[2017] JMSC Civ. 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV06792

BETWEEN	**ANDREA BALL**	**CLAIMANT**
AND	**VICTORIA MUTUAL BUILDING SOCIETY**	**1st DEFENDANT**
AND	**DAVID THWAITES & ASSOCIATES LTD**	**2ND DEFENDANT**
AND	**KAREN THOMAS**	**3RD DEFENDANT**
BETWEEN	**VICTORIA MUTUAL BUILDING SOCIETY**	**ANCILLARY CLAIMANT**
AND	**ANDREA BALL**	**ANCILLARYDEFENDANT**

OPEN COURT

Mrs Marvalyn Taylor-Wright and Mr Anwar Wright instructed by Taylor-Wright & Company, Attorneys-at-Law for the Claimant

Mr Emile Leiba and Mr Jonathan Morgan instructed by DunnCox, Attorneys-at-Law for the 1st Defendant

Mr Kwame Gordon instructed by Samuda & Johnson, Attorneys-at Law for the 2nd Defendant

Ms Cavelle Johnston and Ms Kaysian Kennedy instructed by Townsend, Whyte & Porter Attorneys-at-Law for the 3rd Defendant

Heard: 21st, 22nd, 23rd, 28th, 29th November, 1st December 2016, 6th, 7th, 8th, 9th,10th March, 15th, 16th, 17th , 18th, 19th May and 8th November 2017

Mortgages - Duty of care of Mortgagee in exercising power of sale - Whether reliance can be placed on price achieved at auction - Whether price obtained at auction was due to fault of Mortgagee

Negligence - Duty of care of valuer in valuing property

Laing, J

THE CLAIM

[1] This dispute concerns property located at Lot 2, Liguanea Villas, 11 Liguanea Avenue, Kingston 6, in the parish of St. Andrew. The duplicate certificate of title shows that it is registered at Volume 1401 Folio 775 of the Register Book of Titles and reflects transfer No. 1438623 registered on the 1st November 2006 to the Claimant, Ms Andrea Ball, for a consideration of One Million Five Hundred Thousand Dollars ($1,500,000.00). It is not disputed that this purchase price was in respect of the land only and that a townhouse (the "Townhouse"), was subsequently erected on the property. The land and townhouse will collectively be referred to in this judgment as ("the Property").

[2] The 1st Defendant, Victoria Mutual Building Society ("VMBS"), is a building society incorporated in Jamaica under the provision of the Banking Societies Act. VMBS granted a number of loans to the Claimant. Among these loans was a loan in the sum of Fourteen Million Dollars ($14,000,000.00) to the Claimant on the security of the Property which is evidenced by mortgage No.1469732 registered on the 2nd May 2007. VMBS also granted a loan on the security of the Property in

the sum of Eight Hundred and Ninety Five Thousand Dollars ($895,000.00) evidenced by Mortgage number 1505020 registered on the 20th November 2007.

[3] Ms. Ball fell into arrears with her monthly payments to VMBS and VMBS exercised its Power of Sale contained in the Mortgage. A public auction was conducted by DC Tavares Finson on the 6th March 2011 and the Property was purchased by the Third Defendant, Ms Karen Thomas ("Ms.Thomas") for a consideration of $12,750,000.00 ("the Sale Price").

[4] Ms. Ball seeks a declaration that she is entitled to the equity of redemption in the Property and damages against VMBS for breach of the equitable duty to act in good faith and to take reasonable care to obtain a proper price at the date of the sale in exercise of the mortgagee's power of sale. She also claims damages against the 2nd Defendant, David Thwaites and Associates Ltd ("DTA") fraud and/or negligence arising from a valuation report it prepared dated 2 March 2011 (the "Thwaites Valuation Report") and claims against Ms Thomas for fraud.

[5] VMBS has also filed an ancillary claim against Ms. Ball, claiming the sum of Four Million Seven Hundred and Fifty-one Thousand Four Hundred and Eighty-five Dollars and Twenty-one Cents ($4,751,485.21) which it asserts is the balance due and owing to VMBS as at April 22, 2013 in respect of her loan accounts with that institution.

[6] In this judgment I will first assess the claims in fraud and/or negligence against DTA and in doing so make a finding as to the market price of the Property. I will then assess the claim against VMBS and decide whether VMBS took reasonable steps to obtain the market price for the Property and whether if in doing so it discharged its duty as mortgagee.

Ms. Ball's case against DTA

[7] Ms. Ball claims against DTA for fraud and negligence. She complains that the Thwaites Valuation Report was prejudiced, erroneous and misleading and accordingly did not disclose a true market value of the Property. It was pleaded by Ms. Ball that by not inspecting the interior of the Townhouse on the Property, DTA failed to include the following features of value:

> *(1) Loft with balcony, bedroom with closet and own unfinished bathroom;*
>
> *(ii) Porcelain tiles and parquette floor; and*
>
> *(iii) Floor area of 209.45 square metres (2,260 square feet) instead of 128.60 square metres (1,384.25 square feet).*

Ms. Ball asserts that by preparing the Thwaites Valuation Report without inspecting the interior of the Property and providing it to VMBS knowing that it was intended to be used to inform the sale of the Property, DTA failed to conform to the standard of care owed by professionals in its field.

Did DTA owe a duty of care to Ms Ball

[8] Following the developments in the law of tort since ***Hedley Byrne & Co v Heller & Partners Ltd*** **[1964] AC 465**, it is now settled law that a professional such as a valuer owes a duty in contract and in tort to his client and the duty in tort may extend to third parties with whom there is no contractual relationship depending on the degree of the proximity between them. This is founded on the principle that the duty of such a person "*extends to all those persons, who would be so closely and directly affected by his acts and his omissions that he ought reasonably to have them in his contemplation*". Mrs Taylor Wright on behalf of Ms. Ball relied on a number of cases including ***Diana Eileen Merrett v John R.H. Babb*** **[2001] EWCA Civ 214** in support of the correctness of this principle. That case concerns slightly different facts but is helpful in that the English Court

of Appeal reviewed a number of cases and traced the history of the development of the duty of care as it relates to certain professionals.

[9] It was submitted by Mr Gordon on behalf of DTA that the cases relied on by Ms. Ball as supporting the existence of a duty of care all deal with instances where sufficient proximity between the claimants and the valuer had been established. Counsel submitted that in this case DTA could only be said to owe a duty to Ms. Ball, she being a third party, if it can be shown that DTA had reason to believe that the valuation of the Property was going to be relied and acted upon by her. . Counsel of course argued that it was not contemplated that Ms. Ball would have relied on the Thwaites Valuation Report. I must admit that I find Counsel's submission on this issue to be unduly restrictive to the point of being inaccurate. DTA ought to have appreciated that the purpose of the report was to guide VMBS in the sale process and in determining what price it was prepared to accept. The fact that the sale was intended to be by auction would not eliminate the importance of the report. In those circumstances, DTA ought to have appreciated that Ms. Ball, as Mortgagor, was a person who would be so closely and directly affected by its acts and its omissions that it ought reasonably to have had her in its contemplation when it was assessing the market value of the Property. In the premises I find that DTA did owe a duty of care to Ms. Ball.

[10] Mr Gordon submitted that if the Court finds that a duty of care is owed, then DTA would only be negligent if Ms. Ball proved that:

> *a. the 2nd Defendant's opinion of value was wrong in that it was outside the range permitted to a non-negligent valuer; and*
>
> *b. the 2nd Defendant failed to act in accordance with the standards or practices which are regarded as acceptable by a respectable body of opinion in its profession*

There is authority which supports this position. By way of example, in ***Craneheath Securities v. York Montague Ltd*** **[1996] 1 EGLR 130 at 132** Balcombe LJ (with whom Otton and Aldous LJJ agreed) said as follows:

> *"Since Craneheath did not establish that the figure of £5.25m was wrong, then I agree with Mr Stow that Craneheath's action must fail. It would not be enough for Craneheath to show that there have been errors at some stage of the valuation unless they can also show that the final valuation was wrong. If authority be needed for so self-evident a proposition, it can be found in Mount Banking Corporation Ltd v. Brian Cooper & Co [1992] 2 EGLR 142 at pp. 144-5, 149."*

[11] However, in many of the authorities the test does not appear to be so clearly defined. The earlier cases tended to favour the reasonable standards element referred to above and this has often been termed the conduct test. In contrast, the more recent cases, which perhaps started with ***Singer & Friedlander v. John D Wood & Co*** **[1977] 2 EGLR 84,** have tended to focus on the final figure as opposed to the process employed by the valuer in reaching it. The final figure is then usually assessed in relation to the level of variance with what the court determines to be a bracket of correct value and is termed the margin of error or bracket approach. This bracket approach recognizes that every valuation has a subjective element and that differences do not necessarily mean that someone is negligent. This recognition is aptly discussed in the case of ***Singer v Friedlander*** where Watkins J said:

> *"The valuation of land by trained, competent and careful professional men is a task which rarely, if ever, admits of precise conclusion. Often beyond certain well-founded facts so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore he cannot be faulted for achieving a result which does not admit of some degree of error. Thus, two able and experienced men, each confronted with the same task, might come to different conclusions without anyone being justified in saying that either of them has lacked competence and reasonable care, still less integrity, in doing his work. The permissible margin of error is said by Mr Dean, and agreed by Mr Ross, to be generally 10 per cent either side of a figure which can be said to be the right figure, i.e. so I am informed, not a figure which later, with hindsight,*

> *proves to be right, but which at the time of valuation is the figure which a competent, careful and experienced valuer arrives at after making all the necessary inquiries and paying proper regard to the then state of the market. In exceptional circumstances the permissible margin, they say, could be extended to about 15 per cent, or a little more, either way. Any valuation falling outside what I shall call the "bracket" brings into question the competence of the valuer and the sort of care he gave to the task of valuation."*

[12] Another case which demonstrates the application of the bracket approach is ***Michael and others v Miller and others*** **[2004] EWCA Civ 282.** In this case the claimants purchased an agricultural estate from the defendants by making a part payment with the outstanding balance of the purchase price secured by a legal charge on the whole estate. The claimants failed to repay the loan to the defendants and an order by consent for sale of the estate was obtained. The defendant retained an estate agent and valuer to act for them on the sale of the estate and the claimants subsequently issued proceedings against the defendants, claiming that the defendant had breached their duty to the claimants to take reasonable care to obtain the best price reasonably possible because the valuer did not take into account a crop of lavender that was planted on the estate. Although the valuer was not joined as a party the Court was required to determine whether he had acted negligently in the valuation of the estate.

[13] The Court accepted Counsel's submission that:

> *"where a valuation falls within a reasonable margin of error, the valuer will not be found to have been negligent; whereas if the valuation falls outside a reasonable margin of error, then prima facie the valuer has acted negligently."*

[14] If the test is that the valuer, DTA, will discharge this duty if its valuation falls within an acceptable margin of error, it seems to me that it is first necessary for the Court to determine what was the proper price of the Property and whether the price as contained in the Thwaites Valuation Report would be within an acceptable range of that price.

THE BATTLE OF THE VALUATIONS

[15] The Court was asked to consider the findings of valuers as contained in five separate valuation reports namely: The VB Williams 2007 Valuation Report, The VB Williams 2011 Valuation Report, The Thwaites Valuation Report, the Westcar Development Limited valuation report (the "Westcar Report") and the report of Mr Ainsworth Norton (the "Norton Report"). I will review each in turn and provide the Court's analysis and findings.

The VB Williams 2007 Valuation Report

[16] The VB Williams 2007 Valuation Report calculated the area of the Townhouse to be approximately 171.423 square metres or 1,845.2 square feet. It described the accommodation as follows:

> *Ground Floor*
>
> *Carport, living, dining, kitchen, washroom and foyer.*
>
> *First Floor*
>
> *2 bedrooms with built-in clothes closet and 2 bathrooms,*
>
> *Loft with large enclosed area, which can be partioned and used as 2 bedrooms with bathroom. There is also a staircase giving access from the ground to the first floor and the loft.*

[17] Without deciding whether the gross floor area as represented was accurate, it is patently clear that the existence of the loft was identified and considered. It is therefore only reasonable to conclude that its existence featured positively in the opinion as to the fair market value of the Property. Further evidence of this can be seen in the report under the heading "Appraised value: Conclusion:" which demonstrated that in the report the Property was treated as being comparable to a three bedroom townhouse where it states as follows:

> *"The Property compares favourably with other townhouses in the area. The present market value of 3-bedroom townhouses in the area ranges from a high of Nineteen Million Dollars ($19,000,000) to a low of $10 Million Dollars ($10,000,000) depending on, accommodations, age of building, area of building and land, location, addition, fittings, fixtures, finishing and physical condition"*

The issue as to whether the Property was so assessed, or was properly to be assessed as a "two bedroom with a loft" or as a "three bedroom" was raised during the course of the trial. The Court will address this issue in greater detail later in the judgment.

