaper advertisements and refers to his reports submitted to the Bank following each auction. Both parcels he says were eventually sold when their reserved prices were reduced. He explained that although he received bids at the auctions he could not approve a bid which was below the reserved price. None of this was refuted. He continued that on the 2<sup>nd</sup> December, 2016 Parcel 1696 was sold to Johnny Baltazar for \$275,000 and on 10<sup>th</sup> April, 2017, Parcel 2307 was sold to Allan Dunker for \$160,000.00.

34. Ms. Blades in her testimony referred to and exhibited nineteen reports from Mr. Castillo. Counsel for the Claimant helpfully placed their contents in table form which I reproduce below with some necessary corrections:

Auction Date:	Report Date:	Reserved Price Parcel 2307	Reserved Price Parcel 1689,1695, 1696	Bids:
27-05-15	12-06-15	\$800,000.00	\$800,000.00	NONE
19-08-15	21-08-15		\$800,000.00	NONE
17-09-15	22-09-15		\$800,000.00	\$250 - \$300,000 declined as below reserved price

22-10-15	27-10-15		\$790,000.00	NONE
18-01-16	23-01-16	\$270,000.00		NONE
20-01-16	25-01-16		\$790,000.00	NONE
17-02-16	02-03-16	\$300,000.00		NONE
16-03-16	18-03-16	\$300,000.00	\$790,000.00(1696 only)	NONE
20-04-16	26-04-16	\$300,000.00	\$750,000.00 (1696 only)	NONE
19-05-16	26-05-16	\$310,000.00	\$400,000 (1696 only)	NONE
15-06-16	17-06-16	\$309,750.00	\$396,568.00(1696 only)	NONE
13-07-16	19-07-16	\$300,000.00		NONE
13-07-16	19-07-16		\$396,568.(1696 only)	\$100, - \$225,000 declined as below reserved price)
17-08-16	22-08-16	\$300,000.00		NONE
17-08-16	22-08-16		\$396,568.00 (1696 only)	\$275,000 declined as below reserved price
14-09-16	29-09-16	\$300,000.00		NONE
19-10-16	25-10-16	\$300,000.00		NONE
23-11-16	03-12-16	\$280,000.00		NONE
14-12-16	23-12-16	\$270,000.00		NONE
15-02-17	23-02-17	\$265,000.00		NONE
15-03-17	21-03-17	\$180,000.00		\$155, - \$160,000 declined as below the reserved price.

35. Ms. Blades also exhibited two letters from Mr. Castillo to the Bank. The first is dated 2<sup>nd</sup> December, 2016. It refers to his report of 22<sup>nd</sup> August, 2016 and Parcel 1696. It records his acceptance of \$275,000 from Johnny Baltazar as full purchase price. He adds that Mrs. Joycelyn Codd had

represented Mr. Baltazar at the auction and he (Mr. Baltazar) would contact the Bank to effect transfer. Mrs. Codd was, here, a bidder by proxy.

36. The second letter dated 10<sup>th</sup> April, 2017, refers to Parcel No. 2307 and his own report of even date. It records the acceptance of \$160,000 from Mrs. Joycelyn Codd as the full purchase price. This letter does not in any way indicate that Mrs. Codd had not personally purchased the property. There is no mention of Allan Dunker whatsoever. Instead it states that Mrs. Codd would present the transfer documents regarding the subject property to be executed and returned to her.

**Finding:**

37. I believe the auctioneer's testimony that he did not have the authority to accept the highest bid where it fell below the reserved price. I find absolutely nothing wrong with this. An auction of this kind is simply a public sale to the highest bidder above the reserve. It must be remembered that the auctioneer is only the seller's agent. He must conduct his duties in accordance with his principal's instructions. If he exceeds his actual authority he cannot bind his principal.
38. Section 78(1) of the RLA (referred to above) allows that the auction be "*subject to such reserve price and conditions of sale as the chargee thinks fit.*" Ms. Blades testified that the Bank subsequently approved each sale to the highest bidder although they were below the reserve. Approving the highest bid after the auction, to my mind, does not make the sale otherwise than by public auction. An auctioneer remains free to reject a bid prior to acceptance and his authority only ends when the purchase price is collected. That submission is therefore rejected wholesale.

