

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2012

Claim No. AXA HCV 2010/0025

BETWEEN:

SCOTT HAUSER (Executor of the estate of
RICHARD HAUSER, deceased)

and

CAROL HAUSER

Claimants

and

NATIONAL BANK OF ANGUILLA LTD

Defendant

Appearances:

Mr. Gerhard Wallbank for the Claimants

Mr. Michael D. Bourne and Ms. Dana Campbell for the Defendant

.....
2012: May 7

July 27
.....

JUDGMENT

[1] **BLENMAN, J:** This is a claim by Mr. Scott Hauser in his capacity as Executor of the Estate of Richard Hauser and Ms. Carol Hauser (hereafter referred to as Scott and Carol) against the

National Bank of Anguilla Ltd (the bank) for breach of fiduciary duty and breach of its statutory duty.

- [2] Scott Hauser, in the above capacity of Executor of Richard Hauser, and Carol Hauser also claim that the bank breached its legal and equitable obligations towards them by selling property they had charged to the bank to its subsidiary. Scott and Carol also complain that as a consequence of the bank's actions, they have suffered losses. Accordingly, they claim damages against the bank for the alleged breaches.
- [3] The claim is strenuously defended by the bank who denies that it in any way breached its equitable statutory or legal obligations towards Scott and Carol. The bank also denies that the property that was sold at the auction was sold under oppressive circumstances. Further, the bank denies that it acted in anyway improperly in causing the property to be sold at the auction.
- [4] To the contrary, the bank maintains that it acted professionally and lawfully in causing the property to be sold at public auction. The bank asserts that Scott and Carol are not entitled to any reliefs whatsoever.

Issues

- [5] The issues that arise for the court to resolve are as follows:

Whether the bank was in breach of the statutory or fiduciary duty in selling the property in the circumstances which it did in relation to:

- a. The adequacy of periods of notice prior to the auctions;
- b. The terms and conditions of the sale;
- c. Whether the property was advertised appropriately.

Background

- [6] Scott Hauser's father, Richard, (now deceased) and his mother Carol sold property described as South Central, Block 38611B Parcel 91 to Boutique Resorts Anguilla Limited (hereafter referred to as the Boutique) and granted a vendor's mortgage by way of a promissory note to the Boutique. In order to complete the purchase of the property, the Boutique had to obtain a loan from the bank. Indeed, the bank loaned the Boutique US\$1,740, 000.00.
- [7] Richard and Carol also granted to Boutique the sum of US\$360,000 by way of the mortgage together with the interest at 9% making the Boutique the holders of the second charge by virtue of the promissory note. The bank became the holder of the first charge over the property. In addition, the bank granted a second loan to the Boutique and obtained a third charge over the property.
- [8] Indeed, subsequent to the bank having granted the Boutique the first loan, the bank advanced the Boutique a further sum of US\$150,000 together with interest. As security for the advance, the Boutique granted the bank a charge on the property which charge was registered as a third charge. Under the third charge the bank was given the right to vary the rate of interest, the right to make and tack further advances and the right to consolidation of charges pursuant to Section 8 (1) and 8 (2) of the Registered Land Act Revised Laws of Anguilla. These rights were attached to the third charge and noted together on the land register.
- [9] The Boutique did not pay the promissory note that it had given to the bank and the bank exercised its power of sale as the first chargee. However, before doing so, the bank gave notice of its intention to sell the property to the Boutique. The Boutique failed to remedy its default. The bank caused the property to be placed on auction and subsequently it was sold after several attempts to sell it at public auction had failed.
- [10] Indeed, initially several auctions were held but the property was not sold. It was at the fifth auction, the bank sold the property at public auction. However, Scott and Carol complain that in selling the property the public auction was conducted under oppressive conditions. Scott and Carol say that the bank failed to act in good faith and acted in breach of its legal and/or equitable obligations

towards them as equitable chargees which resulted in the property being sold to a subsidiary of the bank for US\$2,500,000.

- [11] Scott and Carol say that the bank owed a general duty in equity, not only to the mortgagor but also to others, including them, to act in good faith and to take reasonable care to obtain the best price reasonably available for the mortgaged property.
- [12] Scott and Carol say that insofar as the bank sold the property to a subsidiary company, it had the burden to ensure that it took steps to comply with its duty.
- [13] Scott and Carol further state that the bank in selling the property at the price it did, failed to secure the best sale price. Also, they say that in selling the property to its subsidiary, the bank failed to have regard to the conflicts or potential conflicts of interest. As a consequence, Scott and Carol say that the bank breached its legal and fiduciary duties to them and they have suffered losses and they seek to be compensated by the bank for the losses which they claim to have suffered.
- [14] Scott and Carol further complain that after the bank's subsidiary had purchased the property it subsequently sold it for US\$78,000,000. Consequently, they assert that the bank breached its fiduciary duty to act in good faith and to take reasonable care to obtain the best price reasonably available.
- [15] Scott and Carol contend that the auction process was oppressive in that for the first four auctions the bidders were required, prior to the opening of the bidding, to present deposits and were required to have arranged finance for the full purchase price, contrary to established real estate sales practices. Whereas for the fifth auction the condition requiring bidders to put down the deposit was modified, in that bidders were not only required to provide proof of their ability to pay the deposit but they were nevertheless required to produce a bank guarantee from a local financial institution for the balance of the purchase price. This, Scott and Carol say, is not less onerous than being required to have arranged finance for the full purchase price.

- [16] The bank admits that the Boutique defaulted in its repayment of the loan. However, the bank maintains that it acted professionally, lawfully and prudently in having the property auctioned.
- [17] The bank says that after the Boutique defaulted on the payment of its loan, it gave notice of its intention to exercise its statutory power of sale of the property. The Boutique failed to pay the outstanding balance within the stipulated period. The bank says that it thereafter, acting through its solicitors, Keithley Lake & Associates (hereafter referred to as KLA) it had the property appraised on the open market value by Mr. Gifford Connor. Mr. Connor indicated that the open market value of the property was US\$2,900,000 and the forced sale value of the property was US\$2,500,000.
- [18] The bank says that yet again, and out of prudence acting through its solicitors it engaged the services of a valuator, Mr. Cecil Niles to conduct a valuation of the property. Mr. Niles valued the property and appraised it between US\$2,975,000 and US\$3,200,000. He stated that forced sale value range for the property range between US\$2,100,000 and US\$2,240,000.
- [19] The bank says that the property was placed on sale at five distinct auctions, and at all times it tried to obtain the best price. The first public auction with respect to the property was held on or about December 12, 2003 with a reserve purchase price of US\$2,900,000 at which no bids were made. A second public auction was held on or about February 6, 2004 with a reserve purchase price of US\$2,610,000 at which no bids were made. A third public auction was held on February 20, 2004 with a reserve purchase price of US\$2,350,000 at which there was one successful bidder who later failed to complete the purchase and sale. On March 12, 2004 a fourth public auction was held with a reserve purchase price of US\$2,350,000 at which no bids were made. A fifth and final public auction was held on April 16, 2004 with a reserve purchase price of US\$2,350,000 at which there was one successful bidder, namely the National Bank of Anguilla Assets Limited who was a subsidiary of the bank, at a purchase price of US\$2,500,000. The purchase and sale was completed on the 21st April 2004. The property was therefore sold on the bank's fifth attempt of sale by public auction at a purchase price above the reserve purchase price and at the highest forced sale value between the two valuations.

[20] In those circumstances, the bank says that it was indeed able to obtain the highest of the forced sale value that was between the two valuations it had obtained.