The VB Williams 2011 Valuation Report

The evidence of Mr Moore

[18] The VB Williams 2011 Valuation Report was prepared by Mr. Errol Moore who was called as a witness on behalf of Ms. Ball. Mr. Moore received a diploma in Land Economy & Valuation Surveying from the University of Technology and has been conducting real estate appraisals since about 2006. The report he authored describes the Townhouse as a unit disposed over a gross floor area of 209.45 sq metres (2,260 sq ft.) and consisting of:

> *GROUND FLOOR*
>
> *Foyer, combined living area and dining hall, and kitchenette, powder room,*
>
> *laundry, and enclosed back porch.*
>
> *UPPER FLOOR*
>
> *Balcony, two (2) bedrooms - each with bathroom and closet and linen closet.*
>
> *Loft*
>
> *Balcony, and a bedroom with closet and an unfinished bathroom.*

[19] Mr Moore was not a very cooperative witness. In fact, the Court found him to be a very difficult witness. He was evasive and did not appear to appreciate or accept his role as an expert witness albeit one called on behalf of Ms Ball. The tone of his cross examination was foreshadowed by his answers to the questions posed on behalf of VMBS. Question 4 was in the following terms:

> *In accordance with your valuation report, please state the difference in value between a three bedroom townhouse and a two bedroom townhouse with a loft?*

His rather cheeky response (which matched his demeanour while he was in the witness box) was as follows:

> *The difference is obviously that one is a three bedroom townhouse and the other is a two bedroom townhouse with a loft. To provide any further clarification your question would have to be more specific.*

[20] In his further answer to questions posed by Counsel for VMBS, Mr. Moore confirmed that the ground floor of the Property is 1,000 square feet, the first floor is 675 square feet and the loft is 585 square feet totalling 2,260 square feet.

[21] In cross examination, his evidence was that, not having prepared the VB Williams 2007 Valuation Report, he was not in a position to say whether the area of the loft was included in the square footage. He asserted that he measured the square footage of the Townhouse and could vouch for the accuracy of his calculation but he could not explain the discrepancy between his measured area and the area which is stated in the VB Williams 2007 Valuation Report.

[22] Mr Moore challenged the accuracy of the Thwaites Valuation Report on a number of bases (1) The absence of a loft; (2) The location of one of the bedrooms; (3) The square footage; and (4) The comparable data.

[23] It was common ground as between the two experts witnesses Mr Moore and Mr Ainsworth Norton who was called on behalf of DTA, as well as the witness Mr

Thwaites, that one method of valuation is that of the comparative approach in which a value of the Property is determined based on properties of a similar character or nature being sold on the open market within a particular time frame. It was also common ground that the comparable method is recognized by professional valuation surveyors as the best method in determining the market value of residential property and in fact was the method used by all three valuers. In his answers to the questions of DTA as to what method was used to arrive at the valuation as submitted, Mr. Moore stated that he used two methods, the sales comparable method and the contractor's method. He agreed during cross examination that he used the contractor's method to arrive at the replacement cost and used the sales comparable method in arriving at fair market value. Nevertheless his evidence was that he did not attach the market information to his report, because it was not relevant.

[24] The absence of the comparables which Mr Moore says he utilised is in fact very important in that there was no opportunity for the other parties to test appropriateness of those comparables and the Court was therefore deprived of an opportunity to independently assess and weigh the comparisons. This is of course an important feature which goes to the weight which the Court can properly attach to the conclusion of Mr Moore as to the fair market value of the Property.

[25] Mr Moore examined the comparable properties (referred to as comparables), which were used by Mr Thwaites as the basis for the Thwaites Valuation Report. Comparable 1 was a property located on the same road as the Townhouse, but in a different apartment complex. It was initially a two-bedroom structure which was converted to a three bedroom unit. The Thwaites Valuation Report recorded it as having a slightly larger square footage/ metre square area than the Property and in November 2008, it was sold for Nine Million Dollars ($9,000,000.00). Mr Moore agreed that an appreciation to Twenty-five Million Dollars

($25,000,000.00) in value from a value of Nine Million Dollars ($9,000,000.00) would represent an appreciation of over three hundred percent (300%) in the period of less than three years and that this was unlikely in his experience.

[26] As it relates to comparable 2, the Thwaites Valuation Report stated it was a unit in the same complex as the Property and it had been sold in January 2010 for Ten Million Seven Hundred Thousand Dollars ($10,700,000.00).. The evidence of Mr Moore during cross examination was that he did not find it odd that a year and a few months later a similar unit was valued in the same complex at Twenty-five Million Dollars ($25,000,000.00). He agreed that the difference between Twenty-five Million Dollars and Ten Million Dollars ($10,000,000.00) is almost one hundred and fifty percent (150%) and that in his opinion as a valuer he would agree that is highly unlikely that “the Property” can appreciate on a yearly basis by one hundred and fifty percent (150%).

[27] I indicated to Mr. Gordon during his cross examination of Mr. Moore that to the extent that there was no evidence before the Court of the values of any of the comparables at the time the Property was valued at Twenty-five Million Dollars ($25,000,000.00), the line of questioning had to be based on the assumption that the comparables were in fact also valued at Twenty-five Million Dollars ($25,000,000.00) at the time of the sale of the Property. In other words, the more accurate formulation of the question in respect of comparable 1 suggested by the Court and asked by Mr. Gordon was “assuming comparable 1 appreciated to Twenty-five Million Dollars ($25,000,000.00) (on or about the 2nd March, 2011 the date of the Thwaites Valuation Report)”, would that appreciation over that time period be unlikely?” Mr. Moore agreed that it would have been unlikely. He was asked if it would have been “very unlikely” but did not respond due to the intervening objection of his Counsel.

Conclusion on the VB Williams 2011 Valuation Report

[28] In the cross examination of Mr Moore, Mr Gordon managed to elicit the concession by Mr Moore of the unlikelihood of comparable 1 or comparable 2 having appreciated to a value of Twenty-five Million Dollars ($25,000,000.00) at the time the Property was sold. This concession leads the Court to the reasonable inference that, if they were true comparables, and were unlikely to have appreciated to Twenty-five Million Dollars ($25,000,000.00), then it is equally unlikely that the Property would have appreciated to a value of Twenty-five Million Dollars ($25,000,000). If this is so, then it casts considerable doubt on the accuracy of the opinion of value of Mr Moore that the Property would have appreciated to a value of Twenty-five Million Dollars ($25,000,000) at the time of the VB Williams 2011 Valuation. Whether the Property, (much like the comparables) had or had not appreciated to a value of Twenty-five Million Dollars ($25,000,000) is of special importance in light of the fact that the Court was not provided with Mr. Moore's comparables that he purported to have utilised. These comparables presumably would have been capable of supporting his opinion of value. Without his comparables, the Court is being asked to almost blindly accept his opinion of value, while at the same time ignoring the comparables that were produced by DTA in evidence before the Court. In all the circumstances and especially in light of the absence of the comparables which Mr Moore purported to rely upon as being superior to those relied on by Mr Thwaites, the Court is unable to accept on a balance of probabilities that the opinion of value as stated in the VB Williams 2011 Valuation Report is accurate.

The Westcar Valuation Report

[29] During cross examination of Mrs Fisher, a witness called on behalf of VMBS, she admitted that VMBS had obtained the Westcar Valuation Report. This report was dated 28th June, 2010, based on an inspection of the Property carried out on 26th

June 2010. In this report the current market value of the Property was estimated to be Twenty-five Million Five Hundred Thousand Dollars ($25,500,000.00) and the forced sale value was assessed at Twenty Million Four Hundred Thousand Dollars ($20,400.000.00). The Current Market Value was stated to be arrived at "*Based on the factors examined and guided by trend of building cost, the level of prices being realised for similar properties and current market condition*". Interestingly, the first floor of the Property was described as consisting of, *inter alia,* three bedrooms and 2 bathrooms.

Weaknesses of the Westcar Valuation Report

[30] The Author of the Westcar Valuation was not declared to be an expert by the Court. Unlike the expert witnesses Mr Moore and Mr Norton, and also Mr Thwaites (who was not declared an expert), the author of the Westcar Valuation Report was not called as a witness. He was not subjected to the rigours of cross examination as those other witnesses. Accordingly, the Court was deprived of the benefit of having had him respond to questions as to, *inter alia*, the methodology he employed in reaching his opinion of value. For this reason the Court has been very cautious in the weight it attaches to the Westcar Valuation Report.

[31] The Westcar Valuation Report did not provide any details as to the similar properties to which reference was made and the actual prices that were realised which influenced the conclusion as to value. Consequently, the Court was deprived of the opportunity to assess the appropriateness and/or the relevance of these alleged comparables. The opinions in this valuation were also expressly stated to have been reached without the valuer having had access to the interior of the Townhouse on the Property and was based on a previous valuation prepared by Westcar Development Limited. The Court did not have the benefit of the previous valuation report to which reference was made.

Conclusion in respect of the Westcar Valuation Report

[32] Having particular regard to Mr Moore's evidence as to the unlikelihood of the comparables referred to by Mr Thwaites appreciating to Twenty-five Million Dollars ($25,000,000.00) at the time of the sale of the Property, I also similarly find that doubt is cast on the opinion of value as expressed in the Westcar Valuation Report. For these reasons and the weaknesses referred to herein, the Court is unable to accept on a balance of probabilities that the value of the Property on 26th June, 2010 was Twenty-five Million Dollars ($25,000000.00) as stated in the Westcar Valuation Report

The Thwaites Valuation Report

The Evidence of Mr David Thwaites

[33] Mr David Thwaites gave evidence on behalf of the 2nd Defendant DTA, a company of which he is a director and employee. His evidence is that he is a valuation surveyor and has a university degree. He also had to do an apprenticeship with an appraisal company that carries out the business of land valuations and had to also meet the licensing requirements of the Real Estate Board. He explained that he is also a Chartered Valuation Surveyor which is the most recognized professional designation for property related professionals worldwide. This permits him to carry out valuations on all property types and shows the highest level of competence to do so. He has been doing valuations for VMBS for more than 15 years.

[34] He explained that market value is the most probable price for an asset as at the date of valuation. As it relates to the concept of "Fair Market Value" he said this is an accounting term which is generally considered the same as market value. In cross examination however he accepted that it is also a valuation term and that the accounting term is "fair value". Forced sale value on the other hand is usually

a discounted value of the market value. It is usually discounted because it is to advise in respect of the sale of the property within a restricted marketing period. He said by way of example if it would normally take 6 months to sell a property in the open market a discount would be applied for sale of the property at a forced sale.

[35] In cross examination he admitted that in Jamaica there is no requirement for a licensed valuation surveyor (usually referred to as a valuator) to join any association and that all that is required is licensing with the Real Estate Board. He admitted that Mr Craig Brown who accompanied him on the visit to the Property was never registered with the Real Estate Board although he referred to him in his witness statement as a Valuation Surveyor. He however rejected the suggestion that this reference was dishonest and also rejected the suggestion that it was improper to have allowed Mr Brown to participate in the inspection of the Property.

The Basis of Valuation

[36] He said that he was aware of the International Valuation Standards ("IVS") and that they have been adopted by the Royal Institution of Chartered Surveyors ("RICS"). He agreed that the IVS requirement is that the basis of the valuation must be appropriate for the purpose of the valuation. He agreed that the term "basis of valuation" according to IVS and the RICS red book, is a statement of the fundamental measurement assumptions of a valuation and agreed that his stated purpose in the valuation report is "*to appraise market value of the property for public auction proceedings*".

[37] He accepted that a basis of value being, a statement of the fundamental measurement assumptions of a valuation, has to be distinguished from the

approach or method used to provide an indication of value. He also accepted that the appropriate basis will depend on the purpose of the valuation.

[38] He agreed to the suggestion that there is no valuation standard or basis of valuation known as "*market value for the purpose of public auction proceedings*" and also agreed to the suggestion that the IVS valuation standards do not provide a definition of forced sale value in its standards. Furthermore he admitted that a RICS member is prohibited to use the term "forced sale value" as a basis of value in providing a valuation opinion and that forced sale value is not a distinct basis of value.

[39] The essence of Ms. Ball's case in relation to this aspect of the evidence is contained in the suggestion that was put to Mr Thwaites, which he denied, that when he provided the opinion on market value in the Thwaites Valuation Report he relied on forced sale considerations.

[40] He accepted that in accordance with IVS standards a forced sale describes circumstances which apply in public auction proceedings because a seller is under a compulsion to sell. He also accepted that in accordance with RICS the term forced sale value should only be the subject of the valuer's advice to the employer and should not be relied on to determine the value of the property.

