IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CIVIL APPEAL NO. 8 OF 2020

DELTA PRIDE LIMITED APPELLANT

AND

LAAD AMERICAS N.V. RESPONDENT

BEFORE:

The Hon. Madam Justice Hafiz-Bertram	-	President
The Hon. Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon. Madam Justice Minott-Phillips	-	Justice of Appeal

Darrell Bradley for the appellant.
Edwin Flowers, SC for the respondent.

14 June 2022

Date of promulgation/handing down: 13 March 2023

JUDGMENT

HAFIZ-BERTRAM, P.

[1] I have read in draft the judgment of my learned sister Minott-Phillips JA and I am in agreement with the Order proposed by her and the reasons for doing so. There is nothing that I can usefully add. The Order of the Court is as stated at paragraph 32 of the judgment.

_____
HAFIZ-BERTRAM, P.

MINOTT-PHILLIPS, J.A.

[2] Delta appeals against the decision of the court below dismissing its claim against LAAD and awarding costs to LAAD. A& E is no longer a Respondent to this appeal on account of the dismissal of Delta's appeal against it as a consequence of Delta's failure to comply with an order made by this court for it to provide security for A&E's costs of this appeal.

[3] I hope I do no injustice to them in summarizing the grounds of appeal as being that, the trial judge erred in failing to find that:

1. LAAD failed in its duty to obtain the best price reasonably available for the mortgaged property.
2. The sale of the mortgaged property to A&E was a sham and that no true sale occurred.
3. Delta discharged its burden of proving sale of the mortgaged property by LAAD at an undervalue.
4. LAAD should, as a matter of law, have obtained a valuation of the banana farm independent of that of Delta received by LAAD through Fyffe.

[4] Helpfully, there is a concise statement of the nature of the proceedings set out in the Agreed Pre-Trial Memorandum dated 9 July 2019 that was signed by all parties to the proceedings. That concise statement of the nature of the proceedings is reproduced below:

1. Delta was the registered proprietor of two parcels of land operated as banana farms, the first parcel comprised in Minister's Fiat Grant No 913 of 2004, and the second parcel comprised in Minister's Fiat Grant No 200 of 1996 ("**the Charged Properties**").

2. Delta says at all material times the Charged Properties were being operated as a going concern business.

3. LAAD issued a loan to Delta, which was secured by a Deed of Assignment of Mortgage dated 15 December, 2010 and a Supplemental Deed dated 31 December 2010 charging the Charged Properties in favour of LAAD ("**the Mortgage Documents**").

4. Delta fell into arrears with respect to its loan payments. LAAD thereafter exercised its power of sale contained in the Mortgage Documents.

5. A&E says, by virtue of public advertisements in the newspapers, it became aware of the sale of the Charged Properties under the Mortgage Documents, and made an offer to purchase the properties, and that the Charged Properties were sold to A&E by way of an Agreement for Sale dated the 17th day of April 2018.

6. Delta avers that LAAD exercised its power of sale wrongfully and in bad faith, and that the sale of the Charged Properties, and any purported transfer to A&E is unlawful, null and void for the following reasons:

    a. the Mortgage Documents do not contain a power of sale without first going to court; [Ultimately not pursued by Delta.]

    b. LAAD breached its duty of good faith, including by purportedly accepting an unreasonable bid that was a non-cash offer over cash offers of the same or higher values;

    c. LAAD refused the right of redemption to Delta; [Ultimately not pursued by Delta.]

    d. The Mortgage Documents are void on the grounds of

illegality because LAAD is carrying on banking, financial, moneylender or credit business without a license from a Belizean financial regulator.[1] [Ultimately not pursued by Delta.]

7. LAAD denies the claim and says that the sale of the Charged Properties to A&E was done in accordance with the law in that it was properly advertised after notice was given, and sold by private treaty to A&E as provided for under the mortgage.

[5] The admissions made include:

1. That Delta was in arrears to the extent of US$1.4 million and did not pay following demand from LAAD for payment of the outstanding balance.
2. That LAAD published notices in the Gazette and The Belize Times Newspaper indicating that it intended to exercise its power of sale under the Mortgage Documents.
3. That A&E went into possession of the Charged Properties on or about 17 April 2018 following their acquisition.

[6] The judge below did not have to address all the issues that arose in the case before her because, as she recorded, Delta in its closing submissions

> *"…abandoned a number of its claims for declarations. Those included that its loan facility with LAAD was null and void on the ground of illegality, that LAAD acted in breach of contract by preventing Delta from exercising its right of redemption and that LAAD could not exercise its power of sale without a court order."*

[1] Only ***b*** of item 6 remains as the trial judge points out that the declarations relating to a, c & d were abandoned by Delta during its closing arguments.

[7] Delta's grounds of appeal derive from the remaining issues before the trial judge which she itemized, and which included:

1. Was LAAD's sale of the Properties to A&E improper, irregular and/or done in bad faith?
2. Did LAAD sell the Properties at an undervalue?
3. Was the sale or purported sale to A&E a sham?
4. Is A&E a bona fide purchaser for value?

These are all sub-issues of 6 b set out in the concise statement of the nature of proceedings referenced above in numbered paragraph [4].

[8] The trial judge ultimately resolved all those issues against Delta. Having considered all the material before her the trial judge found that LAAD had not failed in its duty to obtain the best price reasonably available for the mortgaged property. In so concluding she, quite correctly, in my view, recited the law as putting the onus on the entity asserting the breach of duty by the mortgagee to prove it, and stating that the burden only shifts where there is a connected party sale. There was no evidence that LAAD and A&E were connected parties and the use of a Vendor's mortgage to finance the sale does not make them connected parties.

[9] Part IV of the Law of Property Act deals with Charges and Encumbrances. The following sections of Part IV (comprising sections 64-122) are relevant.

[10] Section 67(1) which states,

> *"The legal estate, right or interest of the mortgagor in any property shall, notwithstanding a mortgage thereon, continue to be vested in him, and the mortgagee shall take no estate in the property mortgaged, but shall have as his security a charge on the property and* ***a right to an order for sale of the***

property in order to recover the mortgage money together with all costs, charges and expenses of the application for that order*."*

Section 68 (3) which states,

*"**The provisions of this Part relating to the foregoing rights**, comprised either in this section, or in any other section regulating the exercise of those rights, **may be varied or extended by the mortgage deed** and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in this Act."*

Section 68 (4) which states,

*"**This section shall apply only if and as far as a contrary intention is not expressed in the mortgage deed**, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained."*

Section 69 (1) which states,

"Where, by virtue of section 68 (3), the mortgage deed provides that when the mortgage money has become due the mortgagee shall have a power without any order of the Court to sell or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, the mortgagee may exercise such power without applying to the court for an order for the sale of the mortgaged property."