[21] Importantly, the bank says that in selling the property to its subsidiary company, there was no conflict of interest.

[22] Accordingly, the bank asked the court to dismiss Scott and Carol's claim together with costs.

Evidence

[23] Mr. Scott Hauser filed a witness statement and testified on behalf of the Claimants. He was cross-examined at length. Mr. Selwyn F Horsford and Ms. Kelva Lindo filed witness statements and testified on behalf of the bank. They too were vigorously cross-examined.

Claimant's Submissions

[24] Learned Counsel Mr. Wallbank submitted that the bank and its auction coordinator marketed the property too restrictively, despite Scott and Carol voicing their concerns since before even the first auction, in that:

- a. The bank's, minimal international advertising programme was insufficiently extensive to reach the appropriate market; the bank and its instructed auction coordinator did not consider extending the advertisements to reach a wider public upon seeing its failure to attract serious bidders; the notice periods prior to auctions were too tight to give anyone other than cash buyers proper opportunity to complete due diligence on the property and satisfy the financial terms and conditions of the sale; requirements imposed for potential bidders to have the full purchase price available through a local financial institution prior to the auction meant that any overseas buyers, other than cash buyers, would, in order to qualify to bid at all, need to go through the trouble and expense of securing

finance in an amount in excess of US\$2,350,000 without knowing whether their bid would be successful.

- [25] Mr. Wallbank said that the bank had lined up a bidder, its subsidiary NBA Assets, to be ready, willing and able to pay US\$2,900,000 for the property. The bank's Chief Corporate Officer, Mr. Selwyn Horsford, signed off on an Irrevocable Letter of Guarantee covering full payment of a price up to US\$2,900,000 in favour of NBA Assets. Mr. Horsford himself then switched capacities and, on behalf of NBA Assets, bid for the property at the fifth auction at US\$2,500,000. The bank and NBA Assets acted as one throughout.
- [26] Mr. Wallbank posited that in the circumstances, US\$2,900,000 was the available best price for the property and the bank, which controlled NBA Assets, could and should have caused it to pay the best available price in the interests of the second chargee. Instead, the bank caused NBA Assets to buy it for US\$2,500,000 at an auction where the reserve was US\$2,350,000 and with no other bidders present. As it was open to them to decide to pitch a bid higher than the reserve, which the bank, as Vendor had set, they could and should have decided to bid at the best available price, US\$2,900,000 but, apparently ignorant or in disregard of their duty to other chargees, they decided not to.
- [27] Mr. Wallbank said that at that point, the amount outstanding to Richard and Carol upon their second charge was approximately US\$424,320.20. After giving credit for a contribution from the sale, but before continuing interest on the charged loan, Richard and Carol demanded payment of compensation at US\$292,038.05. That demand went unanswered. Subsequently, Scott and Carol calculated that the amount of the deficiency was a higher amount of US\$328,143.87.
- [28] Mr. Wallbank stated that Richard and Carol, through Webster Dyrud and Mitchell (hereafter WDM), expressed their concerns to the bank that it was disregarding its duty towards other chargees in 2004 – well before the decisions in this jurisdiction which gave expressed recognition to that duty: *Caribbean Banking Corporation vs Alpheus Jacobs* HCVAP2004/010, a 2008 decision, and *Credit Suisse AG (Cayman Islands Branch) vs Anguilla Masonry Products Company Limited*

et al AXAHCV0046/2010. Learned Counsel Mr. Wallbank said that the case at bar was not constructed to fit the dicta in those decisions.

[29] Mr. Wallbank said that on 7th November 2003, i.e. before the first auction, Scott and Carol through WDM wrote to KLA and stated:

"As you will be well aware, it is important in such cases that first and second chargees cooperate in the efforts necessary to accomplish a sale at the best price and in the best interests of all parties involved, not least for the protection of the first chargee against any claim that it has not fulfilled its obligations in this regard. In particular I shall be grateful if you will please let me know what steps have been taken to advertise the property not only within but also outside Anguilla, so that we can consider whether we would wish to propose (and perhaps recommend our client to contribute to the cost of) a more extensive advertising programme."

Mr. Wallbank said that part of the context of this letter was that, as KLA were aware, Mr. Scott Hauser operates a Sothebys International Realty real estate sales business in Anguilla. Mr. Wallbank further said that on 11th November 2003, i.e. still before the first auction, KLA replied to WDM stating:

"We are fully aware of our client's obligations to obtain the best price in the event of sale of any charged property, having regard to the best interest of the chargor. In that regard, we have followed the legal and customary procedures with respect to obtaining independent valuations, advertising the sale in the various media and the giving of sufficient public notices. We are unsure of what you mean by "a more extensive advertising programme", given that the notices are, and will continue to be aired on all local radio stations, the two weekly local newspapers and The Herald. Most of these media have regional, and, by being on-line, international audiences."

[30] Turning his attention to the first auction, Mr. Wallbank said that at this first auction there were no bids. Nine persons attended, apart from the Auctioneer and the bank and their representatives. Of

these, four gave their address in the United States of America. It was put to Mr. Hauser in cross-examination that this meant that the advertising had worked to attract these overseas persons. He correctly responded that it could not be presumed that they had found out about the auction through that advertisement. Scott noted that one of those, by name of Potter, was a guest at the Hotel.

Second Auction

- [31] Next, Mr. Wallbank, Learned Counsel, complained that the second auction was advertised from 27th January 2004, for an auction on 6th February 2004, i.e. only 10 days later. The reserve price was reduced to US\$2,610,000. There were no bids. Ten persons, all from Anguilla and none from overseas, attended.

Third Auction

- [32] Mr. Wallbank said that the third auction was advertised from 10th February 2004 for an auction on 20th February 2004, i.e. only 10 days later. The reserve price was reduced to US\$2,350,000 six persons attended apart from the Auctioneer and the bank's representatives. Only one of those was from overseas, namely the United States. At this auction the property was knocked down to the Royale Caribbean Resort at US\$2,650,000 Royale Caribbean did not complete the purchase.

Fourth Auction

- [33] Mr. Wallbank said that the fourth auction was advertised from 26th February 2004 for an auction on 12th March 2004, i.e. only 16 days later, 2004 being a leap year. The Notice of Auction highlighted that there was now imposed a qualifying requirement that "*Persons intending to participate in the auction must produce to the Auctioneer, proof of their ability to pay the 10% deposit as well as a Bank Guarantee from a local financial institution for the balance of the amount of the purchase price, in the event they are successful in their bids*". The reserve price remained at US\$2,350,000. Ten persons, other than representatives of the bank and Scott and Carol and the

Auctioneer attended. Only one of those was from overseas, namely the United States. There were no bids.

Fifth Auction

[34] Mr. Wallbank stated that the fifth auction was advertised from 18th March 2004 for an auction on 16th April 2004, i.e. one month and two days later. The terms remained the same. It was expressly stated in Clause 2 of the Terms and Conditions of Sale that the bank was acting as Vendor under both the First (251/2002) and the Third (3015/2002) charge instruments. On 29th March 2004, i.e. before the fifth auction, Scott and Carol through WDM wrote to KLA:

- a. Objecting that a condition on a bidder to demonstrate the ability to produce the full purchase price seems to be entirely unreasonable, to serve no useful purpose and to be highly likely to reduce significantly the prospect of attracting prospective purchasers. WDM's letter further stated that they were aware of at least one potential bidder at the last auction who was unable to participate for that very reason; and
- b. Adverting the bank to its fiduciary duty towards Scott and Carol as second mortgagee.