[41] In the paragraph 1.1 of the Thwaites Valuation Report entitled: "Instructions:" it is stated that Mrs Patrica Fisher of VMBS gave instructions "*for this appraisal of the Market Value of the subject property for the purpose of Public Auction proceedings.*" A major plank of the Claimant's case is encapsulated in the suggestion to Mr Thwaites that the premise on which his opinion on market value was based was false and misleading because there is no valuation standard or basis of valuation standard known as "market value for public auction proceedings".

[42] He refuted the suggestion that his use of the term “basis of valuation” in his report is a reference to the method or approach he used to provide the indication of value. He explained that his use of the term basis of valuation in the report is a statement of the “*fundamental measurement assumptions in the valuation*”.

[43] Another key suggestion by Mrs. Tayor-Wright (which was not accepted by him) was that his opinion of market value was erroneous and lacking in integrity because of an inherent contradiction in the report between the stated purpose of the valuation and the basis of the valuation.

[44] He explained that although the 22nd February, 2011 letter of instruction from VMBS did not give instructions for purposes of a public auction, it gave instructions to include forced sale, and he therefore made the assumption that it was required for public auction proceedings. He accepted that the existence of forced sale circumstances did not influence the manner in which he carried out his inspection or the exercise and his determination of market value.

Conclusion on the basis of valuation issue

[45] Although a considerable portion of the cross examination of Mrs Taylor Wright was concerned with this issue I do not find that there is any merit in the attack against the Thwaites Valuation Report on this point. I accept the evidence of Mr Thwaites when he agreed to the suggestion that there is no valuation standard or basis of valuation known as market value for the purpose of public auction proceedings. Having found that he was aware of this fact, I also accept his evidence that in the Thwaites Valuation Report his “basis of value” (which is stated in paragraph 1.5 of the report) did not evidence his use of a valuation standard or basis of valuation standard known as “market value for public auction proceedings”.

The External Valuation

[46] Mr Thwaites accepted that under RICS a valuation without internal inspection (which is also called a “pavement valuation” or “drive by valuation”) is a valuation provided on a restricted basis and that a valuation so restricted is not suitable to be used to achieve the highest and best price at the date of the valuation. He accepted that guidance as to how to treat a restrictive valuation is provided by RICS and that under RICS, in the United Kingdom this type of valuation is reserved for limited scope and use and is not appropriate for market value. He accepted that in the UK the recommendation is that this method of valuation be used for a lender’s internal purposes, only for lending purposes.

[47] He accepted that the local associations have no guidelines for use in Jamaica as it relates to external inspections and valuations. He agreed that The Uniform Standards of Professional Practice (USPP) has developed standards for the United States and mandates that if relevant information is not available because of assignment conditions that limit research opportunities, such as conditions that place limitations on inspections or information gathering, an appraiser must withdraw from the assignment unless he can expand the scope of work to gather the information.

[48] He agreed that the IVS stipulates that where a valuer provides an appraisal using restricted information the price is likely to be adversely affected. He accepted that he had a duty to inform the VMBS that the market value is best obtained by adequate inspection.

[49] He accepted that ideally, adequate inspection and investigation would have required an internal and external inspection but rejected the suggestion that he colluded with VMBS to tailor the Thwaites Valuation Report to suit a forced sale

and similarly disagreed that he did not provide his opinion of market value based on accepted valuation standards.

[50] He denied that under the acceptable valuation standards he had a duty to state clearly in his report what the impact of the restricted information was likely to be on the accuracy of the valuation.

Was the exterior of the Property inspected

[51] Mr Thwaites admitted that although in his report the Property is stated to have a roof mounted solar panel he was not sure so it may well be that that was not the case. It was suggested to him that if he had inspected the correct property he would have noticed that there was no solar panel but he remained adamant that he did inspect the correct property that day. He however admitted that Ms. Ball's property did not have three bedrooms on the first floor as he described in his report. He accepted that it is in fact a 2 bedroom property with a loft and that he was not doing a comparison of Ms. Ball's property as it really was, with the other comparables.

[52] Mr Thwaites was also challenged on his evidence as to having left a business card under the door of the Property because the door is not accessible unless one enters the residence. He was shown a photograph of the Property showing a grilled area at the entrance of the property but he nevertheless maintained his assertion that he did leave a business card under the door. This continued denial however does not accord with the photographic evidence which suggests that he could not have so placed a business card under the door.

[53] This evidence as to the discrepancy with the solar panel and the unlikelihood that he could have physically placed a business card under the door of the Property casts doubt as to whether Mr Thwaites did in fact visit the Property or performed an external inspection of the Property as he asserted.

Weaknesses in the Thwaites Valuation

[54] Mr Thwaites said that although he did not do an internal inspection they took measurements and relied on those measurements for his conclusion that the gross floor area was 128.6 square metres. He did not accept that at the time of the Thwaites Valuation Report the gross floor area was 209.45 square metres.

[55] Having not done a measurement of the internal space of the Property it is patently clear that any assertion made by Mr Thwaites in respect of the gross square footage is of little weight.

[56] Mr Thwaites admitted that the source of his information as to the internal features of the Property was a one page description provided to him by VMBS. This one page document admittedly did not have a reference date from when the description was to be assumed. Furthermore, Mr Thwaites admitted that the description on which he relied was itself not based on an actual inspection of the Property, but was instead based on a previous valuation report prepared by Westcar Development Ltd. No doubt as a natural extension of these admissions, Mr Thwaites conceded that his valuation opinion was therefore very restricted as a result of his limited investigation. He however denied that it was improper for him to have agreed to provide his opinion of the market value using such a limited description.

The Comparitive Sales Grid

[57] The suggestion was put that he did not provide a comparative grid with his report to VMBS because he did not do an investigation of comparable sales to which he disagreed and he also disagreed with the suggestion that he provided the grid after he learnt that Ms. Ball was questioning his valuation.

[58] He explained that the source of the information for the Grid was the list of registered sales provided by the National Land Agency ("NLA"). He said he carried out external inspections of comparables 1, 3 and 4 but did not check the NLA to ascertain the Certificates of Title for comparables 1 to 4.

[59] Mrs Taylor-Wright sought to have the Certificates of Title in respect of the comparables admitted into evidence but the Court upheld the objections of the Defendants on the basis that it would be unfair having regard to the fact that the documents were not previously disclosed.

[60] Mrs Taylor-Wright applied for the production of the NLA list of sales from which Mr Thwaites got the information on which he said he relied in making the comparable grid. The Court rejected the submissions on behalf of the 1st and 2nd Defendants that it was not relevant and there was no duty to disclose it. The Court found that the NLA list was relevant because Mr Thwaites was relying on the information contained in the list to support the accuracy of his valuation based on the comparables contained therein. Mr Thwaites had knowledge of the existence of the list, the existence of which only came to light during his cross examination and could not reasonably have been anticipated by Ms. Ball. Mr Thwaites had a continuing duty to disclose this relevant list and in the absence of any evidence that Mr Thwaites or any of the other Defendants would be prejudiced by its late production, the Court ordered that it be produced despite the lateness of the application.

[61] The list was duly produced and admitted into evidence. In re-examination Mr Thwaites explained that he prepared the list from information found on the NLA Registered Sales Subscription Database which he downloaded and printed. This was done because the source of the information allows a subscriber to export one's findings to a word document or spreadsheet. He explained that the actual list provided to Counsel and the Court was only actually physically produced by

him the day before. This confirmed that the extract and compilation from the NLA's website and the final form in which it was produced by Mr Thwaites was not in existence in that final form on the days before when Mr Thwaites spoke of a list.

[62] Counsel for Ms. Ball has submitted that the list produced by Mr Thwaites casts further doubt on his credibility because he admitted that comparable 1 on his grid did not appear on the list he produced at trial. Counsel also suggested that Comparable 3 was also not on the list and Counsel's skilful cross examination established that Mr Thwaites' explanation that comparable 3 is in fact on the list with the address of 107 Hope Road did not make sense. Counsel went further to suggest that comparable 4, 25 Wellington Place "Wellington Glades" is not in Liguanea, but in answer to the Court Mr Thwaites indicated that this comparable is located about 400 metres from the United States Embassy and the Court has taken judicial notice of the fact that the United States Embassy is widely accepted as being located in Liguanea, a fact which became the subject of national discussion a few years ago.

[63] Notwithstanding the fact that Counsel and the Court were misled as to the previous existence of the list, the source material was not shown to be altered and the mis-description did not affect the evidential weight of the two comparables which were relied on for purposes of the Thwaites Valuation Report. These were comparable 3, 1 Liguanea Villa, Liguanea Avenue which was sold in January 2010 for Ten Million Seven Hundred Thousand Dollars ($10,700,000.00) and the aforementioned Comparable 4, 25 Wellington Place Liguanea which was sold in February 2010 for Thirteen Million Four Hundred Thousand Dollars ($13,400,000.00). This is in stark contrast to the valuation reports which Counsel for Ms. Ball has submitted that this Court prefers, none of which have exhibited any comparables which support their ultimate conclusions, or any comparables at all. Ms. Ball is in effect asking the Court to accept their

valuations, simply because they say so, when they have not provided a nexus between their values and any comparable.

[64] Mr Thwaites said they did carry out an income replacement analysis although it is not mentioned in the Thwaites Valuation Report. Mr Thwaites letter to VMBS dated 16th March, 2011 in fact contains an opinion that the cost approach would provide a value estimate of Fifteen Million Three Hundred Thousand Dollars ($15,000,000.00) and the income approach Twelve Million Two Hundred Thousand Dollars ($12,200,000.00) which tends to support his assertion.

[65] Mr Thwaites said that if before he did his valuation he had seen the VB Williams 2007 Valuation Report which placed a value of Sixteen Million Five Hundred Thousand Dollars ($16,500,000.00) on the Property or the VB Williams 2011 Valuation Report which placed a value of Twenty-five Million Five Hundred Thousand Dollars ($25,500,000.00), he would not have revised his own valuation opinion. His answer was not impacted by the fact that the VB Williams 2011 Valuation Report was provided based on a full inspection having been done of the Property. In re-examination he explained that he would not have done so because the values stated in these reports did not appear to be formed on the basis of a sale comparison method, which is the most reliable and accurate method of assessing the value of a residential property. I do not agree with Mr Thwaites in his assessment because although the VB Williams 2007 Valuation Report and the VB Williams 2011 Valuation Report do not provide the comparables they used, both reports speak to the opinion of value being based on the price of comparable units.

[66] He agreed that a reasonable margin of error in valuations of property on the same date is ten to fifteen percent (10-15%).

The Norton Valuation

[67] Mr Ainsworth Norton was called as a witness on behalf of the 2nd Defendant. Mrs Taylor Wright objected to him giving evidence as an expert. He is the manager of the Inspectorate of the Commission of Strata Corporations and prior to this was the Senior Valuation Surveyor employed to the National Land Agency for ten years, which in the Court's opinion is sufficient evidence of his having the necessary expertise for purposes of the issues which were live on the claim. On the 16th of January 2016 he performed an inspection of the Property. He produced the Norton Valuation. He determined the Gross Building Area of the Townhouse to be 194.18 sq metres or 2,090.24 sq ft (excluding the uncovered area occupying the water tank and access balcony) and concluded that the Property would have had a market value as of 24th March 2011 in the region of Seventeen Million Dollars ($17,000,000.00) and a forced sale value in the region of Fourteen Million Dollars ($14,000,000.00). His evidence is that he relied on the comparative approach in which a value of property is determined based on properties of a similar character or nature being sold on the open market within a particular time frame. He said the comparable method is recognized by professional valuation surveyors as the best method in determining the market value of residential property. Unfortunately the Court was deprived of the benefit of examining the comparables which were allegedly used as the basis of Mr Norton's conclusion.

[68] His evidence is that the Income method compares the net rental income and the all risks yields of similar properties in order to capitalise future income (net rents) at a present value. He explained that because of the unavailability of adequate data for the net rental income for properties in March 2011 the income method was not utilized in determining the market value for the Property as of 24th March, 2011.

Weakness in the Norton Valuation

[69] In cross examination Mr Norton said that he was unsure as to whether his valuation is termed a historical valuation by RICS but agreed that it was done on a historical basis. He said that it was a 2016 valuation made based on special assumptions as to what the conditions were in March 2011 and would be a valuation based on restricted information. He would have also had to make special assumptions about the comparable data. He therefore agreed that an actual property inspection of the Property as at March 2011 would be more reliable than an actual inspection of the Property five years later for purposes of determining market value.

The evidence of Mr Norton

[70] I was impressed with Mr Norton as a witness. His credentials are impressive. He struck the Court as a forthright witness who endeavoured to present wholly impartial and accurate evidence to the Court. There was some cross examination by Mrs Taylor-Wright in relation to the details of his employment and when he did his last valuation but this had absolutely no negative impact on the Court's opinion as to his veracity. Mr Norton came across as a model expert witness, who, although called on behalf of a party fully appreciated that his duty ultimately was to the Court. He was never evasive in his answers. He sought to explain clearly his understanding of the matters in respect of which he was questioned and I found his evidence to be of great assistance.