Section 80 (1) which states,

> *"**A deed executed by a mortgagee purporting to assign his mortgage or the benefit thereof shall**, unless a contrary intention is therein expressed, and subject to any provisions therein contained, **operate to assign to the assignee**-*
>
> *(a) the right to demand, sue for, recover and give receipts for, the mortgage money or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon; and*
>
> *(b) **the benefit of all securities for the same**, and the benefit of the right to sue on all covenants with the mortgagee, **and the right to exercise all the powers of the mortgagee**."*

Section 82 (2) which states,

> *"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 or one of two or more mortgagors, and default has been made in payment of the mortgage money, or part thereof, for three months after such service; or*
>
> *(b) some interest or instalment of principal money due under the mortgage is in arrears and unpaid for fourteen days after it became due; or*
>
> *(c) there has been a breach of some covenant contained in the*

mortgage deed or of some provision of this Part, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than a covenant for payment of the mortgage money; and

(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."

[11] As can be seen from the above provisions the statutory regime is subject to a contrary intention expressed in the mortgage deed.

[12] The mortgage deed in this case sets out the following in clauses that I consider to be material, and which contain elements that are contrary to the statutory regime.

Clause 7

"In any of the following events (hereinafter referred to as "events of default")

7.1 on default being made by the Borrower and the Surety ***for a period of fourteen (14) days in the payment of any one or more of the instalments covenanted by the Deed to be paid*** *at the times and in the manner set out in the Second Schedule or of the costs and expenses payable under clause 6 or in the payment of any other money covenanted by this Deed to be paid* ***whether or not notice requiring payment thereof shall have been served upon the Borrower or the Surety****;*

7.2 on default being made by the Borrower in the observance or performance of the covenants expressed or implied in this Deed other than those relating to the payment of money; or

7.3 .....

7.4 ....., etc.

then and in any such case ***the whole of the money secured by this Deed shall become immediately due and payable on demand and the Lender may exercise all statutory powers conferred on mortgagees by the Law of Property Act*** *or any Act amending same."*

Clause 9.10

*"****It shall be lawful for the Lender*** *or any Receiver appointed by the Lender and every person for the time being* ***entitled to receive*** *and give a discharge for* ***the principal moneys interest and other moneys hereby secured when the said moneys have become due to sell*** *or concur with any other person in selling* ***the Property or any part thereof and either together or in lots by public auction or by private contract for cash or other valuable consideration payable*** *either in a lump sum or by instalments or* ***by a sum on account and a mortgage or charge for the balance*** *and with power on any sale to make any special conditions respecting title or evidence of title or other matter as the Lender or the Receiver may think fit with power to vary any contract for sale and to buy in at any auction and to rescind or vary any contract for sale and to resell without being answerable for any loss occasioned thereby and to transfer or convey the property sold for such estate and interest therein as is the subject of the present Mortgage freed from all estates interests and rights to which the said Mortgage has priority but subject to all estates interests and rights which have priority to the present Mortgage* ***PROVIDED ALWAYS that the power of sale hereby conferred shall be exercisable without the restrictions contained in section 82 of the Law of Property Act*** *so soon as the moneys hereby secured shall become due and* ***so that*** *for the purpose of any sale of the Property or any part thereof under this provision* ***the whole of the moneys and liabilities*** *the payment and discharge whereof is hereby secured* ***shall be deemed to have become due or liable to be discharged on the day on which demand for payment thereof shall have been made by the lender****;"* [my emphasis]

[13] In the case of ***Jobson v Capital and Credit Merchant Bank Limited (2007) 70 WIR 204***, in a judgement delivered by Lord Hoffman, the Privy Council pointed out something that appeared to have escaped the attention of counsel in that case and that of the courts below. It was the simple fact that the statutory regime applicable to mortgages of registered land in Jamaica contained a provision (section 128 of the Registration of Titles Act) stating that *"Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument, or endorsed thereon…"* For that reason it was held in that case that the terms set out in the instrument of mortgage prevailed over the statutory requirements imposed on the mortgagee to give notice to the mortgagor before exercising its power of sale. The result was the dismissal by the Privy Council of the claimant's appeal against the respondent bank in circumstances where the bank had sold the claimant's property following her default without notice to her and pursuant to a clause in the mortgage instrument permitting it to do so.

[14] The relevant statutory regime in Belize has the equivalent of Jamaica's section 128 in sections 68(3) and 68(4) of its Law of Property Act which I've already set out above.

[15] It is, therefore, my view that in ascertaining whether there is any merit in any of the grounds of appeal the point of departure for that analysis is the parties' contractual terms set out in the instrument of mortgage.

[16] Those contractual terms clearly show the following:

1. **On default in payment by the Borrower for a period of 14 days the whole of the money secured by this Deed shall become immediately due and payable on demand** and the Lender may exercise all statutory powers conferred on mortgagees by the Law of Property Act (Clause 7).

2. It is lawful for the Lender and every person for the time being entitled to receive and give a discharge for the principal moneys interest and other moneys hereby secured when the said moneys have become due **to sell or concur with any other person in selling the Property or any part thereof**

and either together or in lots **by public auction or by private contract for cash or other valuable consideration payable** either in a lump sum or by instalments or **by a sum on account and a mortgage or charge for the balance** (Clause 9).

3. The power of sale hereby conferred shall be exercisable **without the restrictions contained in section 82 of the Law of Property Ac**t (Clause 9).

4. The power of sale is exercisable by the mortgagee **whether or not notice requiring payment of the outstanding debt shall have been served upon the Borrower or the Surety** (Clause 7).

[17] Section 80 of the Law of Property Act confirms that LAAD, as the assignee of the mortgage, has the benefit of all securities, and, *inter alia*, the right to exercise all the powers of the mortgagee (including its power to sell the property on the terms set out in the mortgage).

[18] The provisions in the Law of Property Act (which gives primacy to the terms in the instrument of mortgage as regards any differences between the mortgage instrument and the Act) are, together with the terms agreed by the parties in the mortgage, sufficient to dispose of the Appellant's assertions that:

1. There was something awry in LAAD selling the property to A&E on terms that included mortgage financing extended to A&E by way of a Vendor's mortgage;

2. The notice given to the mortgagor was inadequate or not given for a long enough period;

3. That LAAD was restricted in how it could exercise its power of sale by the provisions of section 82 of the Law of Property Act.

[19] In this case LAAD, following the Delta's default, gave it written notice dated 14 December 2017 of its intention to exercise its power of sale in the event of non-compliance with its demand for payment. Delta was non-compliant.

[20] The minimum 2-month period stipulated in section 82 of the Law of Property Act did not apply because it was expressly ousted by the parties' agreement in clause 9 of their mortgage deed.

[21] Nevertheless, not only did LAAD give notice (which it was not required to do), it gave 2 months' notice. It also conducted a bidding process (auction) in respect of which it received bids within the bidding period which were less than the price for which it eventually sold the charged properties *via* a private treaty process.

[22] Applying the law to the evidence before her, there is nothing remarkable in the trial judge finding to be reasonable the steps taken by LAAD in exercising its power of sale.