39. The court therefore finds that the sale of Parcel 1696 was occasioned through public auction. As it relates to Parcel 2307, the person who bid highest at the last auction was reported to be Joycelyn Codd with the sum of \$160,000. There is no indication that she was bidding on anyone's behalf and Mr. Castillo is nothing if not meticulous and fastidious. Nowhere in his testimony does he admit to making an error in his report of the day's proceedings. However, the person to whom the land was actually transferred was a Mr. Allan Dunker. But this really makes no difference.
40. A bidder whose bid is accepted at auction is duty bound to pay the purchase price but the property could be transferred to anyone on the bidder's instruction. The precise wording of Mr. Castillo's instructions to the Bank makes it clear that the property was to be transferred as Ms. Codd (the accepted highest bidder) desired. The court therefore finds that Parcel 2307 was also sold through public auction.

**The Reserved Price:**

41. The Claimant maintains that the reserved price and reductions were not informed by any appraisal and there is, in part, a glaring lack of evidence in this regard from the Defendants. I hasten to add, however, that to amount to a breach of duty such an omission must prove prejudicial to the sale.
42. Under cross-examination Ms. Blades revealed there was an appraisal. However, witness, for the defence, Mr. Sheldon Mahung, a certified valuator, presented one from January 2016 for parcel 1696 and another from March 2016 for parcel 2307. Both properties were auctioned as early as May 2015. These reports were clearly not what she could have been referring to. Ms Blades' usual attention to detail and provision of documentary evidence betrayed her very assertion that an appraisal had

originally been done. The fact that she did not refer in any way to the reserved prices in her witness statement heightened the court's suspicion.

43. Further, we see the reserved price on Parcel 2307 move from \$800,000 in May 2015 to \$270,000 in January 2016, \$300,000 in June 2016 and then to \$180,000 in February 2017. It followed no discernible pattern. There was no difference with Parcel 1696. In May 2015 its original reserve was set at \$800,000 and was reduced to half one year later. Thereafter it experienced a steady decrease to \$275,000 in August 2016. The only intervening price between the original and \$400,000 was \$790,000 and \$750,000.
44. Now the Claimant has not ever said what prejudice was caused by the possible lack of an original appraisal. She seems simply to postulate that the absence of an appraisal by a certified valuator was a breach of duty. But *Norma Coy v Small Farmers & Business Bank Ltd. Claim No. 446/2006* has already held that this is not so. The Claimant must prove that the reserve set had a prejudicial effect or was likely to have a prejudicial effect on the sale. That the reserve was either too high or too low so that it affected the fair and proper marketability of the charged property. This court can find no evidence of this.
45. To begin with property valuation is not an exact science and the reserved price was private. It was set for the benefit of the seller. Where the reserved price is public there would obviously be a greater possibility of some prejudicial effect on marketability since it informs the bidding of potential purchasers.
46. If we consider the expert reports as a guide for a reserve price the Parcel 1696 should have been set at \$625,000 (Claimant's expert) or \$875,000



(Defendant's expert). It must be noted that even when the auction and advertisement erroneously offered three parcels (including 1696) for sale, the private reserved price of \$800,000 was never met. In fact, the only bids received ranged between \$250,000 - \$300,000.

47. When it was set at \$790,000 for Parcel 1696 only, again this was never met until it was eventually lowered to \$396,568 and sold for \$275,000. An earlier rejected bid of \$300,000 was higher than what it was eventually sold for but that bid was made only on the third auction in relation to three parcels, while sale of the single parcel was completed after the eleventh auction. It was obvious that the Bank was waiting for a higher bid which simply never materialized.
48. The fair market value for Parcel 2307 was placed at \$493,000 by the Claimant's expert and \$290,000 by the Defendant's. Its starting reserve was \$800,000, far beyond its value which perhaps indicates an arbitrariness. This only lasted for one auction and there were no bids. The next auction saw a \$270,000 reserve and the next a \$300,000. Both reasonable in light of the expert's reports
49. Even at this sum there were no bids through thirteen attempts. Eventually on the fourteenth attempt it was sold for \$160,000 having a reserve of \$180,000. As counsel for the defence stated all this "*gives a fair picture of the conditions of the market at the time.*" I cannot find that the Claimant had been prejudiced in any way where an inference of either bad faith or a disregard for her interest could be drawn. This becomes even more blatant when the advertisements are considered.