[71] He admitted that there was a significant difference between his opinion of value on the one hand and that of both the Westcar Valuation Report and the VB Williams 2011 Valuation Report (which were nine months apart). He agreed that his historical valuation falls outside his acceptable range or margin of error which he said was ten percent (10%) between the values of independent valuations of

two independent valuation surveyors. It is noteworthy that this ten percent (10%) variation or bracket is the same that the Court in ***Singer v Friedlander*** found to be acceptable in the ordinary course. He also said that an acceptable margin of variance between an external valuation without viewing the internal sections and a full inspection is not more than five percent (5%). Using his value of Fourteen Million Four Hundred and Fifty Thousand Dollars ($14,450,000.00) the figure within the five percent (5%) limit of that would be Thirteen Million Seven Hundred and Twelve Thousand Five Hundred Dollars ($13,712,500.00)

[72] He agreed to the suggestion that for well maintained properties in Jamaica, provided they retain their character and provided the location retains its character and there is continued prime demand/market appeal, these properties would tend to increase in value. He agreed that when he inspected the Property in 2016 he found it to be in a good state of repair and decorative condition. He accepted that there was continuous prime demand for properties in the area of the Property before 2000 and that the area maintained its character as a middle and upper middle income neighbourhood.

[73] He indicated to the Court that as a member of RICS he had been at pains to advise financial institutions and others that there is no such thing as “forced sale value” but the institutional clients insist that the terminology should be used and a figure given that would inform them of the limit or provide a baseline of what would be obtained at auctions. He further explained that there is no direct mathematical computation in any standard or guide that RICS produces or that an academic institution would produce but that the industry has adopted a twenty percent (20%) difference between the market value and the forced sale value. He noted however that one would also have to take into account market indications so that if for example the demand is really high for the property the percentage would decrease to less than twenty percent (20%) and conversely if there is a negative market condition it might be more than twenty percent (20%).

[74] Although he did not critique any valuation reports the Court allowed his evidence to the extent that it might have been of assistance in assessing Mr Moore's critique of Mr Thwaites's report. Mr Norton explained that a critical analysis of a Valuation Surveyor's report is not recommended by RICS if the person doing the critique is not privy to the information that the Valuator being critiqued would have used. He further explained that it was not simply a matter of examining the base/source information of the comparable but one would also have to conduct an interview with the Valuation Surveyor in order to ascertain the additional details relative to his treatment of the comparables as well as any special assumptions which he may have discussed with the client. Therefore, in the absence of the comparable data and an interview, a proper critique could not be conducted.

Conclusion in respect of the Norton Valuation Report

[75] I fully appreciate the weakness which I have previously identified in the Norton Valuation Report which is related to the fact that it was a historical valuation or a valuation done on a historical basis. I note with grave concern that Mr Norton has not provided a table of comparables. I have accepted his expertise and his opinion that a historical valuation is possible if the correct assumptions and methodology are employed. However the Court has not been given sufficiently clear evidence of the methodology he employed in arriving at his final opinion of value so that the Court can safely conclude that it is correct having regard to its historical nature. I do not doubt that a competent valuator such as Mr Norton, armed with knowledge of the Jamaican real estate market, having measured and examined the Property in January of 2016, ought to be able to determine with a reasonable degree of accuracy what was its fair market value on or about 24th March, 2011. However Mr Norton has not demonstrated how he managed to do so and do so accurately. Accordingly, the Court would have to blindly assume that he has done so without an opportunity to test and weigh his evidence. For

these reasons I am unable on a balance of probabilities to accept the evidence of Mr Norton that the Property would have had a market value as of the 24th March 2011 in the region of Seventeen Million Dollars ($17,000,000.00) and a forced sale value in the region of Fourteen Million Dollars ($14,000,000.00)

Was the Thwaites Valuation Report Inaccurate?

(a)The finding of a breach of covenant

[76] Mr Thwaites agreed that as at 16th March, 2011 (evidenced by his letter of that date to the Processing Department of VMBS which was about 2 weeks after the date of the Thwaites Valuation Report), a higher value of as much as Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00) could have been found and that up to that time he still had not seen the inside of the Property. He also admitted that this was still his position. In that letter he drew VMBS' attention to the fact that he did not see the interior of the Property and that "*The Property has an obvious breach of the set-back covenant which would frustrate the sale process and have a negative effect on the value achieved"*

[77] It is therefore patently clear that Mr Thwaites' conclusion as to the existence of a breach of covenant factored negatively into his opinion of value. However during cross examination he admitted that, to the extent that he said in the Thwaites Valuation Report that he suspected a breach of a restrictive covenant and that the confirmation of a breach should come from a qualified land surveyor which he is not. He accepted that nevertheless by 16th March 2011 when he wrote to VMBS he moved from a suspicion of a breach to saying the property had an obvious breach of the set-back covenant.

(b)The inaccuracy relating to the size of the Townhouse

[78] The Thwaites Valuation Report assessed the value of the Property on the basis that it was a three bedroom townhouse with a building size of 107.56 square metres (1,384.25 square feet) when in fact it could more accurately be described as a 2 bedroom townhouse with a third bedroom loft (or attic as described by Mr Norton) comprising between 194.18 to 209.45 sq metres (2,090.24 to 2,260 sq ft.).

[79] It was not posited by any of the witnesses and there is no basis for the Court to conclude that there is any particular attractiveness/utility of a loft or attic bedroom which makes it more desirable in the real estate market for the Liguanea area of St Andrew or any other area of Jamaica for that matter. By extension there is no evidence that this specific type of configuration would account for an increase in the value of a property containing such a feature as opposed to another property similar in all material particulars but having three bedrooms on the first floor. A Townhouse having three bedrooms on the first floor is the description utilised by the Thwaites Valuation Report and the Westcar Valuation Report. I am therefore led to find that this inaccuracy of description did not negatively impact the Thwaites opinion of value of the Property.

[80] Stated in other terms, the Court finds that, all other things being equal, there is no evidence of any difference in value between a three bedroom townhouse and a two bedroom townhouse with a third attic bedroom or loft bedroom.

[81] Although it was fully appreciated that Mr Thwaites was giving evidence as the witness who prepared the Thwaites Valuation Report and not as an expert in these proceedings, the Court allowed Mr Thwaites in cross examination by Mr Leiba to comment as to what in his view accounted for the difference in the values between that Report and the VB Williams 2011 Valuation Report. These

comments were permitted in full recognition that it would ultimately be a question for the Court as to what weight was to be attached to such comments. Mr Thwaites said that in his opinion the difference could be attributable to the higher measured floor area which the VB Williams Valuation Report records as 2260 square feet or 209 square Metres as a result of the measured loft. He admitted that the existence of the loft was not something that could have been ascertained from the external inspection in this instance.

[82] In response to Mr Leiba during cross examination, Mr Norton agreed that if the "attic" is a bedroom with a walk-in-closet and an incomplete bathroom, the absence of such a feature would reduce the useable square footage of the Property. This is of course axiomatic.

[83] He explained that the effect of square footage on market value is heightened in the case where the replacement cost valuation is the primary or only value used but is of less significance where comparable data is being used because persons in the marketplace are more likely to look to the accommodation rather than to square footage of the building. It seems to me to be a matter of commonsense and common human experience which does not need any particular expertise, that most persons will prefer more space in a dwelling rather than less, (within certain limits of course).

[84] If one places to the side and ignores for the moment the issue of comparables, it seems to me to be patently clear, that if the value of the Property as a three bedroom town house (or two bedroom townhouse with a third loft bedroom or attic bedroom) is Thirteen Million Dollars ($13,000,000.00) if comprised of 128.60 square metres (1,384.25 sq feet), then all other things being equal, a reasonable willing buyer of the Property would be prepared to pay more for the larger space if it is comprised of between 194.18 to 209.45 sq metres (2,090.24 to 2,260 sq ft.). Accordingly, it is in the Court's opinion a reasonable inference that the

Property would be valued more if it is comprised of between 194.18 to 209.45 sq metres (2,090.24 to 2,260 sq ft.) instead of 128.60 square metres (1,384.25 square feet). The difference in these sizes is in fact, very significant.

[85] On the basis of this admission contained in Mr Thwaites' 16th March, 2011 letter, there is ample foundation for a finding that if one adjusts the Thwaites Valuation Report to omit its accounting for the alleged breach of covenant, the value of the Property, and based on the Court's conclusion that an inspection of the interior of the Property, would have resulted in a higher value being accorded on account of the increased square footage. The Court is of the opinion that based on the evidence before it the proper market price of the Property was Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00)

The use of the external Valuation

[86] Mr Thwaites' evidence was that he is aware of protocols for external valuations but that he did not receive any training in respect of these protocols. He explained that if DTA receives any instructions to carry out a valuation and they find that they are unable to gain access thereto or are denied access, then this is reported to the client and permission sought to conduct an external valuation. This, he said, was done in this case.

[87] Mr. Moore's evidence was that he had heard of the concept of an external valuation but was not aware that there is a protocol governing how an external valuation is done since he had never done one and it was not a part of his training. He also admitted that as a consequence he could not speak to the relevance or importance of external valuation. Mr Moore further stated that if he cannot access a property internally and externally, he would not conduct a valuation of it because inspection is very vital.

[88] Mr Norton during cross examination agreed that a valuation without internal inspection is considered by the RICS standard to be a valuation based on restricted information but did not agree that because of this the RICS standard suggested that it is provided solely for the use of the lender the reason being he was unaware of the context in which RICS said that. He explained that he is not familiar with the 2012 RICS standards but the 2010 standards does not recommend a drive-by valuation as suitable but that it is up to a particular valuer/surveyor and his comfort level as to whether he wishes to undertake a valuation based on the restrictions that are present. He agreed that under the 2010 standards the valuation surveyor should consider whether the restriction is reasonable given the purpose of the valuation and may also consider accepting the instructions subject to certain conditions for example that the valuation is not to be published or disclosed to a third party. The valuer should make it clear in the report, the nature of the restriction and any resulting assumptions and the impact on the accuracy of the valuation. He also agreed that the instructions should be declined if the valuer considers that it is not possible to provide a valuation on the basis of restricted information.

[89] I accept the evidence of Mr Norton that that there is nothing in the accepted professional standards in particular RICS which prohibit the use of an external valuation. However the Court finds that because of the inherent weaknesses of this type of valuation, great care is needed and the desirability of an inspection where this can be done is obvious.

Why was the interior of the Property not inspected?

[90] Mr Thwaites admitted that he did say to someone, possibly Mr Dwayne Cooper, that he was denied access to the Property but he did not think they were ever denied access. He said the instructions he received from VMBS included the address of the Property, the title reference and a name but nothing else such as

a telephone contact number. He gave no evidence of any steps taken to obtain a telephone or other contact information for Ms Ball.

[91] This evidence in relation to the steps which Mr Thwaites took to obtain access to the Property is very important because it points to the inescapable conclusion that Mr Thwaites did not take such steps as would be reasonably expected in the circumstances and there is absolutely no evidence to support an assertion that Ms. Ball in any way hindered the full inspection of her premises in order for a complete valuation to be done.

Conclusion in respect of the Claim against DTA

[92] Having regard to the Court's finding on the value of the Property as provided by The VB Williams 2007 Valuation Report, The VB Williams 2011 Report, The Westcar Valuation Report and Mr Norton's evidence as to his opinion of value, the Court is unable to make a finding of a sum which quantifies the impact of the erroneous assumption as to the Gross Floor Area of the Townhouse made in the Thwaites Valuation Report. In all the circumstances it does appear that the failure to take adequate steps in order to determine the correct square footage of the Property is a deficiency in the Thwaites Valuation Report. However, as the cases which have been discussed previously in this judgment demonstrate, this without more, is not sufficient for the Court to make a finding of negligence against DTA. The Court would also have to determine that the report was wrong in the sense of being outside an acceptable margin of error. However based on the Court's findings in respect of the other valuations, the Court has not been able to find that the Thwaites Valuation Report was wrong in the sense of falling outside an acceptable range of values because the Court has not been assisted by those other reports in ascertaining a range of values. The Court has in these circumstances been constrained to find a "correct or true value" of the Property, rather than simply a "bracket".

[93] On the strength of the admission contained in the letter of David Thwaites to VMBS dated 16th March, 2011 the Court finds on a balance of probabilities that the value of the Property ought properly to have been at least Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00) and not Thirteen Million Dollars ($13,000,000.00) as stated in the Thwaites Valuation Report. However this is a figure which was given to VMBS and in the circumstances there is no evidence to support a finding of negligence or fraud against DTA. Accordingly there is no issue to be determined as to whether VMBS is liable to Ms. Ball for any negligence of DTA its advisers.