[23] As there was no evidence that A&E was a connected entity to LAAD, the burden remained throughout on Delta to establish its claimed sale by LAAD of the charged property at an undervalue. That was not a burden easily discharged as there was ample evidence that the sale was at market value. For example:

1. The sale price of US$1,425,000 exceeded the amount of the bids received within the bidding period;

2. The sale price exceeded the estimate by Fyffe (an entity with accepted expertise in the banana farm industry) of the net possible value of the charged properties as a fully functioning farm at US$945,000 provided to LAAD by email dated 27 February 2017.

3. By 22 March, 2018 Fyffe indicated to LAAD in another email that the net possible value of the farm as a going concern had declined to US$351,000.

4. Applying the then estimated cost of rehabilitation of the farm of US$2,592,000 against Delta's pre-sigatoka disease posited value of the property at US$3,564,000, the market value of the land (as opposed to the business as a going concern) was estimated then to be US$972,000. Delta was copied on those emails which the trial judge pointed out (at paragraph 55 of her reasons) *"formed an integral aspect of Delta's own Executive Summary".*

[24] Delta's complaint about the information from Fyffe's in the document being hearsay is unsustainable having included it as part of its own documents admitted in evidence at the trial.

[25] The Agreement for Sale between LAAD and A&E was dated 17 April 2018 and was for US$1,425,000.

[26] As the Honourable Justices of the Caribbean Court of Justice remind us in its decision in ***Belmopan Land Development Co Ltd v Government of Belize***[2]**,**

> *"The International Standards define 'Market Value' as the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgably, prudently and without compulsion."*

[27] As the trial judge correctly stated (at paragraph 53 of her reasons),

> *"There is no obligation on a mortgagee to engage a certified valuator".*

She went on to quote from a noted text in saying,

> *"The mortgagee must have a reasonably accurate estimate of the value of the mortgage property before he or she sells either privately or by auction."*

[22] [2022] CCJ 1 AJ (BZ) at numbered paragraph 10 of the majority opinion

I agree that she accurately sets out the law on that issue.

[28] Having received a bid of US$1,400,000 after hours on the day bidding closed, LAAD eventually elected not to proceed *via* auction sale and, instead, negotiated a sale by private treaty with A&E for a price (US$1,425,000) that exceeded that late, out-of-time, US$1,400,000 offer (as well as the prior offers received during the bidding period). The terms of sale to A&E included LAAD providing a Vendor's mortgage.

[29] Clause 9.10 of the mortgage specifically allows the Lender to sell the charged property by public auction or by private contract for cash payable in a lump sum or by instalments **or by a sum on account and a mortgage or charge for the balance** [my emphasis]. The parties' agreement thereby contemplates the mortgagee selling by way of receipt of a sum on account and giving a mortgage or charge for the balance. I do not see how Delta can now complain about that, or suggest it was in any way untoward, when the manner in which the power of sale was exercised (*via* the provision of a Vendor's mortgage) was something it expressly considered and agreed to when it contracted with the mortgagee.

[30] On the material before her the trial judge was entitled to find (as she did) that the mortgagee fulfilled its duty to sell the charged property at market value on the day of sale and that Delta had fallen short of its not inconsiderable burden of establishing that LAAD sold the charged property to A&E at an undervalue.

[31] The trial judge arrived at her destination primarily through the application of case law speaking to the duty owed by a mortgagee to his inferior creditors and the mortgagor not to sell the security at an undervalue when exercising his power of sale. I agree with all her conclusions in that regard. As regards the additional issues before her of adequate notice, publication of the sale, and the implication (if any) of the terms of sale providing for a vendor's mortgage, I prefer to place emphasis on the content of the parties' mortgage agreement applied and interpreted in accordance with the applicable statutory laws of the land. In this case, happily, both routes lead to the same destination, namely, that Delta's claim could not succeed.

Order

[32] For the reasons stated I would order that:

i. The appeal is dismissed.

ii. The order of the Hon Madam Justice Sonya Young entered and perfected on the 9 June 2020 is affirmed; and

iii. There be a *nisi* order for costs of the appeal to be awarded to the first Respondent to be taxed if not agreed [pending receipt of written submissions for some other costs order being filed and served by either party within 7 days of the date hereof and our subsequent finalization of this *nisi* costs order following our consideration of those submissions].

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MINOTT-PHILLIPS, J.A.

MINORITY JUDGMENT OF WOODSTOCK RILEY, J.A.

Introduction

[33] The Appellant, Delta Pride Limited (Delta), appeals against the order of Her Ladyship Madam Justice Sonya Young in which she delivered judgment in favor of the Respondent, LAAD Americas N.V (LAAD).

[34] This appeal concerns the issues arising from the Respondent's exercise of its power of sale as mortgagee against the Appellant mortgagor, in respect of the mortgaged properties which comprised of two parcels of land on which banana farms were operated (hereinafter referred to as "the **charged Properties**"). The Appellant had brought the action against LAAD the

mortgagee and the purchaser A&E Trading Limited (A&E) as the Second Respondent. However, further to the Appellant's inability pursuant to a court order to provide security for costs to the Second Respondent, LAAD is now the sole Respondent in the Appeal.

[35] The facts leading up to the exercise of sale are not in dispute and have been agreed on in the pre-trial Memorandum but for the purpose of thoroughness shall be detailed. The central issues arise in particular from the manner of execution of the sale itself.

Background

[36] The Appellant at all material times was the legal and beneficial owner as well as registered proprietor of the charged properties on which two banana farms were operated. The Respondent conducts business related to selling agricultural supplies and equipment and providing money to agriculture-based enterprises in Latin America and the Caribbean. They issued a loan to the Appellant in the amount of US $1.4 million, secured by a Deed of Assignment of Mortgage dated 15 December, 2010 and a Supplemental Deed dated 31 December, 2010 charging the properties in favour of the Respondent to secure the sum of US $500,000.

[37] The Appellant fell into arrears with respect to its loan payments and by letter dated 14 December, 2017,LAAD required payment of the outstanding debt due and gave notice of its intention to exercise its power of sale following non-compliance with the notice to pay on or before 13th January, 2018. Upon Delta's failure to make payment, the Respondent elected to exercise its power of sale and thereafter published three notices on the 4th, 11th and 18th February 2018 in the Belize Times Newspaper and three issues of the Government Gazette on the 10th, 17th and 24th February 2018. The notice stipulated that all offers to purchase were to be made in writing and that there was a two-month deadline for sale from the date of the first publication.

[38] On the 5th April 2018 just at the two month deadline LAAD said it had sold the property for US $1.425 million to A&E partly through loan arrangements and financed by LAAD. A&E indicated it was relayed by phone on 5th April 2018 that its offer was accepted. The formal acceptance was by letter of 20th April 2018 from LAAD to A&E which noted:

"Kindly be advised that your bid to purchase the property of Delta Pride Limited has been accepted by LAAD. Kindly remit the advance payment as agreed.

Documentation for the transfer of land title will be prepared by our attorney for execution. Congratulations.

In the meantime your loan application is being processed."