### **The Advertisement:**

50. Kevin Castillo testified that the properties were both advertised on fourteen occasions in newspapers of wide circulation throughout Belize. He did not exhibit all of these advertisements. For those dated 24<sup>th</sup> May, 2015, Parcel 1696 is presented as part of a trio of parcels. However, the advertisement in August states only Parcel 1696. When we juxtapose that piece of evidence with Mr. Castillo's reports, the Court finds it safe to assume that this type of erroneous advertising persisted from May 2015 until February 2016. This is so because his report of March 2016 refers only to Parcel 1696.
51. It must also be reminded that the parcels were removed from auction for an intervening three month period while payment of the arrears was being arranged. The next advertisement in relation to Parcel 1696 was in August 2015 and it ran four more times before it was corrected. So for that period this property did not have the benefit of true advertising. But was this prejudicial? What must be noted is that the reserved price even for the three parcels was never met when it was at \$800,000 and eventually lowered to \$790,000. Moreover the correct parcel was advertised six more times over six months before it was sold.
52. Parcel 1696 stayed on the auction block from May 2015 to August 2016. It experienced every type of sale climate and was eventually sold in August 2016 for \$275,000.00. I cannot find that the Bank sold or reduced its price, hastily. They exposed the property to the market in a way which may have contained an error for a few months but which was eventually corrected. This caused no prejudice that this court can discern.

53. The Claimant added that 1696 was not advertised as an income generating property which it, in fact, was. However, again I could find nothing prejudicial since it was expressed as:

*“Being a commercial structure 2,400 square feet comprising two office units each having entry lobby and open plan with reception. One office and half bathroom and three Lots ... situate in the main commercial area (Road Side), Placencia Village ...”*

54. There was also a photograph included. The premises were adequately described to my mind.

55. Parcel 2307 was advertised in much the same way in May 2015 and then on 14 more occasions between January 2016 and March 2017. The Tretheweys allege that it had been advertised as including three dilapidated buildings. I could find no evidence to support this whatsoever in all that was presented to the court. Again, nothing has been presented here to show that the property was not properly exposed for sale or that the true market price has not been secured.

**Negligence:**

56. For completion only, although the Claimant referred to negligence in her claim she did not plead any particulars.

**Finding:**

57. This court finds that the Bank was faithful in its duty to secure a true purchase price for both parcels and no bad faith has been made out. The Claimant has therefore not proven its case to the requisite standard and its claim in its entirety must fail. Issue two clearly falls away.

**Whether the bank breached its Undertaking to the Court, and if so, whether Ms. Blades should be committed as an officer of the Bank:**

58. On the 29<sup>th</sup> May, 2017, the court made an order in the following terms, with the consent of both parties:

*“The Application for an urgent without notice injunction having come on for hearing. The attorney for the Defendant gave undertaking that the Defendant will not take, and will see that the lands Registry not pursue any further steps in the process of transferring Parcel 2307 Block 36 Placentia (sic) North Registration Section to Allan Dunker and the application is stayed until further notice.”*

59. This Order was reduced into writing and entered on the 1<sup>st</sup> June, 2017. The relevant parcel was by the 11<sup>th</sup> July, 2017 transferred to Mr. Dunker. At all material time the transfer document was with the Registrar of Lands for processing and is recorded in the Register of Lands as having been entered for transfer on the 10<sup>th</sup> May, 2017, and completed processing on the 29<sup>th</sup> June, 2017.

60. By an application filed on the 28<sup>th</sup> August, 2017 and supported by her own affidavit the Claimant sought the committal, of Ms. Harlesha Blades as the Bank’s officer instructing on its behalf. It charged that she knew of the undertaking and failed/or refused to act in accordance therewith.

61. The defence filed one affidavit in response by Ms. Blades. She explained that she did know of the order and had given directions to counsel and her colleagues who were managing the portfolio to ensure that the undertaking had been complied with. She was on maternity leave at the time.

62. A letter was sent to the Registrar of Lands by counsel on the 1<sup>st</sup> June, 2017 and a copy of the court order was attached. She says she also spoke to the Branch Manager and gave certain instructions. The parcel was transferred

nonetheless. She concluded that she was not the person responsible and in any case the Bank had breached no undertaking.

63. The Application was adjourned by the court to be dealt with at trial. Ms. Trethewey did not testify and Ms. Blades was not cross-examined on the issue at all. Neither party gave any or any in depth submissions on the issue. The Defendant was understandably completely silent, whereas the Claimant in the penultimate paragraph of her submissions only stated:

*“ever after the captioned action was commenced and the Defendant continued to act in bad faith by failing to abide by the undertaking they gave to the court in relation to the transfer of title of Parcel 2307.”*

64. The court considered the two affidavits and found that whether or not the undertaking had in fact been breached, a committal order could not be made. The undertaking did not contain a penal notice in compliance with Part 53.6 and 53.4 (b). Nor did it specify the period by which the act ought to be done by the Bank.
65. The application is therefore dismissed and costs shall be in the cause..

**It is hereby ordered:**

1. The Claim is dismissed with costs to the Defendant in the agreed sum of \$15,000.
2. The Claimant’s application for committal is dismissed. Costs in the cause.

**SONYA YOUNG  
JUDGE OF THE SUPREME COURT**