[35] Mr. Wallbank stated that on the same day WDM wrote a second letter to KLA further objecting, inter alia, that Scott and Carol could not accept that in order to deter frivolous bidders and to avoid deposits being forfeited the bank would need to require prospective purchasers to incur the considerable expense and trouble of arranging finance for the full purchase price before they even know whether they are going to be successful in their bid. On 16th April 2004, the day of the fifth auction, the bank issued an "Irrevocable Letter of Guarantee" to KLA as attorneys for NBA Assets Ltd. Mr. Horsford signed this Letter on behalf of the bank. The Letter guaranteed any amount up to US\$2,610,000 "to cover the balance outstanding on any Bid offered by NBA Assets or any of its agents for the purchase at your auction of" the property.

[36] Learned Counsel Mr. Wallbank reminded the court that Mr. Horsford explained by way of amplification that the bank had given instructions to NBA Assets to start bidding at US\$2,500,000,

and to bid up to US\$2,900,000 if there were intervening bids. A deposit of 10% - up to US\$290,000.00 – would be immediately payable, and so the guarantee covered the difference between that deposit and US\$2,900,000. This is supported by the fact that NBA Assets did put down a deposit of US\$290,000.00 even though that sum is US\$40,000.00 greater than 10% of the ultimate purchase price of US\$2,500,000. NBA Assets must have taken a draft or cheque for 10% of US\$2,900,000.00 to the auction. The bank was therefore ready, willing, and able to cause its subsidiary NBA Assets to pay up to US\$2,900,000.00 for the property. However, it did not. The reserve was set at US\$2,350,000.00. Despite the longer marketing period of just over a month, nobody attended the auction part from the auctioneer and the representatives of the bank and Scott and Carol. This suggests that something deterred them. As only cash buyers would not need to arrange finance prior to bidding, the pool of potential buyers, already limited by the narrow minimal international advertising and by the short marketing periods before each auction, was thereby further narrowed to those with the full purchase price available in cash.

[37] Mr. Wallbank also reminded the court that Mr. Horsford, for NBA Assets, bid US\$2,500,000.00, even though the reserve was US\$2,350,000.00 and there were no other bidders. Mr. Horsford said in cross-examination that he did not know why NBA Assets bid US\$2,500,000.00 and not the lower reserve. Mr. Wallbank said this indicates that US\$2,500,000.00 represented a token increase over the reserve, in order to cast the bank in a better light with regard to its obligations towards other interested parties. However, as the bank, was determined through NBA Assets, to pay up to US\$2,900,000.00 for the property, it must have determined that it could still turn a profit on it. The bank knew this either from the valuation reports from Mr. Niles, who gave a highest open market value of US\$3,200,000.00, and Mr. Connor, who gave a highest open market value of US\$3,000,000.00, or on account of the Bank's connections. Mr. Horsford said in cross-examination that a Director of the bank, Mr. Timothy Hodge, was also a Director of the Anguilla Social Security Board, which ultimately bought the property from NBA Assets for US\$7,500,000.00.

[38] Mr. Wallbank said that it is clear that the bank accepted its own subsidiary's bid for US\$2,500,000.00. The property was transferred to NBA Assets on 23rd April 2004. On 10th May 2004 WDM wrote to KLA informing them that the amount owing to Scott and Carol under the second charge then stood at approximately US\$424,320.20. The bank paid Scott and Carol a

balance of the sale proceeds on US\$134,456.13. Scott and Carol, through WDM, gave credit for that sum and issued a demand on 22nd June 2004 for a shortfall, including interest on the balance at 9% as at 10th June, 2004, in a total amount of US\$292, 038.05. That demand remained unpaid and Scott and Carol brought this claim on 16th April 2010.

The bank's general duty

- [39] In those circumstances, Mr. Wallbank submitted that the bank had well known general duties. Learned Counsel Mr. Wallbank said that a chargee has a duty to act in good faith and owes a duty of care to subsequent chargees and the chargor to obtain the true market value of the property at the time of sale: *Credit Suisse AG (Cayman Islands Branch) v Anguilla Masonry Products Company Limited et al.* AXAHCV0046/2010. This is not a duty in the abstract: it is owed specifically to other chargees. Mr. Wallbank reminded the court that Mr. Horsford stated in cross-examination that other chargees interests were of no concern to the bank. This is supported by KLA's letter of 11th November 2003, in which KLA acknowledged the bank's duty towards the chargor, but was silent in relation to its duty towards Richard and Carol. Mr. Wallbank said that the bank conducted the sale without regard to the legitimate interests of Richard and Carol. The bank therefore approached the whole public auction process on a wrongful basis.
- [40] Learned Counsel Mr. Wallbank submitted that a chargee exercising his right to sell a property must ensure that the highest possible sale price would be obtained on the sale, which should have at its minimum, obtaining the fair market price for the charged property, by way of open competition: Counsel referred to *Credit Suisse. AG (Cayman Islands Branch v Anguilla Masonry Products Company Limited)* *ibid*, in support of his argument.
- [41] Learned Counsel Mr. Wallbank maintained that the bank did not ensure that the highest possible sale price would be obtained on the sale. The bank was ready, willing and able to have its subsidiary buy the property for US\$2,900,000.00, but it chose to buy it for US\$2,500,000.00. The bank picked a figure that was higher than the reserve of US\$2,350,000.00. It could have picked US\$2,900,000.00 but did not.

[42] Mr. Wallbank maintained that the bank, causing the property to be sold its subsidiary at the stated price, breached its statutory and fiduciary duties. He reiterated that Scott and Carol are entitled to be compensated for the losses which they have suffered.

Defendant's Submissions

[43] Learned Counsel Ms. Campbell said that the law as it relates to the duty of a chargee when exercising its power of sale is outlined in Section 75(1) of the Registered Land Act, Revised Statutes of Anguilla, (the "Act"). It states:

"A chargee exercising his power of sale shall act in good faith and have regard to the interest of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by installments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy at the auction and to resell by public auction without being answerable for any loss occasioned thereby."

[44] Ms. Campbell said that this duty that the legislation expresses is clear. It is to act in good faith and to have regard to the interest of the chargor. While it must be read with the established responsibility on the chargee to obtain the best value of the property at the time of sale enunciated in *Cuckmere Brick Co. v. Mutual Finance [1971] 2 All E.R 633* even this duty has limits. The Privy Council in *Downsview Nominees Ltd v. First City Corporation Ltd [1993] A.C. 295* qualified the apparently bald duty. It held that the duty of the mortgagee is to take reasonable care to obtain the proper price, or the best price reasonably obtainable on a sale. It further stated that there is no general duty to take reasonable care in the exercise of the mortgagee's powers, only a duty to exercise the powers in good faith for the purpose of obtaining repayment. The bank, as such, maintains that it has not been shown that it failed to act in good faith and therefore its duty was properly discharged.

[45] Ms. Campbell said these duties, the bank accepts, are owed to subsequent encumbrancers as held by the court in *Credit Suisse AG (Cayman Islands Branch) v. Anguilla Masonry Products Company Limited et al [AXAHCV0046/2010]* where it accepted the authority in *Caribbean*

Banking Corporation v. Alpheus Jacob [Civil Appeal No 10 of 2004 Antigua] that the chargee has a duty to the chargor as well as subsequent chargees to obtain the true market value of the property at the time of sale.

[46] Learned Counsel Ms. Campbell submitted that the import of the above decisions highlight that irrespective of the interested party, the mortgagee has but one responsibility. It is his duty to act in good faith for the purpose of obtaining repayment and it does so by taking reasonable care to obtain the true market value of the property at the time of sale. There is and can be no greater duty to any interested party.