Ms. Ball's case against the VMBS for breach of duty - sale of the Property at a gross undervalue

The Applicable Law

[94] In ***Cuckmere Brick Co. Ltd v Mutual Finance Ltd*** **[1971] Ch** 949 a decision of the English Court of Appeal on which Counsel for Ms. Ball relies, Salmon L.J., at page 966 B made the following observation:

> *It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: (compare, for example, Kennedy v deTrafford (1896) 1 Chancery 762, 1897 Appeal Cases 150, with Tomlin v Luce (1890) 43 Chancery 191, at page 194). The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.*

Salmon LJ went on to conclude at page 968 H as follows:

> *I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he*

> *has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.*

[95] In the same judgment, two other members of the Court of Appeal, Cross L.J. and Cairns L.J. agreed that the mortgagee owed a duty to take reasonable care to obtain a proper price for the mortgaged property. Cross L.J., having examined a number of authorities on the point, expressed his view as follows:

> *There is no doubt that a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property between the date of his taking possession of it and the date of the sale, including, as in the McHugh case, steps taken to bring the property to the place of sale. It seems quite illogical that a mortgagee's duty should suddenly change when one comes to the sale itself and that at that stage if only he acts in good faith he is under no liability, however negligent he or his agent may be.*

[96] I whole-heartedly and unhesitatingly adopt the conclusion of the Court in **Cuckmere** that a mortgagee owes a two-fold duty to the mortgagor; (i) to exercise its power of sale under a mortgage in good faith and (ii) to take reasonable care to obtain the "fair value" or "proper price" of the property sold." I find that this is logical, sensible and "represents the true view of the law". Accordingly, the submissions of Counsel for the VMBS, whether purporting to rely on the case of ***Rudolph Daley v RBTT Bank (Ja) Ltd. et al*** **(unreported) Supreme Court, Jamaica, Claim No. C.L. 1995 D 162, judgment delivered 30th January 2007**, or otherwise, do not find any favour with me, to the extent that it is being suggested that the VMBS'duty is otherwise in this case.

[97] Ms. Ball contends that the sale price was grossly undervalued and that the sale price is by itself evidence of fraud. Ms. Ball's evidence is that at the time she bought the Property it was valued at Sixteen Million Five Hundred Thousand Dollars ($16,500,000.00) according to the VB Williams 2007 Valuation Report. Based on her knowledge information and belief property values in the Liguanea

area in which the Property is located did not depreciate and the Property was well maintained and appreciated in value. It is worth noting that the VB Williams 2007 Valuation Report attributes a forced sale value of Thirteen Million Two Hundred ($13,200,000.00) should the property be put up for forced sale within a 60-day period.

[98] Ms. Ball in her assertion as to what was the correct market value of the Property at the time of the sale relies heavily on the VB Williams 2011 Valuation Report in which the Property is estimated to have a fair market value as at the date of the report of Twenty Four Million Five Hundred Thousand Dollars ($24,500,00.00) to Twenty Five Million Dollars ($25,000,00.00), and a forced sale value (within a 60-day period) of Twenty Million Dollars ($20,000,000.00).

VMBS' Defence

[99] VMBS in its defence relies on the Thwaites Valuation Report. VMBS says that DTA was on its panel of valuators and was engaged as an independent contractor for the purpose of preparing a valuation report and that the Property was sold at a price consistent with the Thwaites Valuation Report and the comparable adjustment grid showing the price at which similar units in the area of the Property were sold.

[100] The Thwaites Valuation Report provides an opinion of the market value of the Property to be Thirteen Million Dollars ($13,000,000.00) and a forced sale price of Ten Million Five Hundred Thousand Dollars ($10,500,000.00). It is therefore noteworthy from Ms Ball's standpoint that the opinion of market value in the Thwaites Valuation Report is less than the fair market value of Sixteen Million Five Hundred Thousand Dollars ($16,500,000.00) as expressed in the 2007 VB Williams Valuation Report which was conducted just short of 4 years earlier on 24th March, 2007.

[101] In approaching the issue as to whether VMBS took reasonable steps to obtain the market price for the Property and in doing so discharged its duty as Mortgagee. I will proceed based on my previously determined finding as to the market price of the Property being Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00) and then decide whether it discharged of its duty in achieving the sale price of Twelve Million Seven Hundred and Fifty Thousand Dollars ($12,750,000.00). The alternative would be to simply decide whether reasonable steps were taken to obtain the market price in the abstract, having regard to the fact that the sale was by auction which is, in and of itself, an acceptable method of determining market value.

The Sale by Auction

[102] Ms. Ball relied on the case of ***Moses Dreckett v Rapid Vulcanising Co. Ltd*** (1988) 25 JLR 130 for the principle that "*a sale by auction does not necessarily prove the validity of the transaction*". Carbery J.A. in the Court in the case of **Moses Dreckett** at page 140A commented as follows:

> *"An interesting point that was canvassed before us by counsel for the mortgagee was whether it could be said that there had been a failure to get the proper or market price where the sale had been conducted by an auction to which the public had access. The answer is that a "sale by auction does not necessarily prove the validity of a transaction." Per Lord Templeman in* ***Tse-Kwong Lan****...In these cases the fact that the property had been sold by public auction did not mean that the mortgages had fulfilled all their obligations: it was still possible to find that one or other duty had been broken for example that the sale had been collusive, or had not been properly advertised"*

[103] VMBS relies on the case of **Moses Dreckett** and in particular the statement of the Campbell JA in the Court of Appeal at page 143(I) commenting in part on ***Tse Kwong Lam v Wong Chit Sen (*****1983) 1 W.L.R. 1349** as follows:

> *It is clear that though Lord Templeman stated that an auction does not necessarily prove the validity of a transaction, he is not to be understood as saying that an auction at which there are independent competitive bids*

by persons who have no foreknowledge of information improperly given by the mortgage which could reduce the level of the bids, will not be accepted as valid and will not provide cogent evidence that the mortgagee has taken reasonable steps to obtain the true market value of the property by and through the medium of the auction sale itself. In this regard the view of Salmon LJ in ***Cuckmere Brick Co****. At p, 643 is most apposite. He said:*

> *"Nor in my view is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding is exceptionally low. Providing none of these adverse factors is due to any fault of the mortgagee, he can do as he likes".*

Thus Salmon L.J. was saying that consistent with the principle which he later enunciated at p. 646 which has been stated earlier in this judgment, an auction which has not been manipulated by the mortgage is evidence of reasonable precaution taken by the mortgagee to obtain the true market value of the mortgaged property on the date on which he decides to sell. The view expressed by Salmon L.J. (supra) negatives any obligation of the mortgagee to fix or have fixed any reserve price (in circumstances where he does not bid at the auction) because he has the right to accept the highest bid even if it was below what was the ascertained true market value. Equally the mortgagee is not obligated to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price when the sale is by auction. He can properly rely on the independent competitive biddings at the auction to obtain the true market value, and even if this is not obtained through poor attendance at the auction and exceptionally low bids, he is not on that account per se liable to his mortgage for breach of an duty to take reasonable precaution to obtain the true market value. To the contrary, the mortgagee could say that he had taken the reasonable precautionary steps to protect the mortgagor by having an auction which has been conducted without any impropriety.

In the present appeal no impropriety as to the conduct of the auction is alleged or proved. The basis on which the mortgagee is being held to have failed in its duty are that it failed to ascertain the then current market value by valuation prior to the auction, and failed to fix a reserve price. These failures I have already said, do not individually or collectively constitute breaches of duty particularly in an auction sale in which the mortgagee has not participated and where no impropriety, in relation to the auction itself has been alleged or appears on the evidence. The situation fits neatly into the case postulated by Salmon L.J. of poor attendance and exceptionally low bids.

[104] Campbell JA at page 142 I clearly recognized as follows:

> *Dealing with sales by mortgagees at auctions, it is undoubtedly true, and a matter of commonsense that the highest bid at an auction will not without more, per se necessarily provide satisfactory evidence that the principle in* ***Cuckmere Brick Co., Ltd*** *(supra) is not breached...*

[105] Counsel for VMBS sought to highlight the difference in the requirements to be met by a mortgagee in fulfilling its duty on a sale by contrasting the case of a sale by private treaty and one by public auction and relied on the following statement of Sykes J in **Rudolph Daley** (supra) at paragraph 54 as follows:

> *To illustrate the point just made I shall contrast two methods of disposition of mortgaged property by the mortgagee. Where, for example, the disposition is by auction, and there is an allegation that the mortgagee acted less than prudently in the sale, the courts looked to see whether (a) the property was accurately described; (b) the auction was properly advertised – proper advertising may include advertising to developers if the property had any planning permission; and (c) the auction was properly and fairly conducted. If these requirements are met, then obviously the mortgagee has acted fairly, and in good faith because he has done all that was necessary to get the best price in the circumstances. If there is a sale by private treaty, then a critical component of a proper exercise of the power is whether a current valuation was obtained and the efforts taken to get the valuation figure or as close to that as possible. Each case will turn on its own facts. In both instances (sale by auction and sale by private treaty) the mortgagee must act in good faith. It is difficult to see how it can be said that a mortgagee acted in good faith if he did not take reasonable steps to obtain the best price possible at the time, that is to say, lack of evidence that the mortgagee took reasonable steps to secure the best price may result in a finding of lack of good faith."*

The Advertisement

[106] In ***Tse Kwong Lam Tse Kwong Lam v Wong Chit Sen*** **(1983) 1 W.L.R. 1349**, Lord Templeman delivering the judgment of the Privy Council at page 1356 said as follows:

> *"On behalf of the Mortgagees it was submitted that all reasonable steps were taken when the Mortgagee, with adequate advertisement, sold the property at a properly conducted auction to the highest bidder. The submission assumes that such an auction must produce the best price reasonably obtainable or, as Salmon L.J. expressed the test, the true*

> *market value. But the price obtained at any particular auction may be less than the price obtainable by private treaty and may depend on the steps taken to encourage bidders to attend. An auction which only produces one bid is not necessarily an indication that the true market value has been achieved."*

[107] The Court has to consider whether in the case before the Court, the advertisement of the auction was defective and if so, whether this was a defect in the sale process which affects the reliance the Court may place on the market price achieved at the auction conducted by DC Tavares Finson. **Bateman's Law of Auctions** 11 edition, at page 32 the following statement is made:

> *"It is usual, where property is to be put up at auction, to publish in newspapers or by means of circulars, advertisements announcing the time, place and subject of sale, and mentioning to whom to apply for further information."*

[108] In ***Michael v Miller*** (supra) the court made the following statement of the law which I find is apposite to the case under consideration:

> *131. It is well settled that in exercising his power of sale over mortgaged property a mortgagee is under a general duty to take reasonable care to obtain the best price reasonably obtainable at the time (see Fisher and Lightwood's Law of Mortgage 11th edn. para 20.23). In this context, 'the best price reasonably obtainable' is synonymous with 'a proper price' (the expression used by Lord Templeman in **Downsview Nominees** at p.315 and by Robert Walker LJ in the **Yorkshire Bank** case at p.1728F) and with 'the true market value of the mortgaged property' (the expression used by Salmon LJ in **Cuckmere Brick** at p.966).*
>
> *132. 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 him 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 (as the judge recognised at p.68F of his judgment) there is no absolute duty to advertise widely. As he correctly put it (at p.69A):*
>
> > *"What is proper advertisement will depend on the circumstances of the case."*

> *133. Similarly, in some cases the appropriate mode of sale may be sale by public auction (in the instant case, no one has suggested that); in others, for example where there is a falling market, it may not. Moreover, a mortgagee who receives an offer in advance of an auction may have to make a judgment as to whether to accept it or whether to proceed to the auction.*
>
> *134. The need for the mortgagee to exercise informed judgment in exercising his power of sale in turn means that a prudent mortgagee will take advice, including (where appropriate) valuation advice, from a duly qualified agent.*

[109] The evidence of Mr Tavares-Finson was that an advertisement of the Property and the auction was done a minimum of four times. The relevant Daily Gleaner tear sheets were also exhibited evidencing advertisements on 13th February, 2011, 6th March, 2011, 21st March, 2011 and 22nd March, 2011. I find that the period of notice using the medium of a newspaper of national circulation was sufficient to bring the auction to the attention of interested purchasers.

[110] The advertisements of the auction in the Gleaner newspaper provided a description of the Property as a three bedroom 2 bathroom property and provided its address. In my view, although it would have been desirable to have included additional details of the Property, this was an adequate description having regard to the statement that further particulars are available from the auctioneer. The issue raised during the trial as to whether it was a 2 bedroom with a loft or attic would not be sufficiently material. I do not find that this description would have negatively affected the quantity or quality of the potential bidders. The Court therefore finds that the advertisements of the auction were sufficient both in number and in content to advise the general public of the auction of the Property.