[39] There is an Agreement for Sale dated 17th August 2018 between LAAD and A&E, both documents are exhibited in the Defence of A&E.

[40] The Appellant alleged that the sale was not properly executed on various grounds and by Claim No. 346 of 2018, commenced proceedings against the Respondent claiming the following relief:

1. *A declaration that a loan facility together with a Deed of Assignment of Mortgage dated 15 December, 2010 and a Supplemental Deed dated 31 December, 2010 entered into between the Claimant and the First Defendant, (hereinafter called the "**loan documents**"), wherein the First Defendant advanced a loan to the Claimant secured by certain properties belonging to the Claimant and described herein, are null and void and of no legal effect on the grounds of illegality, owing to the fact that the First Defendant is carrying on a banking, financing, moneylending or credit business in Belize without a license issued from a Belizean financial regulator.*

2. *Further or in the alternative, a declaration that the First Defendant is in breach of contract or breach of statutory duty by preventing the Claimant without lawful excuse from exercising its right of redemption in relation to the charged properties referred to in the loan documents and described as, firstly, a 504.19 acre parcel of land situated west of Swasey Branch in the Toledo District designated as Block No. 3 comprised in Minister's Fiat Grant No. 913 of 2004 and secondly, a 157.907 acre parcel of land situated on the west side of Swasey Branch in the Toledo District comprised in Minister's Fiat Grant No. 200 of 1996 (hereinafter called the "**charged properties**").*

3. *Further or in the alternative, a declaration that the loan documents do not contain a power of sale by the First Defendant as mortgagee without first obtaining an order for sale by the court, and that any sale of the charged properties by the First Defendant without a court order is null and void and of no legal effect.*

4. *A declaration that an auction exercise conducted by the First Defendant following and pursuant to a notice published in the gazette entitled "For Sale by Order of the Mortgagee" dated 1 February, 2018, including any purported acceptance of a bid by the First Defendant, is null and void and of no legal effect, owing to the fact that the First Defendant breached its duty of good faith to the Claimant and conducted the auction exercise and the acceptance of a bid in an improper and irregular manner, including by unreasonably and either deceptively or negligently purporting to accept a non-cash bid on terms to be agreed subject to financing when there were other cash bids of equal of higher value and thereby sold the charged properties for a gross undervalue to the prejudice of the Claimant.*

5. *An order declaring that any sale agreement or transfer instrument by way of conveyance or otherwise, signed by the First Defendant as mortgagee under the loan documents, purporting to transfer the charged properties is null and void and of no legal effect.*

6. *An order for the immediate possession of the charged properties.*

7. *Further and in the alternative, damages for breach of contract and or breach of statutory duty.*

Delta at the High Court abandoned claims that its loan facility with LAAD was null and void on the ground of illegality, that LAAD acted in breach of contract by preventing Delta from exercising its right of redemption and that LAAD could not exercise its power of sale without a court order.

Appellant's Submissions

[41] The crux of the Appellant's case was that LAAD sold the charged properties arbitrarily and ultimately the sale was improper, irregular, not done in good faith and at an undervalue. LAAD was never notified of the true market value of the Properties since no proper valuation was performed. The published notices were insufficient and did not adequately expose the Properties to the market. In addition to the aforementioned, by pursuing a private agreement with a loan through LAAD itself rather than accepting the best cash offer available, LAAD breached its duty of good faith towards Delta.

[42] In their appellate submissions, the Appellant maintained that its main contentions were that the transaction between LAAD and the purchaser was not an arms-length transaction and LAAD did not take reasonable steps to obtain market value. They set out the reasons underpinning the argument to be (i) the purchaser had inside communications with LAAD concerning the sale; (ii) this was a favorable transaction to LAAD; (iii) the notice was inadequate in both content and circulation; and (iv) there was no reliable evidence put forward by the mortgage company as to what the property's value was. They submit that in light of the aforementioned, there was a heightened need for caution in ensuring that the rights of the mortgagor were protected in the transaction and in the circumstances the duty of good faith was not satisfied.

Respondent's Submissions

[43] LAAD asserted that it had not violated any duty to the mortgagor. It issued a formal, written demand for payment of the outstanding balances which Delta confirmed receipt thereof. It informed that failing to pay within thirty days of the letter's date would result in LAAD exercising its available power of sale. According to LAAD, this was a reasonable amount of time and legal notice.

[44] As regards the method of sale, LAAD avers that Delta did not pay and therefore they sold the property to the highest bidder at the best available price within the designated period to recover their debt as they are entitled to do. The Respondent rebuts that there exists any evidence that the sale was a sham or that they did not take reasonable steps in fulfilling their duty of good faith to the mortgagor.

The Trial Judge's Decision

[45] The issues which the court below found to arise from the circumstances were as follows:

I. Was LAAD's sale of the Properties to A&E improper, irregular, and/or done in bad faith?

Did LAAD take reasonable steps to obtain the true market value:

a. Exposing the Properties to the market

b. Method and terms of Sale

c. Assessing the true market value

II. Did LAAD sell the properties at an undervalue?

III. Are the transfer instruments which transferred the Properties from LAAD to A&E, lawful:

a. Was the sale of purported sale to A&E a sham

b. Is A&E a bona fide purchaser for value

IV. What remedies, if any are available to Delta Pride

[46] The learned judge granted judgment in favor of LAAD and A&E, finding in response to the issues stated that LAAD did take reasonable steps to obtain the market value, that the properties were not sold at an undervalue and that there was no evidence to support Delta's claim of the sale being a sham. Naturally, as a result the claim for any remedy also failed. The rationale behind the judge's conclusions will be more fully detailed when discussed in relation to each issue.

The Grounds of Appeal

[47] The Appellant bases this appeal on the grounds that:

1. *The Learned Trial Judge was wrong in law and fact in failing to make a finding that there was no true steps taken on the part of the First Respondent to obtain the reasonably best price for the banana farm, and to find that the sale of the banana farm to the Second Respondent was a sham and that no true sale occurred. The Appellant relied upon the fact that there was no real offer of US $1.425 million put forward by the Second Respondent, the offer not conforming to the terms of the public notice including not being in writing. The Learned Trial Judge wrongly stopped the attorney for the Appellant from questioning one*

the Second Respondent's witness on having inside knowledge of the public notice sale. On a whole the Learned Trial Judge was wrong in law and in fact in failing to properly or fully assess the weight of the evidence and to find that there was inside information given to the Second Respondent and the public notice was a sham and done improperly.