[47] Ms. Campbell opined that in assessing the exercise of the mortgagee's power of sale, the law gives certain rights to the mortgagee. In addition to those found in section 75 of the Act, namely to set the reserve price and to determine the conditions, the mortgagee may also set the timing of the sale as affirmed in *Silven Properties Ltd v. Royal Bank of Scotland Plc* [2003] EWCA Civ 1409. Moreover, as the UK Court of Appeal reasoned in *Michael v. Miller* [2004] EWCA Civ 282 so long as the bank had obtained valuation advice as to the values which might reasonably be achieved to satisfy the duty to take reasonable steps to obtain the best price, and so long as the bank achieved such a price, then it was a matter for the bank to determine how long a period should be allowed for marketing.

[48] Mr. Campbell advocated that provided the mortgagee has acted in good faith in exercising its power of sale, it ought not to be impugned merely because it has not realized the price desired by a subsequent encumbrancer. This is supported by the decision in *Downsview Nominees Ltd v. First City Corporation Ltd* where their Lordships noted that if a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor.

[49] Ms. Campbell said that on the question of whether the bank could properly exercise its power of sale in face of the alleged conflict of interest, the law is clear. The sale of property by a chargee to itself is permitted where it says in Section 75(1) of the Act. The chargee in exercising its power of

sale has the “*power to buy at the auction and resell by public auction without being answerable for any loss occasioned thereby.*” It follows therefore that if the bank acts in good faith and has regard to the interest of the chargor it is permitted to buy the property. Moreover, there is no obligation on the part of the chargee to sacrifice its interest in favour of the chargor as affirmed in *Caribbean Banking Corporation v Alpheus Jacob* [Civil Appeal No 10 of 2004 Antigua]. The force of this argument must apply equally to subsequent chargees.

[50] Learned Counsel Ms. Campbell submitted that the law, as it stands, therefore places no bar on a separate legal but affiliated entity or subsidiary from purchasing the property. It is just as legally capable of doing same as the bank. The bank however must in such circumstances be guided by the Privy Council in *Tse Kwong Lam v. Wong Chit Sen and others* [1983] 3 ALL ER 54 which gave guidance on the reasonable steps to be taken by a chargee in the case of a conflict of interest.

“There was no inflexible rule that a mortgagee exercising his power of sale under the mortgage could not sell to a company in which he has an interest. However, the mortgagee and the company had to show that the sale was in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the method of sale, the steps which ought reasonably to be taken to make the sale a success and the amount of the reserve. The mortgagee was not bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss, but sale by auction did not necessarily prove the validity of a transaction, since the price obtainable at an auction which produced only one bid might be less than the true market value.”

[51] Ms. Campbell reminded the court that Scott and Carol contend that the bank owed them a duty of care in the exercise of its power of sale. Counsel said that in answer thereto the bank says that there is no such duty in law or equity. This position was affirmed by the Privy Council in *Downsview Nominees Ltd v First City Corporation Ltd*. In that case Lord Templeman stated that:

“The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgage. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company”.

[52] Ms. Campbell said that it is also the argument of Scott and Carol that the bank had a fiduciary duty to act in good faith in ensuring that it sold the property for the best price possible. While the bank in response thereto relies on Section 75(1) of the Registered Land Act, in reliance on the ruling of the court in *Credit Suisse AG (Cayman Islands Branch)*, Ms. Campbell stated that the bank accepts that it has a duty to Scott and Carol as subsequent chargees to obtain the true market value of the property at the time of sale. Ms. Campbell submitted however that this duty on Scott and Carol’s case is overstated. The bank’s duty is and was to do all that is reasonable to get the best market value of the property at the time of sale as determined in *Cuckmere* *ibid* and *Downsview* *ibid*. The duty therefore is not to ensure or obtain a specific sum as determined by Scott and Carol but to act reasonably in the exercise of its power of sale with a view to achieving the best reasonable price to repay the outstanding debt. The bank maintains that this duty was on the evidence properly discharged.

[53] Ms. Campbell said that the bank makes the above assertion because, among other actions, it requested valuations of the property from two qualified valuers in August 2003. It considered these valuations upon receipt in September 2003 and determined a reserve price of US\$2,900,000 for the property and the terms and conditions of the public auction to be held. Moreover, between November 2003 and April 2004, the bank placed some 285 radio ads on Anguillian radio, ran no less than 12.8 inches by 2 inches ads in the local newspaper *The Anguillian* and ran no less than 13 similar ads in an international newspaper, *The Herald*. More specifically, in the month before the property was successfully sold at the 5th public auction, the bank placed some 81 radio ads on Anguillian radio stations and 4 print ads in the local newspaper, *The Anguillian*. Further, the print

and radio ads were sufficiently clear as to identify the property both by its title registration and its familiar description as Cinnamon Reef Hotel. It also identified the salient features of the property, the date and time of the auction and listed the contact individuals if particulars of sale and the conditions were desired as intimated at paragraph 25 of the judgment in *Caribbean Banking Corporation* *ibid.*

[54] Further, the bank listed the property for auction in November 2002 and did so at a reserve price of US\$2,900,000. As is explained in the evidence of Mr. Horsford, the subsequent reductions in this reserve price were due simply to the failure of each preceding auction. Ms. Campbell posited that having set the reserve price above the highest notional market value according to the valuation of Mr. Connor and reduced the reserve price at the subsequent auctions by increments pegged to that original reserve price, it did all that was reasonable to obtain the true market value at the time of sale. Moreover, it is not open to Scott and Carol to impugn this when the correctness of this approach and its nature as an established practice in Anguilla was accepted by Scott during cross-examination.

[55] Ms. Campbell, Learned Counsel submitted therefore that absent *mala fides*, which has not been established in the case at bar, there is no evidence of action in bad faith with respect to the setting of the reserve price. Moreover, pursuant to section 75(1) of the Act, these actions fell squarely within the legally prescribed rights of the bank. These reductions in the reserve price and the ultimate sale for US\$2,500,000 do not therefore establish a breach of the duty on the part of the bank. In particular, it must be noted that in obtaining the sale of the property for US\$2,500,000, the bank realized a sum which represents the higher end of the forced market value estimated by the two valuers. This sum fell within the range that Mr. Connor stated in his valuation as the price at which it was likely to be sold.

[56] Ms. Campbell posited that in addition, it must be observed, there is a qualitative difference between the best price at the time of sale and the highest market value. The best price obtainable at the time of sale may not equate to the highest market value. Ms. Campbell submitted that this is exactly what transpired in this instance. Moreover, counsel said that it is arguable that there is a difference between the open market value where the sale is by a willing vendor who will seek the best price available and the open market value where the sale is by a mortgagee whose only

obligation is to sell for the reasonably best price obtainable. That this translates into a difference between a seller who is willing and motivated to sell for his own benefit and a seller who is required to sell to recover monies owed was accepted by Mr. Hauser.

[57] Ms. Campbell said that the arguments in respect of conflict of interest, also must fail. The authority of *Tse Kwong Lam* requires *mala fides* to disturb a sale to a connected person. This has not been established and the allusion to the fact that a company in which the bank had an interest was the only bidder at the auction offers no reason for the auction to have been postponed or to disturb the sale or to entitle Scott and Carol to relief as prayed. Moreover, that factual matrix does not provide authority for the proposition that the bank should have, in hopes of obtaining a better price, adopt a piecemeal approach to the sale or delay in the hopes of attracting potentially higher offers. Ms. Campbell said that in all the circumstances of this case, therefore, the bank obtained valuations and went beyond that duty in that it obtained two valuations to determine the market and forced sale values of the property. It relied on those two valuation reports and set its reserve price based on the determinations that were stated in the reports. Despite having a reserve price on the date of the fifth auction of US\$2,350,000, it sold the property at that auction within the higher end of the forced sale value for US\$2,500,000.