[111] It is noted however that these advertisements in the Gleaner newspaper stated "*20% Deposit payable immediately on all successful bids by certified cheque*". This was at the bottom of the advertisement which contained the description of other properties and the inescapable conclusion which would have been reached

by a reader is that this condition also applied to the Property. It has not been advanced by Ms. Ball in her statement of case that this term (or any of the other terms or conditions for that matter) was without more, onerous and so there is no issue in that regard for the purposes of this claim. However, that stated condition was not in fact a condition of the auction of the Property. Condition 4(a) required payment "...*within twenty four (24) hours after the completion of the auction sale or on the next business day following the auction sale...*". It is not mere conjecture to assume that there were individuals who may have been able to obtain a twenty percent (20%) deposit within 24 hrs or a week for example, but who may not have be able to come up with such a deposit "*immediately*" on a successful bid. Ms Thomas herself is proof of the existence of such a person. It is therefore in my view not speculative to extrapolate and conclude that there are conceivably other persons who but for that additional term in the advertisement might have shown an interest in the Property and might have even been willing to purchase the Property at a higher price than the price for which it was knocked down to Ms Thomas.

[112] I do not think that the additional provision of details as to the availability of the terms and conditions of sale necessarily cures the danger of a potential purchaser being excluded. This is because such an individual if he is initially deterred by the twenty percent (20%) requirement, presumably would not be inclined to take the additional step of securing a copy of the conditions. As a consequence he would be deprived of the benefit of the very terms and conditions which would have accurately informed him of the true position. The evidence of Ms Thomas on this point is also instructive by way of illustration. She stated that she did not recall seeing the twenty percent (20%) deposit requirement when she saw the advertisement in the newspaper and became interested. More importantly she later said that she did not remember hearing

condition 4(a) relating to the twenty percent (20%) deposit being read at the auction, because if she did she probably would have "backed off".

[113] However, the question as to whether this particular inaccuracy in the advertisement resulted in a diminution in the number and/or value of the bids, is academic, it not having been expressly pleaded in the statement of case or ventilated by the parties at trial. I note the fact by way of comment only and make no findings in this regard. For the avoidance of any doubt I restate my appreciation of the point relied on by Ms. Ball that her main challenge as it relates to the twenty percent (20%) requirement has to do with the fact that there was non-compliance by Ms Thomas with the requirement that it be paid within the required 24-hour timeframe.

[114] It was not so argued on behalf of Ms. Ball and in any event I am not so satisfied on the evidence before the Court that the inclusion of this condition in the advertisement is an adverse factor of such significance that it detracts from the "*cogent evidence that the mortgagee has taken reasonable steps to obtain the true market value of the property by and through the medium of the auction sale itself*".

THE ALLEGATION OF FRAUD AND/OR COLLUSION

The Conduct of the auction itself and subsequent sale

[115] The applicable rules for allegations of fraud may be derived from ***Davy V Garrett* (1878) 7 Ch. D. 473 at 489** per Thesiger, J as follows:

> *...In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts.*

[116] In her Statement of Case Ms. Ball has adequately particularised the allegations of fraud and collusion as against the Defendants.

[117] The use of the term collusion by both sides suggests that there was no dispute as to its definition according to **Black's Law Dictionary 7th Edition** as an agreement to defraud another or obtain something forbidden by law.

[118] In the decision of the Court of Appeal in *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR page 403. In that case Lord Denning MR said:

> *"It is simply the law of contract. If two persons agree that the price of a property should be fixed by a valuer on whom they both agree, and he gives that valuation honestly and in good faith they are bound by it. Even if he has made a mistake they are still bound by it, the reason is, because they have agreed to be bound for it. If there were fraud or collusion, of course, it would very different. Fraud or collusion unravels everything."*

[119] In the case before me, not only would fraud or collusion as between VMBS and DTA in the production of the Thwaites Valuation Report invalidate that that report, but fraud or collusion involving the auction process would similarly invalidate the result of the auction itself and the sale consequent on that result which declared Ms Thomas to be the highest bidder.

[120] Ms. Ball submits that it was the duty of VMBS to have conducted the sale of the Property in accordance with the publicised rules contained in the Particulars and Conditions of Sale and that the sale was not so conducted in accordance with those rules. It is settled law that an auctioneer is an agent employed to perform duties associated with the sale of the relevant property and since a principal is liable for the acts of his agent, which are within the authority conferred upon the agent, to the extent that the complaint is against VMBS in respect of the conduct of the auction, that approach is founded on a sound legal basis.

[121] One of the main complaints was that Ms Thomas as the successful bidder did not pay the twenty percent (20%) deposit, that is, twenty percent (20%) of Twelve Million Seven Hundred and Fifty thousand ($12,750.00) or Two Million Five Hundred and Fifty dollars ($2,550,000.00) deposit on the day of the auction as

required by condition 4(a) of the Particulars and Conditions of Sale. It was submitted on behalf of Ms Ball that Ms Thomas on a balance of probabilities must have known of this requirement by virtue of the advertisement of the auction and/or the rules of the Auction which were read to the persons interested in the auction before it commenced. The Claimant asserted that there was impropriety in the conduct of the auction which prevented the sale from qualifying as a valid/lawful auction sale. In addition to the allegations of collusion the Claimant has also included allegations of fraud as against DTA and Ms Thomas.

[122] Considerable emphasis was placed by the Claimant on alleged irregularities related in particular to the Memorandum including but not limited to:

(a) the fact that Mr Tavares-Finson could not say whether he had signed the Memorandum of Sale and Ms Williams testimony that he did not;

(b) the fact that the sum of US$600.00 allegedly paid by Ms Thomas is not reflected on the Memorandum of Sale;

(c) undated alterations to the Memorandum of Sale which may have been done without Ms Thomas' knowledge; and

(d) the fact that Ms Thomas did not pay the twenty percent (20%) deposit within 24 hours as required by condition 4 (a) of the Particulars and Conditions of Sale

[123] In support of the allegation of collusion and/or improper execution of the auction process, the Claimant called Mr. Rohan Rose as a witness. His evidence was that he was present at the auction because he was interested in a property at Shenstone Drive in Beverly Hills. He noticed that the Property which in his opinion was valued at in excess of Twenty Million Dollars ($20,000,000.00) "*was being auction (sic) for around Ten Million Dollars ($10,000,000.00)*" and his first

thought being that it was “a steal” he decided to participate in the bidding process in respect of the Property. The opening bid of a lady was Ten Million Dollars ($10,000,000.00). He bid Eleven Million ($11,000,000.00) then Twelve Million Dollars ($12,000,000.00) but was outbid by the “*aggressively bidding*” woman who won with a bid of Twelve Million Seven Hundred and Fifty Thousand Dollars ($12,750,000.00).

[124] Mr. Rose did not give any evidence alleging that there was anything improper in the auction process and his opinion as to the value of the Property is obviously of infinitesimal value in the absence of any evidence of him having relevant expertise. Notwithstanding this, the worth of his testimony was further diminished in cross examination, firstly by Mr. Leiba, who got him to admit that he was convicted of a financial crime for which he pleaded guilty and was fined Three Million Five Hundred Thousand Dollars ($3,500,000.00) or 3 years imprisonment. This was followed by Mr Gordon who skilfully demonstrated that there was no advertisement in respect of and consequently no auction of a Shenstone Drive, Beverly Hills property that day. I therefore considered Mr Rose to be a wholly unreliable witness and I do not find it necessary to consider the evidence of Mr Rose any further.

[125] VMBS called Mrs. Janet Jones-Williams (Mrs Williams) as a witness. She is the Supervisor for the Auction Sales Department of D.C. Tavares and Finson Realty Limited (“DCTF”) a position which she has held for upward of twenty years. In her witness statement she spoke to being present at the auction of the Property which took place at the Altamont Court Hotel, Kingston 5. She was cross examined at length about the details of her involvement in all that transpired that day. She explained that in her experience it is usual for a person who does not have the required deposit available to him or her to nevertheless still bid at the auction. She was questioned about a letter dated 23rd March, 2011 in particular in which it was stated as follows:

> *"We enclose herewith Conditions of Sale along with Memorandum duly signed, commission invoice and cheque in your favour in the sum of* ***FIFTY-ONE THOUSAND DOLLARS ($51,000.00) part deposit received****.*

She denied the suggestion that no deposit was paid by Ms. Thomas on the day of the auction and affirmed that she received the sum of Fifty-one Thousand Dollars ($51,000.00) that day. She admitted that that there is a cheque dated the 29th March, 2011 drawn on the DCTF clients account but could not speak to that because it was prepared by the accounts department of DCTF. She conceded that despite what the letter asserts she did not send that deposit to VMBS on 23rd March, 2011 but that the statement to that effect in the letter was not a deliberate falsehood. Mrs Williams said that although on the day of the auction only $51,000.00 was paid, following the enquiry of Ms Thomas as to whether she could pay the balance in a week, she consulted with VMBS and they agreed that they would wait a week. She admitted that up to the 28th March, 2011 DCTF continued to have dialogue with Ms. Thomas in relation to the payment of the required deposit.

[126] A considerable portion of the cross examination of Ms Thomas by Mrs Taylor-Wright was geared at trying to establish that there were irregularities in the auction process including the collection of the deposit from her. Mr William Tavares-Finson the Chairman of DCTF and the auctioneer gave evidence, which provided a useful insight into the auction process and in particular as it relates to the deposit and the required deadlines. As he outlined in his witness statement which was admitted as his evidence in chief:

> *Generally, when an auction is concluded and there is a winning bidder, the winning bidder has to go away and come back with the deposit as they will not be aware as to what their final purchase price will be. This is despite the fact that in many instances the conditions may require immediate payment of the deposit.*

> *With respect to the Conditions of Sale for VMBS, DC Tavares advises successful bidders at the auction to submit the funds that they have with them at the auction as an earnest deposit and then allows the winning bidder 24 hours to return to DC Tavares with the remainder of the deposit. However, the length of time that the winning bidder is allowed to bring in the remainder of the deposit, if it is to be varied will be at the discretion of the Vendor. In this case, it would have been VMBS's decision as to the time period they were willing to give to the winning bidder to complete the payment of the deposit.*

[127] In cross examination he agreed that the deposit requirement is an integral part of the auction process but explained that the public auction is complete when the highest bidder is accepted above the reserve. The secondary aspect would be the payment of the deposit and completion within the time specified. He further explained that in his experience there have been variations by many institutions due to the requirement to get the deposit in time and the anti money laundering requirements. He did not accept the suggestion that the agreement with VMBS for Ms Thomas to pay the deposit in a week was a violation of the auction rules but said he considered that arrangement a modification in accordance with common practice. He said that did not necessarily expect to see the initial nominal deposit reflected on the memorandum of sale.

[128] Exhibit 118 conditions 4(a) and 4(b) were highlighted to Mr Tavares-Finson, the material portions of which provide as follows:

> *4 (a) The purchaser shall immediately after being notified of the sale pay to the Auctioneer or his Agents a sum to be treated as an ernest deposit (the sum to be paid shall be left to the sole discretion of the Auctioneer or his Agents). The Purchaser also shall within twenty four (24) hours after the completion of the auction sale or on the next business day following the auction sale pay to the Auctioneer or his Agents the remaining balance of the sum equivalent to ten percentum (10%) of the amount of the purchase money as a deposit together with a payment on account purchase money of an additional sum of ten percentum (10%) of the purchase price...*
>
> *4(b) In the event that the purchaser is unable to furnish the required deposit and payment on account purchase money, bidding shall resume from the next highest bid.*

As it relates to condition 4(b) he explained that as a practical matter this provision would be almost impossible to work because the successful bidder would have 24 hours to find the deposit and therefore one could not resume at the next highest bid.

[129] The essence of the cross examination of Mr Tavares Finson was that DCTF improperly allowed Ms Thomas to not abide by the rules of the auction and allowed the VMBS to vary the rules so as to facilitate her. In his responses he explained that as an experienced auctioneer and in accordance with the common practice, he worked with VMBS, his client, in order facilitate the sale transaction to Ms Thomas. He denied the suggestion that it was collusive or improper of DCT to have carried out the instructions of VMBS in varying the rules after the bidding had ended. He also denied that by modifying the rules of the auction DCTF created a preferential status for Ms. Thomas over and above other bidders.