2. *The Learned Trial Judge was wrong in law and fact in failing to place proper weight on the evidence of the Claimant that the properties was sold at an undervalue/ The Appellant says that the Learned Trial Judge erred in considering hearsay or second-hand evidence from Fyffes and ignored the fact that the bid from Michael Ferslev and Argyle shows that there was interest in the properties. The Appellants also says that the expert report should not have been discounted. The Learned Trial Judge should have found that, on a whole, all the evidence shows that the property was worth more than what it was sold for.*

3. *The Learned Trial Judge was wrong in law in not finding that the First Respondent, in all the circumstances, should have obtained an independent valuation of the banana farm prior to sale and the Learned Trial Judge was wrong in making any finding concerning value and condition of the farm, including in respect to the sigatoka disease and value and condition. The proper course was for the First Respondent to put forth positive evidence to show condition and value and to satisfy the court that they obtained the reasonably best price.*

4. *The Learned Trial Judge erred in law in refusing the reliefs sought by the Claimant, which relief were just and proper in the circumstances and having regard to all the evidence.*

[48] The Appellant asks that this court grant the following relief:

a. *An order allowing the appeal, setting aside the decision and order of the trial judge entered and perfected on 9 June, 2020 and giving judgment in favor of the Appellants with the reliefs set out in the claim form; and*

b. *The costs of this Appeal and of the costs of the case below be awarded to the Appellant.*

Issues on Appeal

[49] The relevant issues identified which arise for determination are:

(i) Whether the trial judge erred in law and in fact in finding that LAAD took reasonable steps to obtain the best price for the Properties and that a true sale had occurred

(ii) Whether the trial judge erred in law and in fact in finding that the properties were not sold at an undervalue, and whether that was against the weight of the evidence

(iii) Whether the trial judge erred in failing to find that LAAD should have obtained an independent evaluator and in making any such finding on the value of the properties in the absence of such assessment

Law and Analysis

(i) Whether the trial judge erred in law and in fact in finding that LAAD took reasonable steps to obtain the best price for the Properties and that a true sale had occurred

[50] According to **Halsbury's Laws of England 4th Edition Volume 32 page 385, para. 592**:

> "The mortgagee does, ..., owe a general duty to exercise his powers in good faith for the purpose of obtaining repayment which flows from the equitable principles for the enforcement of mortgages and the protection of borrowers... He also owes specific duties once he exercises his powers. It has been said that he owes a duty to act fairly towards the mortgagor."

[51] The Trial Judge rightfully determined that the duty owed is one of good faith borne by the mortgagee and subsumed under the umbrella of this duty is the obligation to take reasonable steps to obtain the true market value at the time of sale. In accordance with a long line of authority as were advanced by the parties, this is the appropriate standard of assessing the mortgagee's judgment in the sale with respect to the steps taken.

[52] This standard or test has been the subject in the dicta of a wealth of authority, particularly within the cases cited of ***Cuckmere Brick Company Limited and Anor v Mutual Finance [1971] Ch. 949*** and ***Selvin Jones vs. Scotia Bank (Belize) Ltd. Claim No. 132 of 2012 Claim No. 132 of 2012***. This duty contemplates – what is reasonable and what is the true market value. The court however is not called upon to be a valuator but to assess the actions of the mortgagee in contemplation of his duty and to determine whether there were "reasonable precautions" taken within the circumstances as discussed within ***Cuckmere***. Therein, Salmon J affirms the lens to be adopted by the adjudicator: "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."

[53] The Trial Judge found in her assessment of the evidence that all the steps taken by LAAD were reasonable. It must be determined whether LAAD was plainly on the wrong side of the line and must assess the considerations made by the trial judge in coming to her conclusion.

[54] Saunders P in ***G A Roe & Sons Limited v Commissioner of Stamps et al [2021] CCJ 12 (AJ) BZ*** noted, "*the legal position that, in exercising its power of sale, a mortgagee is under a duty to the mortgagor in respect of the manner in which the power of sale is exercised. The mortgagee must take reasonable care to get a proper price and to obtain and follow professional advise as to the best method of sale and the appropriate reserve price if the sale is by auction.*[3] *The mortgagee is obliged to take reasonable care to obtain what has been described as the true market value*[4] *or the best price reasonably obtainable at the time.*[5]*"*

Preliminary Issue of Burden of Proof

[55] The Trial Judge determined that the burden of proof was to be borne by the Claimant, now the Appellant, as he who alleged the impropriety of the sale. The Appellant disputed this, submitting that the burden should shift to LAAD the Respondent. This would be in line with

[3] *American Express International Banking Corp v Hurley [1985] 3 AII ER 564.*
[4] *Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949 at 966.*
[5] *TSE Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349 at 1355.*

established principle that where the mortgagee sells to a connected company or one in which he is interested, there is a heightened onus borne by them to uphold the transaction and demonstrate that the sale was in good faith and that they took reasonable precautions to obtain the best price reasonably obtainable at that time.

[56] The Trial Judge, in referencing ***Kevin Philbin v Stewart Davies [2018] EWHC 3472 (Ch)***, found that the circumstances did not exist for this burden to shift as LAAD's previous business relationship with Eugene Zabaneh, who played a part in the present sale on behalf of the purchaser, was insufficient to prove the requisite connection.

[57] Whilst the aforementioned judgment does not elucidate what circumstances constitute a connected sale, the dicta and referenced authority speak generally of the existence of some conflict of interest associated in such a connected sale. This would be clear in instances of companies incorporated by the mortgagee for the purpose of the sale or where family members of the mortgagee have purchased the charged properties. However, it is less clear cut in a circumstance like the present where the existing business relationship is not as clearly defined.

[58] Mr. Zabaneh acted in the sale as the agent of the purchaser. The nature of his business relationship with the Respondent mortgagee is not evidenced as any which would create a conflict of interest in that regard and I cannot disagree with the learned judge that without more, it cannot be deemed that they can be considered a connected party for the purpose of the shifting of the burden of proof.

[59] However, the Appellant asks this court to consider the existence of a conflict of interest in light of the relationship between LAAD and the purchaser being a potential client, as they were purchasing the property with financing from LAAD. The Appellant submitted that LAAD was exercising the power of sale but at the same time there was an interest and benefit to LAAD lending to A&E. They highlight this point to say that this invites heightened scrutiny of the transaction. LAAD clearly stood to benefit if A&E were the purchasers.

[60] The distinction the Appellant is trying to make is appreciated. In the present circumstances, there is the duty to the mortgagor and then there is LAAD's business interest. Such a transaction selling to an entity you are lending to would be in LAAD's interest beyond solely receiving the funds to discharge the debt.

[61] The mortgagee is fully entitled to sell with terms, however there is strength in the submissions of a conflict of interest in the transaction and I do agree that in these particular circumstances it merits a more thorough inspection to ensure the integrity of the transaction.

The Manner in which the Properties were Exposed to the Market

[62] The date of the first publication was 4th February 2018. The notice was published three times in the Belize Times Newspaper – 4th, 11th and 18th February and in three issues of the Government Gazette on the 10th, 17th and 24th February. So the exposure was only a twenty day period, within the Belize Times Newspaper and 14 days in the Gazette, which contained the title particulars of the property and where further information could be sought.

[63] Section 82(2) of the Law of Property Act requires that:

> "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 or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
>
> (b) Some interest or instalment of principal money due under the mortgage is in arrears and unpaid for fourteen days after it became due; or
>
> (c) there has been a breach of some covenant contained in the mortgage deed or of some provision of this Part, and on the part of the mortgagor, or of some person

concurring in making the mortgage, to be observed or performed, other than a covenant for payment of the mortgage money; and

(d) he had 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."

[64] Section 82(2)(d) stipulates a minimum period of two months' notice prior to exercising the power of sale and a minimum of three issues published in the Gazette and one other nationwide newspaper. The property's exposure to the market observes the absolute minimum of both requirements, being three issues and the expiration being two months exactly from the publication of the first notice. However, the length of the exposure is not stipulated and the Respondent elected to circulate the notice in the newspaper over a period of twenty days. Therefore, any prospective purchaser would have had to see the notice within that 20 day period.

[65] In its description of the properties, it identifies: "*ALL THAT piece or parcel of land situate West of Swasey branch in the Toledo District of Belize being the parcel of land designated Block No. 3 and containing 504.19 acres which is comprised in the Minister's Fiat (Grant) No. 913 of 2004 dated the 11th day of January, 2005 as the same with all its abuttals and boundaries is shown in the Plan (No. 913 of 2004) attached to the said Fiat TOGETHER with all crops and buildings and erections standing and being hereon*." This format is repeated in the Second Schedule with the alteration of the relevant details related to the size and location. The time for receipt of bids was set to expire two months from the first publication.

[66] The Appellant submits that this notice was inadequate and contained generic terms which did not properly inform or compel the attention of potential buyers. In particular, they claim that there were no pictures of the banana farms, no listing of the assets or buildings and no statement that the charged properties were suitable for banana production and that persons could have bought the charged properties on terms or through a mortgage, which they contend may have precipitated more offers for sale.

[67] The Trial Judge in her assessment found its circulation in the newspaper to be sufficient and its urgency that is the two-month deadline, to be understandable given the circumstances of the farm's deterioration and accordingly the Respondent's desire to protect their security. It was considered in regard to its content that "*there was adequate detail in the notice to attract a reasonable pool of potential purchasers."*

[68] What then is the standard of a proper advertisement where the exercise of a power of sale of charged properties is concerned, if any? The requirement on a mortgagee is, according to Lightman J in the English Court of Appeal decision of ***Silven Properties Limited and Another v Royal Bank of Scotland plc and others [2004] 1 WLR 997*** at page 368 that:

> *"A mortgagee is under a duty to take reasonable care to obtain a sale price which reflects the added value on the grant of planning permission and the grant of a lease of a vacant property and (as a means of achieving this end)* ***to ensure that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers****: see Cuckmere. But that is the limit of his duty."*
> [emphasis mine]

[69] ***Pendlebury and The Colonial Mutual Life Assurance Society Limited [1911] VLR 332*** serving as the Appellant's authority was instructive in its dicta, Griffith C.J. stating:

> "*the object of giving public notice of a sale by auction, whether by advertisement, bellman, posters or otherwise, is to bring the subject of the sale to the notice of such probable purchasers, and so to induce such competition as will be likely to secure a fair price. The notice ought, therefore, so far as the circumstances will admit, to be of such a nature, both as to particulars given and as to the places in which and the modes by which it is given, as to be likely to secure this result."*

[70] The relevant question should remain whether the public notice did or did not fulfill its purpose. In that exercise, it seems that the information provided in the notice, without more or

without a reader knowing particular information about the area, would provide no inducement to a potential purchaser. It submitted in the Respondent's favor that the notice included where further information could be sought, however, that cannot be held as the same as the information actually being advertised. The potential of receiving information is not the same as actually divulging said information. For one, no potential purchaser could know that there may have been the opportunity to obtain financing which was a particular of the actual sale to A&E and should not have been in any way different a standing or position than any other bidder.

[71] The notice plainly describes the substance of what was available to potential purchasers, that is it outlined the title information of the charged properties and provided details of the circumstances under which the sale had arisen. As the learned trial judge states, "*while such exposure depends on the particular circumstances of each case a mortgagee should be able to robustly demonstrate the sufficiency of that exposure*." However, if the standard is taken to be ensuring that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers, I cannot say that the Respondent's notice has demonstrated such sufficiency of exposure. Notably, the pool of potential buyers would include a specialized group of persons and they were not accounted for in the content of the advertisement by omitting certain relevant information.

[72] The phrase "*all crops*", and the phrase, "*buildings and erections standing and being hereon"* cannot be reconciled with the magnitude or potential of the banana farms as they existed on the land, irrespective of any deterioration. I also do not agree that the time of exposure was sufficient with the price of the properties considered, as was contemplated in the decision of ***Tse Kwong Lam v. Wong Chit Sen [I9831 3 All E.R. 54*** wherein the Privy Council deemed 15 days for advertising to be insufficient time for a property worth less than that in the present circumstances. If the purpose is to induce such competition as will be likely to secure a fair price or to ensure that the properties' potential is brought to the notice of prospective purchasers, the content of the advertisement and time given has not fulfilled its purpose.

[73] Although I will not go as far as to say that photographs of the property were necessary, no reference was made to the substance of what the Properties if purchased offered apart from giving title particulars.

[74] With the small window of time in which the advertisement was circulated, the pool of potential buyers would be narrowed.

[75] I do not believe for this type of property and if as the trial judge noted there is urgency in the sale that simply printing the title particulars to be sufficient and I believe the authority put forward by the Appellant (***Pendlebury v Colonial Mutual Life Assurance Society Limited 8 (1912) 13 CLR 676***) and other decisions support that viewpoint. The case of ***International Trust and Merchant Bank Ltd. [2000] 9 JJC 2201*** wherein the Jamaican Supreme Court found the advertisement of the property to be lacking states at **[76]:**

> "*In the instant case, the only description given of the property in the advertisement was that it was a lot "with a dwelling house thereon". They failed to specifically state that it was a duplex house on two lots of land with a land area of 6,020 square feet. The larger lot, 13A, had the larger side of the house, and contained 4 bedrooms, 2 inside bath rooms, dining room, drawing room, kitchen, helper's quarters and an outside bathroom. The smaller side had same as the other except that it had only 3 bedrooms and on inside bathroom. Dwelling houses in this area rarely have more than 3 or 4 bedrooms. There is a vast difference between a 4-bedroom house with 2 bathrooms and a 7-bedroom house with 3 bathrooms. It can fairly be said that the mortgagee omitted these facts in their advertisement so that it failed to attract prospective purchasers*."

[76] This decision was appealed in ***[2004] 3 JJC 3001*** and the Jamaican Court of Appeal affirmed the trial judge's judgment. Similar circumstances exist in Delta:

> [*9]* *It is important to note that while the property was advertised for sale by public auction and referred to as Nos: "13 and 13A Princess Alice Drive", apart from referring to the Volume and Folio numbers of the Registered*

Title, and a description of what was comprised thereon as being "a single dwelling house", no reference was made as to what Nos. 13 and 13A Princess Alice Drive consisted of. Being a proposed sale by way of a public auction a proper description of the property to be sold was essential as this was what would cause in potential bidders an arousal of interest and thus to attend the sale."