[58] The bank's actions should, Ms. Campbell submitted, be viewed in light of the judgment of Jonathan Parker LJ in *Michael v Miller* *ibid*. There His Lordship noted at paragraph 138 that:

"In so far as the exercise of the mortgagee's power of sale calls for the exercise of informed judgment by the mortgagee, whether as to market conditions, or as to market value, or as to some other matter affecting the sale, the use of a bracket — or a margin of error — must in my judgment be available to the court as a means of assessing whether the mortgagee has failed to exercise that judgment reasonably".

[59] Applying this "*acceptable margin of error*" Ms. Campbell submitted that the bank acted reasonably in assessing the market value of the property by obtaining the informed judgment of qualified valuers as to the market value. While this is not an exact science, the quality or content of neither report has been challenged by Scott and Carol. The court is therefore entitled to rely upon the range of possible receipts from sale found therein. Further, it may assess the proceeds of sale

as recovered by the bank and hold that the bank had exercised the judgment and power of sale reasonably and consistently with its duty. Ms. Campbell urged the court to reject the evidence of Mr. Hauser and accept the bank's evidence that it had done all that was reasonable to achieve the true market value at the time of sale.

Adequate notice period prior to the auctions

[60] Ms. Campbell said that Scott and Carol allege the periods for which the advertising of the public auction were effected are indicative of an unfair sale at public auction. It was adduced under cross-examination of Kelva Lindo that the advertising campaign in respect of the first public auction ran for one month prior to the auction. That campaign in regard to the second public auction ran for 2 weeks. Prior to the third public auction the campaign ran for 10 days. As the bank embarked on a fourth public auction, the campaign again ran for 2 weeks. Finally, in respect of the successful fifth public auction, the campaign ran for 2 days over a month.

[61] Ms. Campbell said that Learned Counsel Mr. Wallbank for Scott and Carol also referred Ms. Lindo to 4.3 of the valuation report of Gifford Connor. Having directed her attention thereto, it was adduced that the properties were being advertised for about a month before the fifth and final auction. Further it was adduced that by the time of that final auction, there had been five (5) months of marketing. Ms. Lindo also clarified in re-examination that her interpretation of 4.3 of Mr. Connor's valuation was that it can take a period of up to as little as 3-6 months to achieve a sale in the lower value ranges and 8 to 10 months in the higher value range of that report before the sale of the property could be consummated. It was not understood to mean that the bank was required to advertise for a period of 8 to 10 months and then offer the property by public auction for sale. Rather it enabled the bank to have attempts to sell and hopefully achieve a successful sale within that time.

[62] Ms. Campbell referred the court to the pronouncement of Parker LJ in *Michael* ibid when His Lordship spoke to the advertising of property by mortgagees in the following way. His Lordship commented at paragraph 132 that:

"It is a matter for the mortgagee how that general duty is to be discharged in the circumstances of any given case. Subject to any restrictions in the mortgage deed, it is for the mortgagee to decide whether the sale should be by public auction or private treaty, just as it is for it to decide how the sale should be advertised and how long the property should be left on the market. Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, in respect of which there can, almost by definition, be no absolute requirements. Thus there is no absolute duty to advertise widely."

[63] Referencing *Fisher and Lightwood on the Law of Mortgage*, Carrington JA (Ag.) noted in paragraph 25 of *Caribbean Banking Corporation v Alpheus Jacob* *ibid* that:

"The advertisements should also have been sufficiently in advance of the sale to permit prospective purchasers to attend the auction and the auction should have been held under reasonable conditions."

Relying on the above quotation, Ms. Campbell submitted, that it was a matter for the bank to determine in the circumstances how the sale should be advertised and how long it should be left on the market. It was not bound by any absolute requirements nor could it have any such requirements imposed on it by Scott and Carol.

[64] Ms. Campbell posited that while as she had identified previously, that a significant number of advertising slots were employed in the bank's campaign, any allegation of failure must be located at the fifth and final public auction. It is a determination of fact for the court whether the bank has advertised sufficiently to discharge its duty. Ms. Campbell said that the advertisements were made sufficient in number and adequately in advance of the sale. There were 81 radio ads on Anguillian radio stations and 4 print ads in the local newspaper, *The Anguillian* which ran for four weeks prior to the auction which gave potential purchasers an opportunity to obtain the terms and conditions of sale prior to the public auction and to prepare themselves to meet the terms and conditions of sale. Moreover, five public auctions were conducted thereby giving all interested persons various opportunities to be aware of the sale and to purchase the property. Counsel said that prior to each of these auctions there were periods ranging from 10 days to in excess of one month during which

the bank advertised the public auction of the property. Ms. Campbell argued that in each instance the public was sufficiently notified in advance to allow them to determine if they wished to participate. Moreover, the advertising provided all the relevant information to the public which allowed potential purchasers sufficient time within which to get their house in order. Further, on the evidence of Ms. Lindo, the bank did not interpret Mr. Connor's marketing period as a recommendation. It was an indication of the market and the likely period in which a sale could be achieved. Ms. Campbell submitted that this is a reasonable interpretation that was open to the bank and urged the court to accept same. Alternatively, Ms. Campbell stated there is no requirement known to the law which would require the bank to have advertised for 8 to 10 months.

Terms and Conditions of Sale

[65] Ms. Campbell stated that in relation to the terms of the auction, Scott and Carol allege that the requirements to produce and/or pay a 10% deposit on the purchase price and to obtain a bank letter of credit were such that they rendered the sale conditions oppressive.

[66] Ms. Campbell said that Mr. Hauser made several relevant admissions under cross-examination. Principally, these are that the requirement to pay the 10% deposit arose only after the successful completion of the sale and as such that condition would not deter anyone from coming to the auction. Further, he accepted that it is customary in real estate transactions for a potential purchaser to pay a deposit to secure the property he intends to purchase. He subsequently conceded that there was nothing unusual or oppressive about requiring a purchaser to do that which is normal practice in any ordinary real estate transaction, that is, to pay a deposit. Mr. Hauser also conceded that a bank letter of credit is nothing more than a letter from a financial institution indicating that the individual named therein is worthy of being giving credit to the amount stated in the letter. In accepting the foregoing he also agreed that persons of means could acquire such a letter of credit from their financial institution without much ado and that the letter was readily obtainable. Significantly, he also agreed that obtaining a letter of credit from a bidder would be a prudent thing for the auctioneer to do. Further, Mr. Hauser accepted that the requirement in the reference in the terms and conditions for governmental approval would not affect belongers of Anguilla. He also agreed that while a non-belonger would have to get an alien land holding license, the terms and conditions of sale for the public auction, at clause 13 provided a period of

time up to three (3) months for a non-belonger to acquire the requisite licenses. As such he accepted that a non-belonger would not be affected by the requirement to acquire government licenses.