The evidence of Ms Karen Thomas

[130] Her evidence was that on 22nd March, 2011 she left her house with no intention to attend an auction and only had Six Hundred United States Dollars (US$600.00). Shortly after she arrived at her office she saw a newspaper advertisement for an auction and the Property was a listed property. At the time she said she did not see the condition that twenty percent (20%) was payable immediately on all successful bids by certified cheque. She attended the Altamont Court Hotel where the auction was being held and participated in the bidding process. Prior to doing so she did not enquire about the reserve price or form an opinion as to the value or the physical condition of the Property. She indicated that she was in the market for a house and someone suggested that she go to an auction. She said she could have afforded to purchase property in the region of Fifteen to Sixteen Million Dollars ($15,000,000.00 - $16,000,000.00)

[131] She indicated that before the auction started the auctioneer mentioned some "ground rules". She was shown exhibit 118, (the Particulars and Conditions of Sale of the auction) and said she signed it once the bidding process was complete but did not have sight of it prior to the bidding process. She said she was not aware that she had until 24 hours after the auction to pay the twenty percent (20%) deposit until after the proceedings on the day of the auction and placed her bid without knowing how much money she would have had to pay down as a deposit on the Property. After being told by the representative of the auctioneer (who she recalls to have been Ms Williams) of the requirement for the payment of the deposit by the next day she said she indicated that she would not have had the balance by then and asked if she could be given until the next week. She subsequently got that permission. She said she paid Six Hundred United States Dollars (US$600.00) that day as a deposit although it was not reflected in the appropriate area of the memorandum for "deposit on account" she was not concerned that it was not so reflected because she had a receipt for that sum. She accepted that the memorandum did not accurately reflect the amount she paid on 22nd March, 2011 which was only Six Hundred United States Dollars (US$600.00)

The Court's findings in respect of the allegation of collusion or fraud

[132] The Court has to consider whether it was improper for VMBS to have amended the Particulars and Condition of sale so as to extend the time within which Ms Thomas was required to have provided the twenty percent (20%) deposit.

[133] The Court accepts that there was a bidding process after advertisement of the auction to the public and the Property was knocked down to Ms Thomas, she being the highest bidder with a bid that exceeded the reserve price. On the evidence presented to the Court and giving particular weight to the explanation of Mr Tavares-Finson in relation to the practical realities that are faced by vendors

and the various participants in an auction, I do not find that there is any evidence of fraud and or collusion as it relates to the bidding process.

[134] As a matter of contract law, there is nothing to prevent VMBS from waiving or varying the time requirements for payment of the twenty percent (20%) deposit that were outlined in the Terms and Conditions of Sale once the hammer had dropped and the Property had been knocked down to Ms Thomas the highest bidder. I do not find that this variation is evidence of collusion nor do I find that there was anything improper which affected the validity of the auction and sale process. The use of unnecessarily stringent conditions or inflexibility in applying those conditions may serve to undermine a sale. In this case, having regard to explanation as to her being able to obtain the necessary funding if afforded the opportunity of additional time, I do not find that extending the time period for her to comply with the conditions amounted to a breach of duty by VMBS.

[135] The Court has found on a balance of probabilities that there was no impropriety or irregularity by VMBS in the exercise of its power of sale or more specifically, in the sale of the Property to Ms Thomas consequent upon her being the successful bidder at the auction. In any event as Forte P put it in the case of ***Lloyd Sheckleford v Mount Atlas Estate Ltd*** **(unreported) Court of Appeal, Jamaica, SCCA No 148/2000, judgment delivered December 20, 2001** at page 7:

> *...It is clear from the provisions of section 106, that it not only gives the Mortgagee the power to sell, but is specific in protecting a bona fide purchaser for value from the consequences that may flow, if the exercise of the power by the mortgagee was the result of impropriety or irregularity.*

Ms Thomas therefore has the additional protections afforded by the Registration of Titles Act. The Court has found that Ms Thomas is a bona fide purchaser for value and the claim against her accordingly fails.

Did the variation of the terms and conditions result in the auction being converted to a private treaty?

[136] Having regard to the Court's findings that there was no fraud, collusion or any material irregularity in respect of the sale of the Property I do not accept the submissions on behalf of Ms. Ball that the issues which are the subject of complaint relating to the conduct of the auction have had the effect of invalidating the auction or converting it being to a sale by private treaty. Counsel for Ms. Ball in her submissions in this regard has relied on the case of ***International Trust Merchant Bank v Gilbert Gardener*****, (unreported), Court of Appeal, Jamaica, SCCA No 111/2000, judgment delivered 30th March 2004**. However it is to be noted that the decision in that case was very fact-specific and turned to a large extent on the fact that the auctioneer in that case bid at the auction without no such right having been so reserved in the conditions of sale. This was done in circumstances where the first and second bids of the sole legitimate bidder were below the reserve price and the Court of Appeal stated in paragraph 18 of the judgment that:

> *"... the auctioneer's duty at that stage was to have called off the auction and withdraw the property from the sale. While not affecting the validity of the sale to Mr Bisnott, the manner in which the auction was conducted would result in the sale being treated in law as one effected by way of private treaty."*

The failure to obtain a proper valuation

[137] Mrs Fisher confirmed in cross examination that VMBS had the Westcar Valuation Report in its possession at the time it gave instructions for the Thwaites Valuation Report to be done and at the time when that commissioned report by DTA was accepted.

[138] The Westcar Valuation Report states that the gross building area is approximately 1,680 sq. feet or 156.08 sq. metres which the Court notes is less

than 1,845.2 sq. feet (171.423 sq. metres) described in the 2007 VB Williams Valuation Report or the gross floor area of 2,260 sq. feet (209.45 sq. metres) in the VB Williams 2011 Valuation Report.

[139] In her witness statement Mrs. Fisher said that in circumstances where the power of sale is being exercised by VMBS, if the valuator was not permitted access VMBS would provide information extracted from the valuation submitted by the mortgagor at the time when the mortgage application was submitted. In cross examination she said she would not say it is a policy, but is a general statement of what would normally be done. She initially went on to say that VMBS provided DTA with the relevant information regarding the details/size of the Property based on the previous valuation provided by Ms. Ball in 2007 (which would lead to the inference that this meant information taken from the 2007 VB Williams Realty Valuation). However she later resiled from this position, initially admitting that the extract that was sent as an enclosure in the VMBS letter to DTA dated 22 February 2011, was page 2 only of the Westcar Valuation Report. The fact that one page only of the report was provided to Mr Thwaites is supported by the evidence of Mr Thwaites himself, but she later said that she could not recall what was sent since she did not have the file. She further indicated that she was not the person who packaged the envelope or dispatched the letter dated 22nd February, 2011 to DTA and as a consequence did not know what attachments there might have been.

[140] It was put to Mrs Fisher as part of Ms Ball's case that because the Westcar Valuation report was no older than 12 months at the relevant time, it should have been relied on by VMBS. It was suggested to her that VMBS' policy requires that at an auction, VMBS is required to be in possession of a valuation report which is no older than 12 months but Mrs Fisher was adamant that the appropriate maximum age of a qualifying valuation report was 6 months. Primarily because of the Court's finding as to the limited weight to be attached to the Westcar

Valuation Report because of the absence of comparables, I do not find that anything turns on whether VMBS' policy included a 12-month or 6-month limit on the life of the valuation reports it used.

[141] Mrs Taylor Wright suggested to Mrs. Fisher that for VMBS to provide only one page of the Westcar Valuation Report was "reckless" and that in providing one page only without also disclosing the price as opined in that report was "dishonest". Furthermore, a number of specific suggestions were made to Mrs Fisher with finely nuanced positions which I do not see the necessity of reproducing in detail here, but the general effect of which was that VMBS acted improperly (the terms recklessly, negligently or dishonestly were used) in accepting the Thwaites Valuation Report, (and fixing a reserve price based on it as well as permitting the subsequent sale) while being in possession of the VB Williams 2007 Report and the Westcar Valuation Report.

Court's finding on the use of use of Thwaites Valuation Report

[142] Although in **Cuckmere** it was stated that "*the mortgagee is not obligated to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price when the sale is by auction*", VMBS did have the Thwaites Valuation Report in its possession before the auction, and condition 1(a) of the particulars and Conditions of Sale of the Property at the auction expressly stated that the sale is subject to a reserve price fixed by the vendors. By fixing a reserve price VMBS installed an added level of protection to ensure that the market price achieved by the independent competitive biddings at the auction did not fall beyond a minimum amount and in so doing went beyond what it was obligated to do as per **Cuckmere**.

[143] Based on the law as outlined in **Cuckmere** and **Moses Druckett**, VMBS asserted that it is entitled to rely on the price as determined by the independent

competitive biddings at the auction and that by selling the Property to Ms Thomas at that price, it satisfied its equitable duty, since there are no irregularities of the type identified in that case. Accordingly VMBS has the right to accept the highest bid even if it was below what was the ascertained true market value. On this analysis it would follow that if the opinion of value as stated in the Thwaites Valuation Report was less than what the Court finds was the true value as conceded by Mr Thwaites in his letter of March 16, 2011, that does not affect Ms. Ball's ability to rely on the price achieved at the auction. This is arguably so even though a higher reserve price might have been fixed if Mr Thwaites' higher value of Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00) was used.

[144] Whereas a mortgagee is not obligated to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price when the sale is by auction, as stated in the case of **Moses Drecket** (supra), I accept the statement in **Miller**(supra) that "*The need for the mortgagee to exercise informed judgment in exercising his power of sale in turn means that a prudent mortgagee will take advice, including (where appropriate) valuation advice, from a duly qualified agent.*". In **Tse Kwong Lam** (supra) at page 1357 of the judgment the following suggestion was made:

> *The Mortgagee could have consulted estate agents about the method of sale and about the method of securing the best price. At the very least he could have consulted an estate agent about the level of the reserve price.*

[145] The Court accepts Ms. Ball's submissions that in view of the wide disparity in the opinions as to the value of the Property as contained in the various valuations that were in the possession of VMBS prior to the auction, it ought to have been evident to its employees that special care needed to be exercised to ascertain the correct value of the Property since it was going to fix a reserve price at the

auction in order to seek to achieve “the best price reasonably attainable” or a “proper price”. This is further fortified by the fact that VMBS accepted the figure of Eighteen Million Seven Hundred and Twenty-one Thousand Dollars ($18,721,000.00) as the insurable value of the Property for the period 2010/2011.

[146] The Court also finds that based on the letter from Mr Thwaites to VMBS, the institution ought to have placed particular importance on the qualifications to the Thwaites Valuation report that were emphasised, such as, the fact that the interior of the Property had not been inspected and secondly, that there was reliance being placed on what was termed an “obvious breach of the set-back covenant” without any confirmation by a land surveyor of the existence of this alleged breach. In those circumstances in which it was conceded that a higher value of as much as Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00) was possible, VMBS ought to have been alerted to the fact that although the Thwaites Valuation Report fixed the market value of the Property of Thirteen Million Dollars ($13,000000.00), because of the qualifications, this figure was unreliable.

[147] In the case of **Druckett** no impropriety as to the conduct of the auction was alleged or proved and the Court held that the failure to ascertain the then current market value by valuation prior to the auction, and failure to fix a reserve price, did not individually or collectively constitute breaches of duty. The Court found that the situation in that case fell squarely in the “poor attendance and exceptionally low bids” type of case which Salmon L.J. in **Cuckmere** envisioned where a mortgagee was well within his rights to accept what was the final bid.

[148] In the case before the Court impropriety as to the conduct of the auction was alleged but was not proved. The cases to which reference have been made earlier in this judgment, including **Druckett,** suggest that VMBS would only have breached its duty of care if a proper price was not achieved at the auction as a

result of its failure. The Court has found that based on the evidence before the Court in Mr Thwaites' letter, the upper figure of Fourteen Million Five Hundred Thousand Dollars($14,500,000.00) represented the market value of the Property. The Court accepts the evidence of Mr Norton, and adopts a twenty percent (20%) difference between the upper limit market value of Fourteen Million Five Hundred Thousand Dollars ($14,500,000.00) and what could have been considered to be the forced sale value. This approach establishes a forced sale value of Eleven Million Six Hundred Thousand Dollars ($11,600,000.00). The price achieved at auction was Twelve Million Seven Hundred and Fifty Thousand ($12,750,000.00) in the Court's view, in these circumstances, the price at which the Property was sold cannot be considered to be at an undervalue. In this case there was poor attendance and a low final bid at the auction. However these are adverse factors which on the evidence were not due to the fault of VMBS and it was duly entitled to sell the Property to Ms Thomas at the price of her winning bid. Accordingly for the reasons discussed above, I do not find that this was a case in which Ms. Ball has proved to the Court on a balance of probabilities that VMBS had not satisfied the duty of care it owed to Ms. Ball.

Were there modifications that required the permission of VMBS? and if so, what is the effect of this?