[77] On the content, to the average reader opening the newspaper, title particulars are not something familiar. They exist mainly within the context of legal documents. Nothing was wrong with including the title particulars, but without more, this was not sufficient detail to fulfil the purpose of ensuring that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers (Cuckmere).

[78] While it was noted where to get further information, there would have to have been an "arousal of interest" in the first place to incite a potential bidder to seek this.

[79] I want to stress the point that proportionality matters in a case such as the instant one, and a property such as this requires a proper description and, in my opinion, afforded an appropriate opportunity on the market. Again, this is on the bedrock that whilst the mortgagee has a great measure of latitude as the court understands the significance of the right to recover one's security, they are not entitled to conduct the sale in any way. All the factors must be regarded cohesively to ensure there is a standard or principles in the exercise of this judgment.

[80] The critique of the timing and content of the advertisement alone is only one aspect but it must be coupled with the other factors that existed in this sale.

<u>The Method of Sale</u>

[81] The core complaint under this part of the ground is that an aggregate of factors of the sale render it improper. The Appellant submits for this court's consideration the following in support of its claim that no true sale occurred and the transaction constitutes a sham: (i) that the property

was being sold by LAAD to A&E Trading Limited, who had a previous relationship with LAAD and was accepting terms, including that LAAD was providing a loan to facilitate the sale; (ii) that the Respondent sold the banana farms for the debt, that being US$1.425 million and the debt being US$1.4 million; and (iii) that this was a first attempt at sale so there was no previous attempt at an auction or sale by accepting bids.

[82] LAAD refutes the claim, countering that the Appellant has put forward no evidence to substantiate the allegation that the sale was a sham, which in earnest, is the implication generated by the Appellant's argument and which they utilize directly in their main ground even though it was not expanded on within their submissions. The case of ***Derrick v Trinidad Asphalt Holdings Ltd and Another [1980] 33 WIR 273*** was cited by Counsel for the Respondent in support of the view that a sham requires that "*all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligation which they give the appearance of creating*."

[83] The Respondent correctly highlights the absence of any proof of the elements required to meet said threshold. In stating the existence of the facts themselves, its cumulative effect read together may implicate the occurrence of a sham, but it cannot merit without more the conclusion of it. However, on the Respondent's authority, a sale at just above the sum to discharge the mortgage ought to be looked at carefully by the court and concurrently, the absence of a proper valuation in the circumstances merits further discussion and so shall be ventilated under that particular ground.

<u>Conformity with the requirements of the terms of offer</u>

[84] The Appellant further submits that A&E did not fulfil or meet the requirements of the terms of the offer because the terms necessitated that the offer which is to be accepted must be in writing. They further aver as there was no written bid from A&E for 1.425 million dollars, that is not being in any evidence put before the court, A&E's bid should not have been accepted. The sale to A&E was evidently by private treaty, as the seller LAAD were entitled to negotiate as they so found necessary. The issue though then arises if by private treaty why others were not

accommodated in the same way. Michael Ferslev was not offered the same opportunity to treat outside the rules of the auction. Further the letter of acceptance was not until the 17th April 2018, after higher offers to purchase had been received. They were outside the bidding time but A&E was outside the bidding rules and LAAD was already not holding itself bound by the auction. Yet the statement was made by LAAD to other potential purchasers that it had already sold the property on the 5th April.

(ii) Whether the trial judge erred in law and in fact in not finding that the properties were sold at an undervalue against the weight of the evidence

[85] The Appellant avers that the court considered second hand or hearsay evidence in consideration of the issue of valuation claims. They further claim that the trial judge failed to place proper weight on other bids which they maintain advances that there was interest in the properties, and on the expert report which the trial judge discounted. Ultimately, the submission is that had the appropriate weight been placed on the evidence, the trial judge would have found that the properties were worth more than they were sold for.

[86] In treating first with the claim of hearsay, the Appellant in his grounds of appeal submits that the evidence from Fyffes, a company which provided a valuation which was used by the Respondent, was second-hand or hearsay and should not have been considered by the trial judge.

[87] The Appellant further submitted that the court appointed expert's opinion should not have been discounted in the court's consideration of the properties' value. The court below found the expert's report to be unreliable on account of more reasons than one and deemed it non-compliant with the Civil Procedure Rules.

[88] The expert admitted to never having valued a banana farm (Though he indicated he has valued several citrus farms and cane fields). In his first report he assessed the current value where the appropriate valuation was to be on the farm at the time of sale. There were marked discrepancies between the character of the farms at this juncture as rehabilitation had been undertaken since the sale. At the time of sale, the court considered that the farm was in the

condition having suffered the devastating effects of the aggregate black sigatoka outbreak, Hurricane Earl and a tropical depression. The trial judge rightly requested the report be revised to reconcile with directions. To the court's confoundment, the value had increased from the last valuation as opposed to decreasing which would be expected taking into account the damage that was present at the time. With regards the second report, the trial judge was dissatisfied with the disclosure of the source of certain information used to found the valuation and with the expert's inclusion of subjects which did not form a part of his directions.

[89] An expert's duty calls him to make it clear when a question or issue falls outside their expertise or when they are unable to reach a definite opinion. In such event, an expert is permitted to conduct research on a topic on which he is to testify and to seek the opinions of others in order to strengthen his opinion, so long as he documents where he sought this advice and so long as he is not attempting to become an expert on a subject in which he has no knowledge.

[90] The expert in the present circumstance testified to taking a collaborative approach in which he met with Roger Strickland, representing the Appellant, and Antonio Zabaneh, representing the purchaser, A&E Trading Limited and the three addressed concerns and characteristics pertaining to the banana farms to aid him in his report. Therefore, he executed the research as required to fill the lacunas in his expertise. However, the expert was unable to account for the source of certain information utilized in his report.

[91] The judge's reasons for discounting the evidence of the expert were well-founded and rational within her capacity and she was entitled to find that the report should not have been given weight in the court's consideration of the properties' value.

[92] With regard to the weighing of the bids as proof of interest in the property, there were three other bids before the deadline and two bids made after the deadline. The Appellant claims that the 1.6 million bid that came in after the deadline demonstrates that within a matter of a couple of days, a bidder would have raised their bid by two hundred thousand dollars. They go further, maintaining that had the bidder been told that the property could be bought on terms, perhaps the bidder may have gone to 1.8 million or two million.

[93] The bids show that there was interest and it does speak to the potential value of the properties, but it would be difficult to extrapolate and hypothesize what could have happened .

[94] However, the issue of the real value of the property does not end there. As aforementioned, there are no absolute duties under the general duty of good faith. The circumstances inform what are the reasonable precautions necessary on a case-by-case basis. Here, valuing the charged property is not a simple matter. There was damage done to the properties by the sigatoka disease on top of other force majeure incidents. The Appellant made an offer to the Respondent mortgagee to continue their relationship by restoring the value of the farm. In this effort an Executive Summary was sent with an estimate of figures as a proposal. Fyffes, the interested party whose summary was relied upon, valued the property at approximately US $3.5 million fully functional. The trial judge accepted that this would be the range of the property value. The expert had said 3.8 million. (In 2014, the bank had from its valuation US $8.5 million. This amounts to a surprising US $5 million decrease in four years' time).

[95] Even accepting US$3.5 million as a reasonable determination of market value fully functional the reduction for rehabilitation is essential to determine true value.

[96] Fyffes first estimated the rehabilitation as US $1.296,000 and in a follow-up correspondence only a month later, placed the value of the property at the same but the rehabilitation cost as US $2,592,000. Fyffes labeled this as a "possible valuation" within correspondence in evidence. Very interestingly A&E in its offer referred to financing from LAAD of US $1,000,000 to be used to rehabilitate the property. So if the value was taken as US$3.5 million, rehabilitation at US$1 million, the value would be $2.5 million. Yet the property sold at $1.425 million. Using Fyffes' valuation as the Trial Judge noted "If the court considers the February assessment the farm would be valued at US$2,208,000, using the March assessment it would be US$972,000. What would be the basis to consider Fyffes considerable one month increased rehabilitation costs except that it dramatically reduced the value of the property.

[97] The trial judge disregarded the valuation of the court appointed expert for his inability to show "*methodology, inaccurate assumptions, information lacunas and other deficiencies*." However, Fyffes' opinion without any of this information and no rationale as to why the

rehabilitation cost doubled within a month, the basis for this exponential rise, and no information as to their methodology, was considered. Surely, we cannot set the standard that reasonable precaution by a mortgagee is going with any estimate as long as is suited to the mortgagee and discharges the debt. In line with authority put forward by the Appellant, the circumstances called for an independent valuator to determine what the final valuation of the property would be taking into account the fully functioning value minus damage.

[98] In ***Pendlebury*** cited by the Appellant there had been a reckless disregard of the mortgagor's interest. The omission to take obvious precautions to ensure a fair price, getting a proper valuation, failing to adequately advertise the sale were held to amount to showing that the mortgagee was absolutely careless. Whether a fair price was obtained or not, the mortgagee's conduct was considered reckless and not in line with acting in good faith.

[99] In the case of **Gilbert Gardiner v International Trust & Merchant Bank** as noted which was affirmed by the Jamaican COA, the court adopted the Pendlebury decision. Therein, the COA states at paragraph 21 that, "…the exercise she carried out amounted to a sale by way of a private treaty. This would necessitate that all the necessary pre-conditions attendant on such sales had to be satisfied and more particularly the following:

1. A current market valuation of the mortgaged property.
2. A proper advertisement of the mortgaged property with a view to attracting potential purchasers.
3. A sale of the property so carried out as to obtain the market value of the property or failing this the best price reasonably obtainable for the property."

(iii) Whether the Learned Trial Judge erred in failing to find that the First Respondent should have obtained an independent evaluator and in making any such finding on the value of the properties in the absence of such assessment.

[100] The Appellant submits that there is no objective evidence of the property value which would inform whether the price at which the property was sold was reasonable. The Respondent did not have a formal valuation completed on the properties prior to sale and testified that a

valuation opinion made by Fyffes who had specialist knowledge of and great experience in the banana farming industry, as well as the value of the bids, were sufficient in determining market price. The trial judge relying on authority that propounded no obligation on the mortgagee to engage a certified valuator, agreed with the Respondent that this advice was sufficient in proving that reasonable steps were taken in assessing the true market value.

[101] As aforementioned, the valuation opinion by Fyffes was part of an Executive Summary which was submitted by Delta to LAAD as part of settling their issue on the arrears owed. In this summary, Fyffes placed the value at approximately US$3.5 million when the farm was fully functioning. The first rehabilitation cost was estimated to be at US$1.296 million and one month later, was revised to amount to US$2.592 million. The trial judge concludes that the capacity in which Fyffes would have given this opinion would be as a party interested in investing in the property.

[102] On the circumstances of this case, the necessity for rehabilitation of the properties considered, I believe an independent valuator would have been the most prudent action to take given the circumstances. It is difficult to believe that a property valued at US$8.5 million, even with the circumstances leading to its depreciation, would be sold a mere three years later for $1.425 million, less than a quarter of its value, and it be accepted as reasonable without more. Even accepting the new value of US$3.5 million. What was the basis for the almost doubling of the rehabilitation cost in one month. These circumstances affect a determination of true value.

[103] Irrespective of the experience that Fyffes had, at the time of sale, what was prudent was a valuation detailing the damage and the respective costs having done the relevant research to apprise the mortgagor of the property's value.

Conclusion

[104] Authorities have made it clear that as aforementioned, where the purchase price is just enough to settle the debt, this must be looked at closely. The words of Sir Donald Nicholls V.C.: "'A duty to be fair" are relevant.

"*The first observation I make on this argument is to emphasise that a mortgagee does owe some duties to a mortgagor. As Lord Templeman noted in the China Bank case, a mortgagee can sit back and do nothing. He is not obliged to take steps to realise his security. But if he does take steps to exercise his rights over his security, common law and equity alike have set bounds to the extent to which he can look after himself and ignore the mortgagor's interests. In the exercise of his rights over his security the mortgagee must act fairly towards the mortgagor. His interest in the property has priority over the interest of the mortgagor, and he is entitled to proceed on that footing. He can protect his own interest, but he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor. If he takes possession he might prefer to do nothing and bide his time, waiting indefinitely for an improvement in the market, with the property empty meanwhile. That he cannot do. He is accountable for his actual receipts from the property. He is also accountable to the mortgagor for what he would have received but for his default. So he must take reasonable care to maximise his return from the property. He must also take reasonable care of the property. Similarly if he sells the property: he cannot sell hastily at a knock-down price sufficient to pay off his debt. The mortgagor also has an interest in the property and it is under a personal liability for the shortfall. The mortgagee must keep that in mind.* ***He must exercise reasonable care to sell only at the proper market value***.

As Lord Moulton said in of Mc Hugh v. Union Bank of Canada [1993] A.C 299,311; "It is well settled law that it is the duty of mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property so that the mortgagor may receive credit for the fair value of the property sold."

[105] Here there are a combination of several factors that show LAAD plainly "on the wrong died of the line" - the timing of the advertisement, the insufficient content and exposure of the advertisement, the negotiations with the purchaser and not others and on different terms, the lack of valuation, the discrepancy in valuation and rehabilitation costs, the conflict of interest for LAAD, the existence of higher cash bids in the face of the acceptance of a non-cash bid.

[106] I find that the duty of good faith owed to the Appellant was breached.

Disposition

[107] In light of the findings, I would allow the appeal. As the sale cannot be set aside, the court should alternatively grant damages and remit the matter to the High Court for assessment of damages.

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WOODSTOCK RILEY, J.A.