- [67] Ms. Campbell said that it was adduced under cross-examination of Ms. Lindo that the actual condition differed from the advert as placed. The advert indicated that "*persons intending to participate in the auction MUST produce to the Auctioneer proof of their ability to pay the 10% deposit as well as a Bank Guarantee from a local financial institution for the balance of the amount of the purchase price in the event they are successful in their bids.*" The terms and conditions however, stated that the auctioneer may require such evidential production.
- [68] Ms. Campbell said that as the evidence of Mr. Horsford clarifies, the effect of this condition applied only to the successful bidder. Additionally, he demonstrated the reasonableness of this condition and indicated the rationale for its imposition. He told the court that this condition was to ensure potential participants at the public auctions would not frustrate their efforts to realise a sale of the property. These views were echoed by Ms. Lindo under cross-examination when she told the court that it is in the interest of the bank to impose conditions that would deter persons who were intending to frustrate the sale. She further told the court that serious bidders would be attracted if they were required to get finances before even attending the auction and that the main reason for the terms and conditions of sale was to attract serious bidders. Further, Ms. Lindo reinforced that it was the unexplained default of Royal Caribbean Resort that caused the bank to change the terms and conditions of sale.
- [69] Ms. Campbell said that section 75(1) of the Registered Land Act vests the chargee with the right to exercise its power of sale "*subject to such reserve price and conditions of sale as the chargee thinks fit and to resell by public auction without being answerable for any loss occasioned thereby.*" In *Credit Suisse AG (Cayman Islands Branch)* the court held at paragraph 88 that "*it is a matter of law that matters that concern the preparation, conduct and timing of the sale are determined by the chargee only.*"

[70] Ms. Campbell submitted that the bank had the right to set the reserve price and impose such conditions of sale as it deemed fit. Ms. Campbell further submitted that the bank imposed reasonable terms and conditions of sale to increase the certainty of the closing of the sale by any successful potential purchaser. There is no credible evidence that there were terms imposed that would operate to deter competing bidders. In fact it is common ground that the only requirement imposed by the bank was that at the public auction, interested bidders were to provide proof of their ability to pay the 10% deposit which became immediately due and payable upon acceptance of the successful bid. This was entirely within the bank's purview as section 75(1) confers on the chargee the right to impose such conditions of sale as it deems fit and it was reasonable in all the circumstances. The allegation, therefore, that the auction was held under oppressive conditions is without merit.

[71] Ms. Campbell posited that her submissions on the reasonableness of the bank's actions were confirmed by Mr. Hauser in cross-examination where he admitted that there was nothing unusual or oppressive about requiring a potential purchaser to pay a deposit of 10% at an auction as it was indeed a real estate transaction. He further stated that it would be prudent of the auctioneer to obtain a letter of credit and in fact such was readily obtainable. Ms. Campbell therefore advocated that Mr. Hauser departed from his assertion that these requirements "*acted as the most serious deterrent to bidders*" for in the circumstances they were by no means unreasonable. Moreover Mr. Hauser under cross-examination agreed that the alien land holding licence requirement would not affect a non-belonger because they were given up to three (3) months to obtain any government approvals which were necessary. Consequently, Ms. Campbell submitted that none of the matters of which Scott and Carol complain could or did operate as deterrents to potential purchasers. Further, or alternatively counsel submitted that the fact that the terms of the public notice and/or the terms and conditions of sale were reasonable in the circumstances and ought not to be impugned.

Appropriate Advertising

- [72] Turning next to the issue of advertising, Ms. Campbell said that Scott and Carol allege that the medium used for advertising the public auction of the property was inappropriate and that they constructed towards an unfair sale at auction.
- [73] Ms. Campbell reminded the court that under cross-examination Ms. Lindo told the court the target market was anyone in general, that is, the public. She went on to say that she considered that the types of people who would be interested in buying the property were persons in a similar business, that is, hotel and tourism. In identifying these market segments she considered that they would be located in the neighbouring island and in Anguilla. While Ms. Lindo did consider that there may be persons further afield she considered that it was best to reach these target groups by advertising in *The Anguillian*, *The Herald* and the three (3) radio stations. This was because as she said the advertisement would reach beyond Anguilla and St. Maarten because the radio stations have internet and *The Herald* is also online and can reach other persons.
- [74] Ms. Campbell said that Mr. Hauser admitted under cross-examination that he had no evidence to prove that the audience which could be reached by the advertising media employed by the bank was small. Specifically he was not aware of the circulation of *The Anguillian* or *The Herald* nor did he know the figures for the listenership of Kool FM, Radio Anguilla or Heartbeat Radio. Ms. Campbell said that there was and remains no evidence before the court upon which it may accept the ineffectiveness of the advertising media used by the bank. Counsel referred the court to *Caribbean Banking Corporation* ibid in which Carrington JA in the Court of Appeal held at paragraph 25 that "*the bank's statutory duties required it to advertise the sale, to describe the properties properly in the advertisements and ensure that the advertisements were sufficient in number and content to reach the appropriate market.*" It however, at paragraph 31 stated that "*there is no absolute duty to advertise widely, and what is proper advertisement depends on the circumstances of each case*"
- [75] Ms. Campbell posited that the bank has complied with the requirements as stated by Carrington JA (Ag.) in that it made several advertisements for the sale of the property in *The Anguillian* and the

Herald. Specifically with respect to the final successful auction it placed four advertisements for a period of one month in The Anguillian and advertisements were placed in The Herald. The bank also via radio broadcast on Heartbeat Radio, Kool FM and Radio Anguilla station ran 27 spots on each radio station for a total of 81 spots. These advertisements were clear, sufficiently particularized and gave reasonable advance notice of the auction dates. Further, the advertisement stated: the address, size and specific amenities located on the property, the size of the amenities, date, time and location of the auction and contact information for further details on the terms and conditions. Ms. Campbell submitted that despite the seeming geographic limitations of the advertisements in the Anguillian newspaper, on Anguillian radio stations and in the St. Maarten Herald, the presence of non-Anguillian residents at the various auctions evidences that the advertisements did in fact reach beyond Anguilla and St. Maarten.

- [76] Notwithstanding those submissions, Ms. Campbell argued that there is no absolute duty under law to advertise widely. The Registered Land Act and the case law support the submission that these are matters within the purview of the mortgagee. Further, what is proper depends on the circumstances of each case and on the facts as established in this matter, Ms. Campbell submitted that the bank's advertised widely enough in the circumstances. The bank therefore contends that at all material times it had taken reasonable steps in pursuit of its duty to obtain the true market value at the time of sale. Moreover by virtue of section 75(1) of the Act, the bank is not answerable for any loss that might have been occasioned by the sale.

Quantum of Damages

- [77] Ms. Campbell submitted that the maximum that can be recovered, if any, by Scott and Carol is US\$290,000.00 which represents the deficiency between the sum of US\$425,000.00 for the secured loan and the US\$135,000.00 received by them from the proceeds of sale.
- [78] Ms. Campbell further submitted that should the court make a finding in favour of Scott and Carol, this will not automatically entitle Scott and Carol to recover the said US\$290,000.00. Instead the amount recoverable will be dependent on what the court considers to have been the best market price at the time of sale. Ms. Campbell posited that the Scott and Carol can only recover the full

deficiency if the best market price at the time of sale, as determined by the court, is sufficient to facilitate such a recovery. If however, the sum is insufficient, Scott and Carol can only recover the difference between the amount they would have received and the US\$135,000.00 actually received.

[79] Learned Counsel Ms. Campbell further submitted that the same argument applies to the calculation of interest. Interest will only be calculated on the deficiency between the amount found by the court to have been the best market price at the time of sale and the US\$135,000.00 actually received. The process of determining the best market price at the time of sale is not an arbitrary exercise. Ms. Campbell said that as mentioned above in reference to **Tse Kwong Lam**, the court will be relying on *"the use of a bracket, or a margin error" as a means of assessing whether the mortgagee had failed to exercise that judgment in a reasonable way.*"

[80] Ms. Campbell stated that the only evidence tendered to the court that could assist in determining the bracket or margin of error are the two valuation reports produced and relied on by the bank in support of its position that the power of sale was properly exercised on the basis of informed judgment. In light thereof, given that the proceeds from sale were within the ranges as offered by the valuers, the court ought not to find, Ms. Campbell submitted, that the power of sale was improperly exercised.