[149] Clause 2 (viii) of the instrument of mortgage dated 20th April, 2007 provides as follows:

> *"To put and maintain at all times the mortgaged premises and all buildings, fixtures, fences and gates on the mortgaged premises in good repair and condition to the satisfaction of the Society and in case of agricultural land to keep as well all cultivation thereof in good planter-like condition AND ALSO not without the consent in writing of the Society to make or cause or permit to be made any alteration to or in the use of the mortgaged premised not permit the mortgaged premised or any part thereof to suffer depreciation by neglect or mismanagement.*

[150] It is not disputed that Ms. Ball did not obtain consent in writing to do the modifications she did to the Property which may have contributed to its appreciation in value. However it was established at trial that improvement of the property was a stated purpose of a loan Ms. Ball obtained from VMBS. In these circumstances it is the Court's finding that the issue of lack of permission is of no moment.

THE ANCILLARY CLAIM

[151] By way of an ancillary claim, VMBS is claiming the sum of Four Milion Seven Hundred and Fifty-one Thousand Four Hundred and Eighty-five Dollars and Twenty-one Cents ($4,751,485.21) which it asserts is the balance due and owing to it by Ms. Ball as at 22nd April 2013 in respect of three loan accounts.

[152] Ms Ball's defence to the ancillary claim is based in large part on the facts on which she relies in support of the main claim but further asserts that the conduct of VMBS created the conditions which caused her to run into difficulty with the loan payments. Ms Ball also asserts that VMBS breached its duty to her in contract to exercise reasonable care and skill in the management of her loan account and its duty in contract or in equity to render proper accounts. It is Ms Ball's position as stated in paragraph 24 of her Ancillary Defence and Counterclaim, that VMBS breached this duty by, *inter alia*,:

> *"...iii. The neglect or refusal to pay interest on the amount overpaid by her on the said loan account and referable to the rebate without explanation.*
>
> *iv. Failing to render the basis of the computation of the said rebate.*
>
> *v. Arbitrarily and unilaterally appropriating the said rebate to her accounts without consultation or explanation.*
>
> *vi. The failure to reduce the monthly payments subsequent to the said rebate which itself constitutes an admission that payments*

were being made by [her] in excess of the amounts legitimately due, without explanation...."

The alleged accounting error of VMBS

[153] Ms Ball's evidence as disclosed in her witness statements is that in August 2007 her business was severely damaged by hurricane Dean which caused its closure and impacted her ability to make her monthly payments. She made arrangements to address the position in which she found herself but started to have difficulties again by June 2009 and fell into arrears. On 10 August, 2009 she was advised that VMBS was planning to sell the Property at an auction scheduled for the 29th September 2009. She again took steps to stave off the auction and it was cancelled. She concluded however that the Property should not have been listed for auction because VMBS had incorrectly appropriated the loan of Fourteen Million Dollars ($14,000,000.00) at the time of disbursement into two loan accounts of seven million dollars each. She said that it should have instead been split into two loans one of Four Million Dollars ($4,000,000.00) and the other of Ten Million Dollars ($10,000,000.00). These two loan accounts of Seven Million Dollars ($7,000,000.00) each attracted interest rates of twelve point nine-nine percent (12.99%) per annum and fifteen percent (15%) per annum, when what should have taken place is that she should have had a Ten Million Dollar ($10,000,000.00) loan and a Four Million Dollar ($4,000,000.00) loan at twelve point nine-nine percent (12.99%) and fifteen percent (15%) per annum, respectively.

[154] The Claimant drew the attention of VMBS to this and this was acknowledged by letter addressed to her dated 3 November 2009 ("the 3rd November Letter"), signed by Mrs. Patrica Fisher, Manager of the Processing Department of VMBS . In this letter, the Claimant was advised that the loan amounts were incorrectly

applied at the inception of the loan disbursement. As a result of an adjustment by VMBS, an interest rebate of One Million One Hundred and Six Thousand Ninety-five Dollars and Forty-four Cents ($1,106,095.44) on account 950185-95-0 was realised and appropriated as follows:

Account 950185-95-0 $232,105.86 applied to monthly payment,

Account 950185-96-9 $242,826.67 applied to monthly interest

Account 950185-96-9 $631,162.91 applied to interest.

[155] The arrears of the accounts as at 3 November, 2009 were outlined as follows:

Account 950185-95-0 $93,220.00 (1 month in arrears),

Account 950185-96-9 $467,875.86 (3.5 months in arrears)

Account 950185-96-9 $23,560.00 (2 months in arrears).

VMBS in the same letter proposed to write off fifty percent (50%) of the late fees which had accrued on the accounts.

[156] Ms. Ball challenged the waiver and argued that all the late fees ought to have been waived and not only fifty percent (50%) thereof. She complained that she was never asked by VMBS how the rebate was to be credited to her accounts and VMBS proceeded to arbitrarily and unilaterally apply the Rebate. Ms. Ball questioned whether the adjustment was properly calculated and applied, and whether the accounts were properly managed at all. In her view the rebate should have settled all her arrears or at the very least should have settled her arrears save for the monthly payment due on the 30th October 2009.

[157] Ms. Ball asserted that the error of VMBS caused her to be paying a higher monthly mortgage payment than she was lawfully obliged to pay. She says that this error prejudiced her ability to make the monthly payments and resulted in

penalties in the form of administrative charges and late fees and caused her accounts to reflect inaccurate arrears.

[158] Ms. Ball also asserted that additional evidence of the weakness of the VMBS' accounting systems can be garnered from the fact that even after the 3rd November, 2009 letter which VMBS claimed addressed all the inaccuracies, further adjustments still had to be made at her insistence and this is evidenced in the letter dated 6th April, 2010 to her from VMBS in which an adjustment of the monthly payments on her accounts was shown as follows: on the number 950-ending account, Ninety-three Thousand Two Hundred and Twenty Dollars ($93,220.00) was adjusted upward to Ninety-four Thousand Eighty Dollars ($94,080.00). As it relates to the number 969-ending account, One Hundred and Thirty-two Thousand Two Hundred Dollars ($132,200.00) was adjusted downward to One Hundred and Thirty-one Thousand Two Hundred Dollars ($131,200.00) resulting in a total adjustment from Two Hundred and Thirty-seven Thousand Two Hundred Dollars ($237,200.00) to Two Hundred and Thirty-seven Thousand Sixty Dollars ($237,060.00).

[159] Mr. Horace Bryan was the manager of the Centralised Operations Unit of VMBS when Ms Ball was first granted the Mortgage and between 2008 and 2010 he was the Assistant Vice President of Centralised Services. He gave evidence on behalf of VMBS and admitted to having limited familiarity with Ms Ball's relationship with VMBS. In cross examination he agreed that he saw three different documents expressing monthly payment, namely the letter of commitment dated March, 2007. The letter dated 5th May 2007 and the Instrument of Mortgage dated 20th of April, 2007. He did not agree that VMBS' accounting system reflected three inconsistent and contradictory monthly payments. He also agreed that One Hundred and Sixty-nine Thousand Seven Hundred and Seventy Dollars ($169,770.00) which he saw in the letter of commitment is not a statement figure, One Hundred and Seventy-four Thousand

One Hundred and Fifty Dollars ($174,150.00) which he saw in the 17th May, 2007 letter, and different from the One Hundred and Eighty Four Thousand Three Hundred and Sixty Dollars ($184,360.00) expressed as monthly payment in the mortgage. He agreed that inconsistencies in the VMBS' accounting records would have led to incorrectly reported pay off balances.

[160] However the evidence of Mr Bryan is that the incorrect appropriation did not cause Miss Ball's account to be in arrears, because, the amount of the appropriation is less than the balance outstanding on her accounts.

The evidence of Ms. Patrica Fisher

[161] Ms. Patrica Fisher gave evidence that she was the Senior Assistant Mortgage Manager for VMBS in 2008 and was familiar with Ms Ball as a customer of VMBS. In amplification of her witness statement Ms Fisher explained that there was an error in the 3rd November, 2007 letter in that the percentage rates expressed in the first table should be reversed, that is to say for the account ending 950 the previous interest rate should have been stated as fifteen percent (15%) and twelve point nine-nine (12.99%) for the account ending 969 but that the letter is accurate in all other respects.

The interest rebate

[162] Ms Fisher explained that the Mortgage arrears Notice dated 19 October, 2009 in respect of the 969 account, shows the total balance overdue as Two Hundred and Forty-two Thousand Eight Hundred and Twenty-six Dollars and Sixty-seven Cents ($242,826.67) while the notice of the same date in respect of the 950 account shows the total balance overdue to be Two Hundred and Thirty-two Thousand One Hundred and Five Dollars and Eighty-six Cents ($232,105.86). However, she indicated that these are computer generated letters and the 3rd November, 2007 letter reflects what the actual figures were after the adjustments

had been made. Ms Fisher's evidence was also that even after the adjustments had been made the accounts were still reflecting arrears.

[163] During cross examination by Mrs. Taylor-Wright, Mrs Fisher said that she did not agree that the division of the Fourteen Million Dollar loan into two equal loans of Seven Million Dollars ($7,000,000.00) each on which an interest rate of twelve point nine-nine percent (12.99%) and fourteen point nine-nine percent (14.99 %) respectively was a serious error on the part of VMBS. She admitted that the incorrect apportionment of the loan resulted in an overpayment by Ms Ball on the number 950-ending account but said that this was a "slight overpayment". She also admitted that the incorrect apportionment on the number 969-ending account resulted in a "slight short-payment". Counsel suggested to her that the overpayment which she describes as "slight" was a sum of Thirty-five Thousand One Hundred and Twenty Dollars ($35,120.00) per month for a period of 30 months at least and she conceded that she could not recall exactly how much the overpayment was. I initially grappled with, but eventually understood and accepted the evidence of Mrs Fisher as to the calculation and application of the interest rebate and I do not accept that it reflected and actual overpayment as was asserted by Ms Ball.

Conclusion on the management of accounts and calculation issue

[164] I accept the evidence of Ms Fisher on a balance of probabilities that although there were initial miscalculations as it relates to Ms Ball's accounts, these were subsequently rectified and that the 3rd November, 2007 letter accurately reflected the state of Ms Ball's accounts. I do not accept that the initial miscalculations caused Ms Balls accounts to be in arrears or resulted in the arrears which formed the basis for VMBS asserting its right to sell the Property.

[165] The Court rejects the claim that VMBS breached its duty to her in contract to exercise reasonable care and skill in the management of her loan account and/or in its duty in contract or equity to render proper accounts. In the premises the Court finds that there is no merit in Ms Ball's Defence to the Counterclaim on a balance of probabilities.

[166] The Court finds that subsequent to the 3rd November 2007 the accounts as rendered to the Claimant were accurate. I have reviewed in detail the evidence of Mrs Fisher as to VMBS' system of generating notices and I find that following the correction reflected in the 3rd November 2007 letter, the Statutory Notice dated 16th December 2010 accurately stated Ms Ball's indebtedness at $21,727,312.06. I further find that following the application of the sale price of the Property, Mortgage Indemnity Insurance and Transfer Tax, the amount claimed as being the balance due and owing to the Ancillary Claimant from the Ancillary Defendant as at the 22nd April 2013 is Four Million Seven Hundred and Fifty-one Thousand Four Hundred and Eighty-five Dollars and Twenty-one Cents ($4,751,485.21) has been established to the satisfaction of the Court on a balance of probabilities having regard to the Court's finding that the price of the Property as obtained at auction was not in breach of VMBS' duty of care. Accordingly the Court finds for VMBS on the Claim and also finds for VMBS on the Ancillary Claim.

[167] Based on the Court's findings above the Court also finds for VMBS on the Ancillary Defendant's Counterclaim.

The claim for interest on the Ancillary Claim

[168] The Ancillary Claimant has claimed contractual interest at the rate of nine point three nine percent (9.39%) per annum in accordance with the Deed of Mortgage from the 23rd April 2013 and that claim is granted.

[169] I wish to take the opportunity to express my gratitude to Counsel for their industry and the considerable assistance provided by way of their comprehensive written submissions. The omission of a detailed analysis of some elements of those submissions and the supporting authorities should not be taken to mean that they have not been read and considered.

Disposition

[170] In the premises the Court makes the following orders.

1. Judgment for the Defendants on the Claim.

2. Judgment for VMBS the Ancillary Claimant on the Ancillary Claim in the sum of Four Million Seven Hundred and Fifty-one Thousand Four Hundred and Eighty-five Dollars and Twenty-one Cents ($4,751,485.21), plus interest at the rate of 9.39% per annum from 23rd April 2013 to 8th November 2017, the date of judgment, and statutory interest at the rate of 6% per annum thereafter until the judgment is satisfied.

3. Costs of the claim are awarded to the Defendants against the Claimant on the Claim.

4. Costs of the Ancillary Claim are awarded to VMBS the Ancillary Claimant against the Ancillary Defendant.

5. Judgment for VMBS the Ancillary Claimant on the Ancillary Defendant's Counterclaim.

6. No order as to costs on the Ancillary Defendant's Counterclaim.