Court Analysis and Conclusions

[81] I have reviewed the evidence and given deliberate consideration to the very helpful submissions of learned counsel. In my review of the evidence, I state that Mr. Hauser struck me as a fairly straightforward gentleman who, because he feels that he was wronged, did not appear to be as objective as he could have been in his evidence in chief. However, in the face of searching cross-examination by Learned Counsel Mr. Bourne, Mr. Hauser was forced to resile from most of the positions that he had adopted in his evidence in chief in seeking to assert that the bank had acted improperly.

- [82] Both Mr. Horsford and Ms. Lindo who testified on behalf of the bank painted the picture of honest and credible witnesses. This remained so even during the very skillful cross-examination by Learned Counsel Mr. Wallbank.
- [83] At the end of the evidence that was presented by both sides, there was very little, if any, factual variance between the respective sides.
- [84] The following represents my findings of facts unless otherwise agreed: Credit must be given to Learned Counsel Mr. Wallbank for very succinctly chronicling much of the relevant facts. I accept and adopt most of the facts in accordance with the manner he has chronicled them.
- [85] The Boutique owed the bank US\$174,000.00 plus interest based on loan to which there was a first charge of the property for the sum of US\$360,000.00 plus interest at 9% per annum. The bank also held a charge over the property for US\$150,000.00. It was in effect a third charge. The Boutique was the chargor for all three charges. Richard and Carol had loaned the Boutique money and held the second charge over the property.
- [86] The Boutique fell into arrears on its loan obligations to the bank. Having given the Boutique the opportunity to remedy its default and with the Boutique's failure to remedy it the bank indicated to the Boutique that it intended to have the property sold at public auction. Towards this end, the bank instructed KLA to handle the sale of the property – KLA in turn assigned Ms. Lindo to market the property and organize the auction sale, using KLA's subsidiary, Anguilla Credit Management Ltd. (ACML). Towards this end, ACML obtained a valuation report from Mr. Connor. He gave an "open market value" of between US\$2,800,000 and US\$3,000,000, with a price not likely to be achieved of US\$2,900,000. He also gave a "forced sale value" of between US\$2,900,000. to US\$2,600,000, with a most likely price of US\$2,500,000. ACML subsequently obtained a second valuation from Mr. Niles. He gave an "open market value" range of US\$2,975,000 to US\$3,200,000 and a forced sale range of US\$2,100,000 to US\$2,240,000.
- [87] Thereafter, Ms. Lindo commenced a marketing exercise. She utilized the media that is usually used for selling land, namely, The Anguillian, a local weekly newspaper; Radio Anguilla; Heartbeat

Radio; and Kool FM. In addition, Ms. Lindo caused the auction to be advertised in St. Maarten in the Daily Herald, which is an international newspaper. The property was eventually sold at the fifth auction. Scott and Carol allege that the bank in causing the property to be sold at the fifth auction breached the duties towards them.

[88] It bears repeating that Scott and Carol seek an order that the court compels the bank to compensate them for the deficiency which they say amount to US\$2,900,000. This sum represents the difference between the stated amount of its secured loan as 2nd chargee of US\$424,000,000 and US\$135,000 that was paid over to them from the proceeds of the sale of the property.

[89] The burden of proof lies on Scott and Carol, in the case at bar. However, as the evidence unfolded, it became clear that most of the allegations that Mr. Hauser had made in chief were baseless. He however, very candidly admitted that many of the allegations that he had made were in fact things that he had wished would have happened. Importantly, Mr. Hauser agreed that the auction price at the first auction was US\$2,900,000. He also conceded that if the bank applied the forced sale value as its method of obtaining the sale price, US\$2,900,000 would not have been the opening reserve price, that bid. He accepted that if the forced sale value had been used, it would have been between US\$2,400,000.00 and US\$2,600,000.

[90] There is no doubt that the auction prices for the second, third, fourth and fifth auctions were percentages of the reserve price of the first auction.

[91] It was after there were no bidders at the first auction that the reserve price was reduced by 10% at the second auction. This, Mr. Hauser accepted is consistent with the local practice in Anguilla. The second auction having been unsuccessful, it was only then that the auctioneer reoffered the property and further reduced the reserve price so that at the third auction, the price was 81% of the original auction price. This reserve price remained unchanged for the fourth and fifth auction.

[92] In relation to the terms and conditions of the auction, I am satisfied that the terms and conditions of the fifth auction were not onerous on non- belongers as Mr. Hauser originally sought to have me believe. Clause 13 of the terms and conditions provided a period of time of up to three months for a

non-belonger to obtain the requisite licences in order to be able to purchase the property. Neither was the requirement that a successful bidder make a deposit of 10% of the reserve price, by any means onerous.

[93] Insofar as Scott and Carol have complained about the requirement that the potential purchaser obtain a bank letter of credit, I am far from convinced that this was an impediment to any person who had the requisite means for purchasing the property. In any event, under strenuous cross-examination, Mr. Hauser was forced to agree that it was not difficult to obtain this. I agree with the bank that this was prudent on its part to stipulate this requirement. With respect to Scott and Carol's allegation of conflict of interest. I am not satisfied that Scott and Carol have provided the court with any cogent evidence on which it can be concluded that there was any possibility of what the potential bidders intended to bid, being communicated to NBA Assets before the actual time of bidding.

[94] I am satisfied that the bank quite properly exercised its power of sale in relation to the property to satisfy the amount owing to it under its two charges. The only question is whether in having the property auctioned it breached its legal, statutory or fiduciary duties to Scott and Carol.

[95] I am not of the considered opinion that much of the resolution of the issues would turn on the legal solutions and very minimally, on the court's findings of facts.

[96] In relation to the issues that have been joined between the parties, I have taken the time to produce extensively the legal and factual submissions that were very helpfully advanced by both learned counsel. In my view, this obviates the need for me to provide any extensive in depth analysis since I am of the view that the submissions are very lucid and comprehensive. Indeed, both Mr. Wallbank and Ms. Campbell have presented the court with very helpful submissions in relation to each of the issues.

[97] Even though I find Mr. Wallbank's submissions very attractive, I have no doubt that based on the factual situation he had a difficult task in persuading the court that the bank violated any legal or equitable principle. To the contrary, the case law that was very closely and carefully reviewed by

Ms. Campbell is against the positions that are contended for by Mr. Wallbank. This is so in relation to each of the issues that has to be resolved. Simply put, the case law is not on the side of Scott and Carol.

[98] This may well be one of the reasons why Mr. Wallbank very skillfully felt content to pay significant regard to the factual circumstances as posited on behalf of Scott and Carol.

[99] With respect to the three sub-issues that have to be determined, I would simply state that where there are divergent positions taken by Mr. Wallbank and Ms. Campbell, I find the arguments that were advanced by Ms. Campbell unassailable in view of the very persuasive authorities that were presented by Ms. Campbell to support the positions that she advocated.

[100] Out of respect to both learned counsel, I propose to briefly indicate the conclusions to which I have arrived which are in keeping with the very compelling arguments of Learned Counsel Ms. Campbell.

[101] It is the law that the duty of the chargee is clearly stated in section 75(1) of the Registered Land Act of the Laws of Anguilla. In a word, the chargee has a duty to act in good faith and have regard to the interest of the chargor. I also equally accept that it is the duty to take reasonable care to obtain the proper price, or the best price reasonably obtainable on sale. See *Downsview Nominees Ltd v First City Corporation Ltd* *ibid*. I am however, not of the view that the additional principle that was ascribed to the Privy Council in *Downsview Nominees Ltd v First City Corporation Ltd* *ibid*, namely, there is no general duty to take reasonable care, should form the basis of the court's determination. It seems to me that the justice of cases such as these, require the chargee to take reasonable care in its exercise of its power of sale. See *Credit Suisse AG Cayman Islands Branch v Anguilla*. This much is agreed by both sides.

Adequacy of Notice

[102] I come now to address the issue of the adequacy notice. It is indisputable that section 75 of the Registered Land Act enables the mortgagee to set the reserve price and to determine the terms

and conditions of sale. Based on the evidence that was adduced in the trial, there is no basis for me to conclude that the bank acted improperly in exercising its power to set the reserve price and in determining the period of marketing. See *Michael v Miller* *ibid*.

[103] In any event, I do not hold the view that the periods of notice before the auction of the property were in any way unreasonable or too short. Further, Mr. Hauser's evidence during cross-examination on this aspect of the case did not stand up to the vigorous cross-examination that sought to test it.

[104] In view of the totality of circumstances, I am not of the considered opinion that there is a scintilla of evidence to support the allegation that the bank did not act in good faith. Neither am I of the view that the bank breached its duty to properly market the property prior to the auctions. The uncontroverted evidence paints a different picture. What to my mind is critical is the fact that by the time of the fifth and final auction, the property had been marketed for five months in total.

[105] Be that as it may, in my view the period of notice which is of paramount importance is the one which preceded the fifth and final auction at which the property was eventually sold. A period of notice in excess of one month cannot be held to be short, bearing in mind that the property was consistently advertised to be sold for five months. Also of great significance is the fact that there was no change in the reserve price of the property from the third auction to the fifth auction.

[106] Accordingly, Scott and Carol's claim on the ground of inadequacy of notice therefore fails.

Terms and Conditions of Sale

[107] On the issue of the terms and conditions of sale and insofar as much of what Mr. Hauser said in complaining about the terms and condition of the auction fell away during vigorous cross-examination by Learned Counsel Mr. Bourne, in my view, very little remain for the court to address. For the sake of completeness however, I state that Mr. Hauser has failed to adduce any cogent evidence upon which the terms and conditions as set for the auction could be impugned. I

have already indicated my views on much of the complaints that have been made in relation to the terms and conditions.

[108] It bears stating that Mr. Hauser was forced to concede that the terms and conditions were not onerous as he had initially sought to portray. I am convinced that the terms and conditions imposed by the auctioneer were prudent, based on the previous bidders failure to consolidate the purchase of the property after a bid was accepted at that auction.

[109] The conditions which were imposed by the auctioneer such as - the requirement that the successful bidder pay a deposit of 10% and produce a bank letter of credit - are matters of prudence for the exercise of which the bank cannot be faulted. It is very usual for persons who are entering into agreements of the sale of real property to require that a 10% deposit be made towards the purchase price. This, Mr. Hauser very candidly accepted to be true. The requirements for a potential purchaser to obtain governmental approval only applied to non-belongers of Anguilla and clause 13 provided a period of time up to three months for a non-belonger to acquire the requisite licenses. This, to my mind, was quite reasonable and would not have deterred serious bidders. All in all, the terms and conditions were fair and did not in any way undercut the bank's duties to Scott and Carol.

Appropriate advertising of property

[110] I come now to address the final issue, namely, whether the property was appropriately advertised.

[111] I am far from persuaded that the media used for advertising the public auction of the property was inappropriate. There is no credible basis for this conclusion. Neither, I do not hold the view that in all of the circumstances of the case at bar the advertisements were not sufficiently circulated in advance of the proposed sales in order to permit prospective purchasers to attend the auction. For what it is worth, the important advertisements, in my view, are the ones that were made in relation to the fifth auction, this being the auction at which the property was eventually sold. I am of the considered opinion that the use of the various forms of media to publicize the notice of the auction was adequate and of sufficient local and international reach.

[112] Equally, I accept that the method of advertising that was utilized, namely, The Anguillian, The Herald (an international newspaper) and on three radio stations, was adequate. I also accept that the radio stations have internet and The Herald is online.

[113] I accept it to be a true position of the law that there is no absolute duty to advertise widely and what is proper advertisement depends on the circumstances of the case. See *Caribbean Banking Corporation v Alpheus Jacob* *ibid*. I bear in mind that it was a resort that was being sold. Looking at the matter in its entirety, I have no doubt that the advertisement of the 5th and final auction was quite appropriate, namely, 27 spots on each radio station for a total of 81 spots. Also, four advertisements for a period of one month in the Anguillian and the Herald.

[114] The ground of improper advertisement cannot be sustained.

Conflict of Interest

[115] In order to bring closure to the case at bar on the matter of conflict of interest. I have carefully reviewed the submissions that were advanced by Learned Counsel Mr. Wallbank and Learned Counsel Ms. Campbell on this issue. With respect, there is no evidential basis upon which I can hold that the bank acted improperly in having its subsidiary purchase the property at the auction. In fact, there is nothing in law which prevented the bank itself from purchasing the property. To the contrary, section 75(1) of the Registered Land Act empowers the bank to purchase the property over which it had the charges at the auction. It is the law that a chargee in exercising its power of sale has the power to buy at the auction and resell by public auction without being answerable for any loss. Therefore, it is a correct proposition of law that there is no legal bar that can be placed on the affiliate of a chargee from purchasing the auctioned property.

[116] I accept, however, that the bank must be guided by the principles that were enunciated in *Tse Kwong Lam v Wong Chit Sen* *ibid*. I can do no more than to adopt and apply those principles which were referred to earlier in the case at bar. That case has provided very helpful guidance for cases of conflict of interest. Scott and Carol have failed to lead cogent and persuasive evidence to establish that the bank has not acted in good faith nor had taken reasonable precautions to obtain

the best price reasonably obtained at the time, namely, by taking expert advice as to method of sale, the steps which ought reasonably to be taken to make the sale a success at the reserve price.

[117] In the circumstances, I do not accept that the bank in any way failed to have regard to the conflict of interests or potential for conflict of interests.

The best sale price

[118] For the sake of completeness, I propose to briefly address this matter. I have no doubt that the bank has a duty to take reasonable steps to obtain the best price. Indeed, so long as the bank has achieved such a price and in so doing it has obtained valuations as to the prices which might reasonably be achieved, it would have satisfied this aspect of its duty. See *Michael v Miller* *ibid*. Also, once the bank has acted in good faith, as it did, it cannot be condemned merely because it has not realized the price that is desired by the subsequent encumbrancer. There is no basis for me to conclude that the bank acted in any way improperly in the case at bar. See *Downsview Nominees Ltd v First City Corporation Ltd* *ibid*.

Conclusion

[119] In the premises, Scott Hauser, Executor of the Estate of Richard Hauser, (deceased) and Carol Hauser have failed to establish their claim against National Bank of Anguilla Ltd.

[120] It is therefore ordered that Scott Hauser, Executor of the Estate of Richard Hauser, (deceased) and Carol Hauser's claim against National Bank of Anguilla's is dismissed.

[121] Prescribed costs are awarded in the sum of EC\$14,000 unless otherwise agreed.

[122] The court gratefully acknowledges the assistance of learned counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla