



[2026] JMCC COMM. 2

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE COMMERCIAL DIVISION  
CLAIM NO. SU 2021 CD 00407**

<b>BETWEEN</b>	<b>COMMUNITY AND WORKERS OF JAMAICA CO-OPERATIVE CREDIT UNION LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>AL CHAMBERS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>LASCYNTH CHAMBERS</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>EVERETT HYATT</b>	<b>3<sup>RD</sup> DEFENDANT</b>

Ms. Stephanie Williams and Mr. Vasheney Headlam instructed by Henlin Gibson Henlin, Attorneys-at-law for the Claimant.

Ms. Houston Thompson and Ms. Shanelle Nelson instructed by Nunes, Scholefield, Deleon & Co. Attorneys-at-law for the Defendant.

**Civil procedure– Whether the Claimant disbursed the full sum of the loan- Whether the Claimant failed to act in good faith and/or was negligent in the exercise of its power of sale- Measure of damages- Whether market value or forced sale value relevant in calculation of damages- When is the set-off to be done**

**IN OPEN COURT**

**Heard on: 21<sup>st</sup>, 22<sup>nd</sup> and 24<sup>th</sup> July, 2025, 17<sup>th</sup> December, 2025, 30<sup>th</sup> January and 26<sup>th</sup> February, 2026**

## STEPHANE JACKSON-HAISLEY J.

### INTRODUCTION

[1] This is a claim by COK Sodality Co-operative Credit Union Limited (the Credit Union) for recovery of monies due and owing pursuant to a Loan Agreement and Promissory Note both dated September 10, 2010 granted to the 1<sup>st</sup> Defendant, Al Chambers. Lascynth Chambers and Everett Hyatt, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, respectively are guarantors of the loan however, as they were not served with pleadings, the claim did not proceed against them.

[2] Mr. Al Chambers defaulted on the loan and as a consequence, the Credit Union exercised its power of sale in or about November 2019. The proceeds of sale were insufficient to fully liquidate the loan and Mr. Chambers remain indebted to the Credit Union.

[3] Mr. Chambers denies the indebtedness and has instead countered that there was a breach of fiduciary duty owed to him. He asserted that the properties used as security were sold below market value and he did not receive an accurate statement of account. He has counterclaimed for the following:

- i. *An account of the sums realised from the sale of:*
  - a. *Property comprised and registered at Volume 1405 Folio 380 of the Register Book of Titles (Lot #13 Waltham, Manchester). This property was owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*
  - b. *Property comprised and registered at Volume 1405 Folio 375 of the Register Book of Titles (Lot #2, Waltham, Manchester). This property was owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*
  - c. *Property comprised and registered at Volume 1405 Folio 377 of the Register Book of Titles (Lot #10, Waltham*

*Manchester). This property was owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

- ii. An account of how the Claimant has used and applied the said proceeds of sale.*
- iii. An account of the offers received from the sale of the said properties.*
- iv. An account of all monies paid by the 1<sup>st</sup> Defendant on account of the said loan.*
- v. A set off all money found due to the 1<sup>st</sup> Defendant on the taking of such accounts against any sums found due and owing to the Claimant.*
- vi. An order for the payment by the Claimant of all moneys found due to the 1<sup>st</sup> Defendant on the taking of such accounts.*
- vii. Damages for negligence and/or breach of contract and/or fiduciary duty.*
- viii. Interest pursuant to the Law Reform (Miscellaneous Provision) Act.*

**[4]** At the commencement of the trial, the parties agreed the terms of the Claimant's Notice of Application for Court Orders filed July 16, 2025 for the name COK Sodality Co-operative Credit Union Limited to be substituted for Community and Workers of Jamaica Co-operative Credit Union Limited.

#### **EVIDENCE ON BEHALF OF THE CLAIMANT**

**[5]** Sheldon Gooden was employed to the Credit Union as a Debt Management Operations Supervisor from May 2018 to February 28, 2025. He asserted that on or about September 10, 2010, Mr. Chambers, the primary borrower, entered into a loan facility agreement with the Credit Union for the sum of Ten Million Dollars (\$10,000,000.00) with interest at the rate of sixteen percent (16%) per annum. He stated that the loan was secured by a 1<sup>st</sup> Guarantor's Mortgage executed by the

Defendants on August 25, 2010 over properties located at Lot two (2) Waltham in the parish of Manchester registered at Volume 1405 Folio 375 as well as Lot thirteen (13) Waltham in the parish of Manchester registered at Volume 1405 Folio 380.

**[6]** Mr. Gooden asserted that the loan was also secured by a 2<sup>nd</sup> Guarantor's Mortgage executed by the Defendants on August 25, 2010 over property registered as Lot ten (10) Waltham in the parish of Manchester registered at Volume 1405 Folio 377. He stated that this property was already encumbered by Mortgage No. 146794 registered on April 2, 2007 for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000.00) for a loan received by Mr. Chambers from the Credit Union.

**[7]** He averred that the loan facility was disbursed to Mr. Chambers in two (2) tranches. The first tranche in the sum of Nine Million, One Hundred and Sixty Thousand Dollars (\$9,160,000.00) was disbursed on September 10, 2010 with cheque no. 0197136 in the sum Eight Million, Three Hundred and Sixty-Three Thousand, Nine Hundred Dollars (\$8,363,900.00) made payable to Global Tyres & Auto Services and cheque no. 0197137 in the sum of Seven Hundred and Ninety-Six Thousand, One Hundred Dollars (\$796,100.00) made payable to Al Chambers.

**[8]** He contended that the Defendants defaulted on the loan and as a consequence, the Credit Union exercised its power of sale over Lot ten (10) in or about November 2019 for the purchase price of Two Million, Eight Hundred Thousand Dollars (\$2,800,000.00). He averred that the property was advertised in the Gleaner Newspaper on February 17, March 4, 8 and 9, 2016 as well as on April 16, 2017 and after a number of offers were solicited, the Credit Union accepted the highest offer. During cross-examination, Mr. Gooden agreed with Counsel's suggestion that the Credit Union should have obtained an updated valuation report for the sale of the property which was conducted in 2019 but stated that the Valuation was used to determine the advertised price. He also agreed that the Credit Union's

policy is to obtain a valuation report of no more than two (2) years old before proceeding to sell.

**[9]** Mr. Gooden indicated that the net sale proceeds in the sum of Two Million, Four Hundred and Forty-Nine Thousand, Nine Hundred and Thirty-Three Dollars and Fifty-Eight Cents (\$2,449,933.58) fully liquidated the 3<sup>rd</sup> Defendant's account. However, the 1<sup>st</sup> Defendant's account was only partially liquidated. During cross-examination, Mr. Gooden accepted that the 3<sup>rd</sup> Defendant's account is a separate account from which the proceeds of sale of lot ten (10) was used to settle. He also accepted that there is no mention of the proceeds of sale for lots two (2) and thirteen (13) anywhere in his evidence.

**[10]** He asserted that the Credit Union took all reasonable steps to ensure that it received the best price available on the market and that it exercised its power of sale in good faith. However, during cross-examination, he accepted that there is no mention in his evidence of the steps the Credit Union took to exercise its power of sale. He stated that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were advised of the sale and a formal demand was made for the balance outstanding by letters dated December 20, 2019 and May 26, 2020. He contended that notwithstanding the demands, the Defendants refused or neglected to settle their indebtedness. As at June 24, 2021, the sum of Eleven Million, Eight Hundred and Fifty-One Thousand, Six Hundred and Fifty-Five Dollars and Sixty-Seven Cents (\$11,851,655.67) together with interest remains outstanding.

## **EVIDENCE ON BEHALF OF THE 1<sup>ST</sup> DEFENDANT**

**[11]** Al Chambers was an active volunteer of the Credit Union and served at various levels until he was promoted to Director. Sometime in 2009/2010, he commenced negotiations to secure working capital for his company Global Tyres & Auto Services Limited and approached the Credit Union, however, as the Credit Union's policy did not allow for corporate financing, three (3) loans were negotiated by him

which were guaranteed by properties located in Waltham in the parish of Manchester. The properties located at Lots two (2) and thirteen (13) Waltham, Manchester were jointly owned by Mr. Chambers and his wife Lascynth Chambers, however, property located at Lot ten (10) Waltham was jointly owned by Mr. Chambers and Everett Hyatt.

- [12]** Mr. Chambers asserted that there were three (3) monthly repayments amounts of approximately Ninety-Seven Thousand Dollars (\$97,000.00), One Hundred and Five Thousand Dollars (\$105,000.00) and One Hundred and Sixty-Seven Thousand Dollars (\$167,000.00) to service the loans. He averred that a total of approximately Twenty-Six Million Dollars (\$26,000,000.00) has been paid in servicing the debt between 2010 and 2015 however, there has been continuous discrepancies in the allocation of the monthly payments. He asserted that despite repeated requests for meetings at various levels, the poor management of his loan portfolio remains unresolved which resulted in some loans being overpaid while others fell in arrears and were subjected to heavy interest and penalties.
- [13]** Mr. Chambers averred that, as a board member, he made several efforts to bring settlement to the liabilities and resolve any potential damage to his character. He stated that the then Chief Financial Officer, Mr. Courtney Wynter intervened and requested that a reconciliation be conducted however, the problem returned after Mr. Wynter left the institution. He averred that in 2015, he agreed for the properties being held as security to be liquidated and portions used to settle the loan balance which at that time was approximately Eight Million Three Hundred Thousand Dollars (\$8,300,000.00). He contended that an updated valuation done in 2015 showed that the three (3) properties were valued at Eighteen Million Dollars (\$18,000,000.00) and any sale could have covered the sum outstanding with an excess of approximately Seven Million Dollars (\$7,000,000.00) being returned to him.

- [14] He contended that the Credit Union depleted his shares, savings and deposits held in separate accounts including those of his daughter's personal account that were in the custody of the Credit Union. He further contended that the Credit Union sold the three (3) properties far below market value and the allocation of sale proceeds for Lot ten (10) was incorrectly posted which resulted in greater hardship in terms of interest, fines and penalty.
- [15] He asserted that the negligent and reckless execution of the monthly loan repayment instalments led to inaccurate allocation of payments resulting in delays, missed payments and sums being routed and held as unreconciled amounts. He contends that the Credit Union failed to obtain the true market value of the properties and failed to obtain the best price for the properties.
- [16] During cross-examination, Mr. Chambers accepted Counsel's suggestion that he received the full disbursement of Ten Million Dollars (\$10,000,000.00) from the Credit Union. He also accepted that there is no evidence before the court challenging the Credit Union on any misallocation of funds and he accepted the suggestion that he agreed for the properties to be sold to liquidate his debt. He acknowledged Counsel's assertion that payments were applied to his account based on the member activity report shown to him however, indicated that since there is no indication what the sums represents, he could not confirm payments.

#### **SUBMISSIONS ON BEHALF OF THE CLAIMANT**

- [17] Counsel for the Claimant, Ms. Stephanie Williams, submitted that the Court should find that the Credit Union disbursed the full loan sum of Ten Million Dollars (\$10,000,000.00) to Mr. Chambers and his assertion that the full loan was not disbursed is not supported by evidence. She argued that no evidence has been led or adduced that the loan was repaid in full. She pointed out that though Mr. Chambers was required to make a monthly payment of One Hundred and Sixty-One Thousand Five Hundred and Fifty-Seven Dollars and Eight Cents

(\$161,557.08), he missed several monthly payments and the fact of his arrears is supported by the letter dated December 2, 2014 wherein he admitted his indebtedness and expressed gratitude for the Claimant's willingness to grant him six (6) months to regularize the loan. She argued that if a misapplication or misallocation of funds was a live issue, it would have been raised in the correspondence that dealt directly with default in payments.

- [18] Counsel submitted that the member activity report tendered at exhibit 41 details all payments made, all amounts owing on the loan as well as the proceeds of sale after the application of fees from the sale of Lots two (2) and thirteen (13). Counsel referred the Court to Clause (ae) of the loan agreement which grants the Claimant absolute discretion to apply payments and proceeds from securities to account for indebtedness in such sequence, priority and order as the Credit Union may in its absolute discretion determine.
- [19] Counsel asserted that it is not in dispute that the properties were sold below the market value and the forced sale value at the time of the sale, nevertheless she argued that the Claimant exercised its power of sale in good faith and took all reasonable steps to obtain the best price in the circumstances. Counsel urged upon the Court the Unreported Supreme Court Judgment in **Bank of Nova Scotia v Rosegreen and Ors** Claim No. C.L. 1998/B240 delivered on November 10, 2008, which explained that the onus is on the mortgagee to show on a balance of probabilities that the sale was bona fide, that precautions were taken to obtain the best price reasonably obtainable and that reasonable steps were taken to obtain the best price in the circumstances.
- [20] Ms. Williams pointed the Court to **Rudolph Daley v RBTT Bank (Jamaica) Limited**, Unreported Supreme Court, Jamaica Claim No. 1995/D162 delivered on January 30, 2007 where Sykes J. (as he then was) at paragraph 51 stated:

*“A prudent person would always seek the best possible price at the time the power was being exercised. Proof that an attempt was made to have the best possible price at the time was often evidenced by (i) getting a current valuation if there is a sale by private treaty; (ii) advertise the property properly; (iii) seeing to it that the property is accurately described in the advertisement and (iv) where appropriate a properly conducted auction. This is by no means an exhaustive list and neither do they all apply at the same time in each case but it captures, in my view, what the case law regards as important benchmarks against which any purported sale by the mortgagee is measured...”*

[21] She also relied on **Anthony Johnson and Arlene Johnson v Jamaica National Building Society** [2017] JMSC Civ 25 where Lindo J reasoned that a mortgagee owes a duty of diligence in respect of the price for which the mortgaged property is sold and should take reasonable precautions to obtain a proper and reasonable price for the mortgaged property at the time of the sale.

[22] Counsel submitted that the Claimant exercised its power of sale in good faith. She contended that the Claimant obtained valuation reports for Lots two (2), ten (10) and thirteen (13) from Thomas Forbes and Associates Limited on June 10, 2015 which provided the value of the lots prior to the sale. She asserted that the subject properties were subjected to public auction on March 9, 2016 and were unsuccessful and that the properties were advertised in the Gleaner for a period of a year and the Claimant accepted the highest offers obtained in the circumstances. She contended that there is no evidence that the sale was tainted by dishonesty or impropriety or that the Claimant exercised its power of sale other than for a legitimate purpose. Counsel urged upon the Court the authority of **Paulette Francis v Bank of Nova Scotia Jamaica Limited** [2023] JMCC Comm 8 where Brown-Beckford J. affirmed that the focus should not be on the value alone but on the sale in the circumstances as a whole. Therefore, the failure to obtain a current valuation at the time of the sale of the property does not signify bad faith.

[23] Ms. Williams submitted that the 1<sup>st</sup> Defendant’s Defence and Counterclaim should fail. However, if the Court finds that the Claimant failed to exercise its power of

sale in good faith, she submitted that the proper course is for 1<sup>st</sup> Defendant to be awarded the difference between the market price at the time of sale and the sale price.

## **SUBMISSIONS ON BEHALF OF THE DEFENDANT**

- [24] Ms. Houston Thompson on behalf of the Defendant accepted that there is no dispute that the 1<sup>st</sup> Defendant executed a Promissory Note in favour of the Claimant for the sum of Ten Million Dollars (\$10,000,000.00) with interest and used several parcels of land in Waltham, Manchester to secure the loan and that Mr. Chambers is indebted to the Claimant. However, she contends that the Claimant failed to act in good faith and irresponsibly managed the 1<sup>st</sup> Defendant's loan account to his detriment.
- [25] She also contends that the Claimant was negligent in the management of the 1<sup>st</sup> Defendant's loan account. Counsel stated that between 2010 and 2015, the 1<sup>st</sup> Defendant made numerous regular payments totalling approximately Twenty-Six Million Dollars (\$26,000,000.00) across the three (3) loan accounts however, the Claimant has failed to disclose proof of records or balances despite repeated requests for statement of account and a reconciliation of his account.
- [26] Counsel submitted that the Claimant failed to provide proper notice to the mortgagor before exercising the power of sale or give the borrower an opportunity to remedy the default in contravention with Section 106 of the Registration of Titles Act (ROTA). She argued that the only notice provided to the 1<sup>st</sup> Defendant was in 2019 after the properties were sold. She contends that the 1<sup>st</sup> Defendant disputes that the process was properly followed and maintain that the 1<sup>st</sup> Defendant was not afforded transparency. She further contended that the failure to provide notice of the demand sum is detrimental to the Claimant's claim as the provision of a notice is a mandatory obligation before the power of sale becomes exercisable. She argued that the imposition of fees, penalties and interest are based on

inaccurate balances caused by the mismanagement of the account and the 1<sup>st</sup> Defendant should not have been penalized for arrears caused by the Claimant's administrative failures.

- [27] Counsel submitted that the law imposes a duty on mortgagees to exercise the power of sale in good faith and in a business like and prudent manner, having due regard to the mortgagor's interest in the surplus proceeds of sale. She also referred the Court to the **Anthony Johnson v Jamaica National Building Society** case arguing that it confirms that while a mortgagee is not a fiduciary, they must take reasonable precautions to secure a proper price. Counsel argued that courts have consistently held that proof of good faith requires more than mere assertions, it must be shown by concrete actions such as obtaining a current valuation, conducting a properly advertised public auction or private treaty sale, and transparently managing the process.
- [28] Ms. Thompson contended that though a mortgagee is not a trustee of the power of sale for the mortgagor, he must act in good faith and with reasonable care. She referred the Court the seminal English case of **Cuckmere Brick Co. Ltd v Mutual Finance Ltd** [1971] EWCA Civ 9 where the court confirmed that while a mortgagee is not obliged to act for the mortgagor's benefit, he must not act dishonestly or recklessly, and is under a duty to take reasonable precautions to obtain the true market value of the property at the time of sale.
- [29] Counsel cited **Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** [2020] JMSC COMM 34 and also referred to **Rudolph Daley v RBTT Bank (Jamaica) Ltd** which provide guidance to mortgagees on the exercise of their power of sale. Ms. Thompson asked the Court to find that this sale was conducted in bad faith with no evidence that the Claimant followed the proper procedures required under Section 106 of the ROTA. She argued that the Claimant failed to demonstrate that it took reasonable steps to secure the best possible price in the circumstances and that though advertisements were placed in the Gleaner

newspaper in 2016 and 2017, the sale occurred more than two (2) years later in 2019, with no updated valuation or any evidence of renewed marketing or advertising efforts prior to the final sale.

[30] Counsel contends that the 1<sup>st</sup> Defendant was not provided with the procedure of the sale, how offers were solicited, how the final purchaser was selected, or whether the auction, if any, was properly conducted. He was not provided with copies of offers received, details of advertising, or a breakdown of how the proceeds were applied, though he made repeated requests for same. She contended that the lack of updated valuations, the long gap between advertisements and sale, and the absence of documentation of the sale process, all support an inference that the Claimant did not act prudently or in good faith. Counsel quoted Vice Chancellor Knight Bruce in **Matthie v Edwards** 63 E.R. 817, who noted that the mortgagee is not to “throw away the property” but to act with due diligence to obtain as fair a price as reasonably possible.

[31] She submitted that the Claimant has failed to discharge their burden that they sold the property in good faith, and the evidence suggests that the power of sale was exercised in a manner that was arbitrary, lacking in procedural safeguards, and ultimately unfair to the mortgagor. Counsel argued that the Claimant mishandled the loan repayment process, failed to account for profits and ultimately sold the mortgaged property at a gross undervalue which has satisfied the requirements of a claim for unjust enrichment. She referred the Court to the decision in **Claudette White v Cyril Mullings and Eldred Mullings** [2017] JMSC Civ 111 where Fraser J speaks to the relationship between restitution and unjust enrichment, noting that a key prerequisite for granting restitution is that the benefit received by the defendant must be shown to be unjust.

[32] Counsel submitted that the 1<sup>st</sup> Defendant is entitled to damages representing the difference in the market value of the property and the sale price. She further asserted that he should not be required to pay interest on the property beyond the

date of sale. She relied on the reasoning in **Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** to support of her position. Alternatively, should the court accept that monies were owed to the Claimant in the amounts as pleaded, the subsequent sale of the properties, if exercised in good faith would have sufficiently covered any outstanding loan balance alleged by the Claimant.

## **ISSUES**

**[33]** The issues for the Court to consider are:

- i) Whether the Claimant disbursed the full loan amount of Ten Million Dollars (\$10,000,000.00)
- ii) Whether the 1<sup>st</sup> Defendant is indebted to the Claimant, and if so in what sum;
- iii) Whether the Claimant failed to act in good faith and/or was negligent in the exercise of its power of sale and/or was negligent in its exercise of the power of sale.

## **DISCUSSION**

### **Whether the Claimant disbursed the full loan amount of Ten Million Dollars (\$10,000,000.00)**

**[34]** There is no dispute that the 1<sup>st</sup> Defendant executed the Promissory Note dated September 10, 2010 and obtained a loan from the Credit Union. It is not contested that based on this loan facility agreement, that the 1<sup>st</sup> Defendant agreed to borrow the sum of Ten Million Dollars (\$10,000,000.00) with interest at a rate of sixteen percent (16%) per annum. According to the Claimant, the full sum of Ten Million Dollars (\$10,000,000.00) was disbursed to the 1<sup>st</sup> Defendant. However, the 1<sup>st</sup> Defendant asserted in his Defence that only the sum of Eight Million, Three Hundred and Sixty-Three Thousand, Nine Hundred Dollars (\$8,363,900.00) was disbursed.

[35] In the evidence, Mr. Chambers outlined that the loan portfolio in 2010 was approximately Twelve Million Dollars (\$12,000,000.00) of which Two Million Dollars (\$2,000,000.00) was never disbursed. However, during cross-examination Mr. Chambers accepted that cheques for Eight Million, Three Hundred and Sixty-Three Thousand, Nine Hundred Dollars (\$8,363,900.00) and Eight Hundred and Forty Thousand Dollars (\$840,000.00) were disbursed. When asked if a third cheque of Seven Hundred and Ninety-Six Thousand, One Hundred Dollars (\$796,100.00) was disbursed, he at first responded that he doesn't recall that cheque, but when shown a National Commercial Bank cheque in the said sum, he agreed that it was issued to his loan account.

[36] He thereafter accepted that the full sum was disbursed. I therefore find as a fact that the Claimant disbursed the full sum of Ten Million Dollars (\$10,000,000.00) to the Defendants.

**Whether the 1<sup>st</sup> Defendant is indebted to the Claimant and if so in what sum**

[37] The Claimant's position is that the principal sum outstanding after the sale of Lot ten (10) amounted Three Million, Six Hundred and Twenty-Four Thousand One Hundred and Forty-Five Dollars and Thirty-Two Cents (\$3,624,145.32) and when interest is applied at the rate of sixteen percent (16%), to the principal sum, it results in the outstanding sum of Eleven Million, Eight Hundred and Fifty-One Thousand, Six Hundred and Fifty-Five Dollars and Sixty-Seven Cents (\$11,851,655.67). The 1<sup>st</sup> Defendant has accepted that his loan was in arrears, however, he asserted that the Claimant incorrectly allocated his monthly payments resulting in incorrect interests, penalty and fines being applied to his loan.

[38] Mr. Chambers insisted that he has consistently serviced the loans and has paid approximately Twenty-Six Million Dollars (\$26,000,000.00) between 2010 and 2015 but that there have been continuous discrepancies in the allocation of the

monthly payments. He has asked for an order for an accounting to be done of all the money he paid on account of the loan.

- [39]** On behalf of the Claimant, a Member Activity Report and a Statement of Account were tendered into evidence. Mr. Gordon gave evidence about the Member Activity Report pointing out that it assists in ascertaining the amounts owed on the loan and reflects all payments on the account, interest and balance but that it does not capture the fees. The Claimant also tendered into evidence a letter dated December 2, 2014 in which Mr. Chambers admitted that he was in debt and expressed gratitude for the Claimant giving him six (6) months to regularize his account. Mr. Chambers did not deny the sending this letter.
- [40]** The Defendant has not presented any evidence to contradict the contents of the Member Activity Report or Statement of Account. Although Mr. Chambers made assertions of incorrect calculation, he has failed to provide what he says is a correct calculation from a credible source as to what he owes. Since Mr. Chambers' contention is that it is not accurate, the burden would be on him to show through evidence from an accountant or similar professional, the basis on which he says it is not accurate. He could have gotten an accountant's report indicating how this Twenty-Six Million Dollars (\$26,000,000.00) that he said was paid should have been allocated and whether taking into account any interest, penalties and cost it satisfies his indebtedness. He has failed to do this.
- [41]** The question regarding the exact sum that is owed to date will be dependent on the view I take of the manner in which the power of sale was exercised and the apportionment of the funds following the power of sale which are issues raised in the 1<sup>st</sup> Defendant's Defence and Counterclaim.

**Whether the Claimant failed to act in good faith and/or was negligent in the exercise of its power of sale**

[42] In the Counterclaim, Mr. Chambers claims an account of the sums realised from the sale of the properties and an account of how the Claimant used and applied the said proceeds of the sale. He has also sought an account of the offers received from the sale of the properties, a set off of money found due to him and an order that all such sums be paid to him.

[43] He has averred that the Claimant was negligent in its exercise of the power of sale over his properties, in that it failed to advertise or otherwise market the properties to get the best price for same, sold the secured properties below market value and failed to adhere to the provisions of the ROTA in the exercise of its powers of sale.

[44] Section 106 of the ROTA gives a mortgagee power of sale over a property where the mortgagor has defaulted in making payments. There is no doubt that at the time the Claimant decided to exercise its power of sale over the properties that the 1<sup>st</sup> Defendant was indebted to the Claimant. The 1<sup>st</sup> Defendant had been in default for a long period of time and so the Claimant was well within its right to exercise the power of sale. The Claimant would have been entitled to act in its own interest to recover the debt owed. The question is whether the Claimant exercised the power of sale in good faith or whether it was negligent in the exercise.

[45] Section 106 of the ROTA provides:

*“If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit...”*

[46] The application of section 106 has been seen in a number of cases in the Supreme Court and Court of Appeal. The Supreme Court decision of **Rudolph Daley v RBTT Bank** relied on by both parties is instructive. One of the main issues the Court addressed was what is the nature of the duty imposed on the mortgagee who exercises his power of sale. After an examination of several authorities dealing with the mortgagee's duty, Sykes J (as he then was) summarized the position as follows at paragraph 50 and 51 of the judgment:

*"[50] The cases show that there is one duty on the mortgagee. The duty is to act fairly, properly and prudently in all the circumstances of the case in order to secure the best possible price....The solution was that the mortgagee had to act in a business-like manner when exercising the power of sale...."*

*"[51] A prudent person would always seek the best possible price at the time the power was being exercised. Proof that an attempt was made to have the best possible price at the time was often evidenced by (i) getting a current valuation if there is a sale by private treaty (ii) advertise the property properly (iii) seeing to it that the property is accurately described in the advertisement (iv) where appropriate a properly conducted auction. This is by no means an exhaustive list and neither do they all apply at the same time in each case, but it captures in my view, what the case law regards as important bench marks against which any purported sale by a mortgagee is measured."*

[47] Sykes J. (as he then was) in arriving at his decision placed emphasis on the bank's failure to properly describe the property. He found the description provided to be grossly inaccurate, which led persons to believe that the property was worth less than the real value. That coupled with the fact that there was no current valuation cemented the decision he arrived at which is set out as paragraph 86 of the judgment as follows:

*"The bank failed in its duty to act as a mortgagee should, when exercising the power of sale. The absence of a current valuation in the context of sale by private treaty is powerful evidence that the bank failed to take reasonable precaution to obtain the true market"*

*value of the mortgaged property at the date on which he decides to sell (per Cooke J.A. in Jobson at paragraph 14)."*

[48] In proving the proper exercise of the power of sale, it is the mortgagee that bears the burden. This is succinctly stated in the case of **Bank of Nova Scotia v Rosegreen and Ors** relied on by the Claimant. Jones J considered the question of whether the Claimant properly exercised its power of sale under the mortgage when it sold the Defendant's property by private treaty and made it clear at paragraph 49 of the Judgment that the onus is on a mortgagee to show on a balance that the sale was bona fide and that precautions were taken to obtain the best price reasonably obtainable.

[49] Jones J highlighted at paragraph 54:

*"The issue raised by the first Defendant is whether the Claimant properly exercised its power of sale. In addition to statute, the common law has outlined the duty of care of a mortgagee as it relates to the exercise of its power of sale. Most of the cases in this area have concentrated on fair price, valuation and proper advertising, to determine whether the power of sale is properly exercised."*

[50] He also emphasized at paragraph 55 that *"A mortgagee is a trustee of the proceeds of sale, but he is not a trustee of the power of sale, which he is entitled to exercise in his own interest."* The Court took into account the evidence that there was firstly a public auction at which there was no bidding, following which the Claimant bank listed the property for sale by private treaty with a number of realtors. A valuation report was done in 2001 which valued the property at Sixteen Million Dollars (\$16,000,000.00) with a forced sale value of Twelve Million Dollars (\$12,000,000.00). The property was sold for Eleven Million Dollars (\$11,000,000.00) which was One Million Dollars (\$1,000,000.00) less than the forced sale price. Although the court commented that the valuation report cannot be considered to be current, this by itself was not evidence of an undervalue and

in the circumstances, including that the Claimant acted in a reasonable manner in trying to obtain the best price possible, the court found that the Claimant had fulfilled its duty of care.

[51] Similarly, in the **Anthony Johnson** case Lindo J found that a valuation done at about the same time the agreement for sale was being contemplated is in keeping with the evidence of Ms. Campbell that where there is an older valuation, another one would be commissioned. The price sold in that case was higher than the forced sale value and within the range of the market value. Lindo J found that the mortgagee took reasonable steps to secure a purchaser at the best price possible in the circumstances and cannot be said to have acted unreasonably or to have acted in breach of its duty to take reasonable care to get the best available price at the time of sale.

[52] It is my view that the valuation report is important for the purposes of determining whether the property was being sold at a reasonable price at the time. This is a useful meter in deciding the seminal question of whether the exercise of the power of sale was done in good faith. The question of good faith was discussed in the case of **Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** cited on behalf of the Defendants. In that case the court found that the failure to secure a current valuation report demonstrated that the bank did not act reasonable and with good faith.

[53] In the **Paulette Francis** case, relied on by the Claimant, Brown-Beckford J. underscored the importance of reliance on a current valuation. She commented on the finding of the Court in the **Bruce James** case, that by failing to obtain a current valuation report the mortgagee failed to ensure that the best possible price could be obtained and as such did not act reasonable. Her comment was that it is not in every circumstance where there is no current valuation that the mortgagee would have failed in its duty, emphasizing the fact that the focus should not only be on the valuation.

[54] When all these cases are taken into account and considering the dicta of Brown-Beckford J. in the **Paulette Francis** case that the mortgagee is not a trustee of the power of sale, can it then be said that the Claimant in these circumstances acted in good faith. Brown-Beckford J. went on to accord recognition to what she referred to as the overarching duty of good faith whilst noting that the mortgagee is not a trustee of the power of sale and as such can act in its own interest.

[55] Therefore, the mortgagee is not obliged to take actions to increase the value of the property or delay the sale of the property in the hope that the market will improve. If the mortgagee is found to have acted in good faith and takes reasonable steps to secure the best price, then they would have satisfied their duty. Therefore, the fact that the property could have been sold at a higher price does not mean, without more, that the duty has been breached.

[56] In describing what is meant by the duty of good faith Brown-Beckford J extrapolates at paragraph 44 of the judgment that:

*“A breach of the duty of good faith may arise where the sale of the property was tainted with some element of dishonesty or impropriety or based on the circumstances of a particular case.”*

[57] The cases relied on demonstrate the many components that ought to be considered in order to determine whether the power of sale was properly exercised, with the sale price being simply one of those components.

[58] The clear evidence in this case is that all three (3) lots were sold well below the market value and the forced sale value. The fact that the properties were sold below market value does not, in and of itself, demonstrate evidence of negligence or a lack of good faith in the exercise of the powers of sale. In considering the question of good faith, although there’s no evidence that the sale was tainted with dishonesty or impropriety on the part of the Claimant or any illegitimate purpose

that is not the end of the matter, the court still has to consider the circumstances of the sale in order to determine whether the mortgagee exercised reasonable care to sell the property for the best price obtainable.

**[59]** On the question of Notice to the Defendants, Mr. Chambers accepted in cross-examination that he received Notice that he was in default from in or around 2015 and that the Claimant intended to exercise its power of sale. This Notice was sufficient.

**[60]** It is therefore necessary to examine the evidence surrounding the exercise of the power of sale of the three (3) properties in the context of the sufficiency of advertisements and the valuation reports. Mr. Gordon's evidence is that the subject properties were advertised on the 17<sup>th</sup> February 2016, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, March 2016 and the 16<sup>th</sup> April 2017 however, the Claimant did not provide actual proof of all the advertisements. What was provided was a tax invoice from Breakenridge and Associates, a firm of surveyors and licenced real estate dealers who Mr. Gordon says was asked to auction the properties. The invoice refers to auctions held on March 9, 2016 for all three (3) properties. The invoice also refers to newspaper advertisements – four (4) insertions- Feb 17, Mar 4, 8, 9, 2016. Presumably, these advertisements were in respect of the auction only.

**[61]** There is no indication from this what were the descriptions accorded to these properties so as to be able to examine the description. This would have been important taking into account the requirement for the property to be accurately described in the advertisement. Without the actual advertisement, the Claimant has failed to demonstrate accurate description.

**[62]** There is also no auction report indicating whether any bids were made and the amount of any bid. There remains no evidence that this auction was properly conducted. Suffice it to say, the properties were not sold at auction, and the

Claimant thereafter advertised the property on the open market. This is evidenced by the advertisement which was tendered into evidence.

**[63]** The sole advertisement that was tendered into evidence was a Gleaner advertisement dated April 16, 2017. It described all three (3) properties with Lot two (2) being advertised for Three Million Dollars (\$3,000,000.00), Lot ten (10) being advertised for Two Million Seven Hundred Thousand Dollars (\$2,700,000.00) but in respect of Lot thirteen (13), the advertised price was not shown on the advertisement. The description given to them, though not detailed was accurate and would suffice

**[64]** In fact, the witness spoke only of one (1) property being sold, presumably Lot thirteen (13). Although Mr. Gordon says the Claimant took all reasonable steps to ensure it received the best available price on the market and speaks to the Claimant soliciting a number of offers, he does not provide any proof of this. In fact, when taxed in cross-examination he accepted that the properties were advertised for less than the forced sale value.

**[65]** In considering the sufficiency of the advertisements, the Claimant failed to provide any proof of the previous advertisements. The tax invoices are not proof of advertisements as they do not reflect the particulars of the advertisement and the required accurate description. This would have been crucial particularly because Mr. Gordon's employment with the Claimant company commenced well after 2014, in August 2016 so he has no personal knowledge of this. There is no proof that the properties were ever advertised at market value. It is the Claimant who has the burden of proof, and they have failed to prove the averments they made to my satisfaction.

**[66]** It was asserted on behalf of the Claimant that it took all reasonable steps to ensure that it received the best price available on the market. Mr. Gordon's evidence in support of this assertion was that the Claimant solicited a number of offers and

accepted the highest offer obtainable in the circumstances. However, no details were provided as to when this took place and the nature of the offers made. In the evidence in chief there was no reference to any valuation report being taken into account in securing the best price. The properties were advertised for less than the forced sale value. There was no evidence of any renewed marketing or advertising done with sufficient proximity to the time of sale of the properties.

**[67]** In cross-examination, Mr. Gordon was asked questions in relation to the role that the valuation reports played in the Claimant's exercise of its power of sale. He agreed that at the time of sale of Lot thirteen (13) there was no updated valuation. The most recent valuation was that dated September 24, 2015 in respect of all three (3) properties and the offer to purchase Lot two (2) was made on May 18, 2017 and that for Lot ten (10) was made on July 21, 2017 almost two (2) years post the valuation report.

**[68]** Mr. Gordon testified that the credit union's policy was not to sell a property without a valuation of no more than two (2) years old. Despite that policy, the Claimant went ahead and sold Lot thirteen (13) with a valuation report of forty-four (44) months and at a price less than the forced sale value. So too in relation to Lot ten (10) the valuation report was twenty-six (26) months old. Lot two (2) was however twenty (20) months. Mr. Gordon sought to explain that internally, there was a policy in place that they would advertise properties at their market value. If the property fails to sell within a defined period, they would then implement a discount and that discount would range as high as forty percent (40%) of the value of the property but it would have to be at least a year from the original advertisement date before they would go that far so they would reduce the asking price as they progress further and so with these properties listed from as far back as 2014 a full maximum discount would have been applied.

**[69]** The Claimant has not provided any credible evidence that the property was listed for at least a year so as to generate the forty percent (40%) discount. This is

compounded by the failure to provide evidence of proper advertisements for the auction and thereafter, there was only one advertisement. The Claimant has not proved its assertion that the properties were advertised for any appropriate length of time.

**[70]** Although the sale of the property at an undervalue in and of itself would not have been sufficient to show a lack of good faith, that coupled with the failure to prove proper advertisement amounts to evidence of a lack of good faith. I am also satisfied on a balance of probabilities that the Claimant breached its duty to take proper care to secure the best price for the properties and so was negligent in its exercise of the power of sale. Therefore, the Counterclaim succeeds. The Claimant has therefore failed to prove that the 1<sup>st</sup> Defendant is indebted to it in the sum claimed in the Particulars of Claim.

## **DISPOSITION**

**[71]** The 1<sup>st</sup> Defendant/Counter Claimant would therefore be entitled to an account of how the Claimant has used and applied the said proceeds of sale and a set off of all moneys found due to the 1<sup>st</sup> Defendant on the taking of such accounts against all sums found due and owing to the Claimant. The Claimant had attempted to provide an account of how the money was factored into the outstanding debt by way of the Member Activity Report. The 1<sup>st</sup> Defendant has not successfully challenged the report, however, it is clear to me that a more detailed report would have better aided the Court in arriving at more precise figures. However, the court has placed reliance on the Member Activity Report in arriving at its findings so I do not know that any useful purpose would be served by ordering that the Claimant provide the accounts at this time, as requested in the Counterclaim. I will refrain from making an order in respect of the accounts.

**[72]** On December 17, 2025, I delivered an oral judgment in the matter setting out my findings in respect of liability and sought the assistance of both counsel in the

computation of actual figures. I explained that since the properties were sold at different times the better approach was to do the set aside at the time of sale of each property as opposed to the point in time when all three (3) properties were sold. I asked them to agree the sums that were outstanding at the end of each sale and provide me with these figures. Counsel were not able to agree and so were asked to file their own submissions in this regard which they did and which I have taken into account.

**[73]** In summary, on behalf of the Claimant it was argued that the Court should assess the sum due to the 1<sup>st</sup> Defendant on his Counterclaim as the difference between the forced sale value of the properties at the time of sale and then set off the total amount from the amount currently due on the Claimant's claim.

**[74]** Counsel for the Claimant also sought to remind the Court that it is not the entire sale price that is applied to the delinquent account but rather the sum after deductions. It would certainly have been open to the Claimant to provide proof of any deductions or an estimate or percentage that the court could use. They have failed to do this leaving the court with no estimate or guide as to what the deductions would be. In any event, the calculation of damages is not being done by way of special damages where a precise figure is required but rather as general damages.

**[75]** On behalf of the 1<sup>st</sup> Defendant, it was emphasized that the cases have said that in determining the measure of damages, the court should use the difference between the true market value at the date of sale and the actual price obtained by the mortgagee. Counsel contended that the measure of damages is the difference between market value and the sale price when the power of sale was exercised. Counsel calculated this difference to be a total of Eight Million, Seven Hundred Thousand Dollars (\$8,700,000.00) and submitted that this sum should be awarded to the 1<sup>st</sup> Defendant. Counsel for the 1<sup>st</sup> Defendant further contended that there should be no set off as the Claimant failed to indicate the amount of debt at the

time of the first sale for the court to assess whether the market value at the time would have been sufficient to extinguish the debt.

- [76] In further submissions, the Claimant urged the Court to adopt their view of the correct calculation which sets out the principal sum as at November 27, 2017 as Nine Million, One Hundred and Eleven Thousand, Nine Hundred and Forty-Eight Dollars and Sixty-One Cents (\$9,116,948.61) and the interest as Six Million, Four Hundred and Thirty-Four Thousand, Six Hundred and Ten Dollars and Fifty-Five Cents (\$6,434,610.55) and thereafter applied the forced sale value after each case plus interest accruing between each sale to arrive at a figure of Three Million and Fifty-Four Thousand, Eight Hundred and Sixty-Three Dollars and Twenty-Five Cents (\$3,054,863.25) as being outstanding and due to the Claimant plus interest.
- [77] On behalf of the 1<sup>st</sup> Defendant, it was emphasized that the cases have said that in determining the measure of damages, the court should use the difference between the true market value at the date of sale and the actual price obtained by the mortgagee. Counsel contended that the measure of damages is the difference between the market value and the sale price when the power of sale was exercised. Counsel calculated this difference to be a total of Eight Million, Seven Hundred Thousand Dollars (\$8,700,000.00) and submitted that this sum should be awarded to the 1<sup>st</sup> Defendant. Counsel for the 1<sup>st</sup> Defendant further contended that there should be no set off as the Claimant failed to indicate the amount of debt owing at the time of the first sale for the court to assess whether the market value at the time would have been sufficient to extinguish the debt.
- [78] In response to the Claimant's submissions on the method of calculation, counsel for the 1<sup>st</sup> Defendant contended that there should be no additional interest after the sale. Reliance was again placed on the **Bruce James v JMMB** case in which the Court ordered that the mortgagor was not to be charged interest as it was the mortgagee's failure to act prudently to obtain the optimum sale prices and so the mortgagor should not be required to pay interest on the sum owed beyond the date

of sale. The Trinidadian case of **Alpras Investments Ltd v National Commercial Bank of Trinidad and Tobago Ltd** (1992) High Court Trinidad and Tobago No 2389 of 1991 (unreported) reflected a similar position in the dicta of Mr Justice Wills who affirmed that:

*‘on the completion of the sale, interest ceases to run against the mortgagor.’*

[79] The general principle set out in the **Rudolph Daley v RBTT Bank and Bruce James v JMMB** cases remains applicable. Sykes J (as he then was) in the **Rudolph Daley** case set out how the remedy ought to be determined at paragraphs 86 and 87 of the judgment as follows:

*“86. The bank failed in its duty to act as a mortgagee should, when exercising the power of sale. The absence of a current valuation in the context of sale by private treaty is powerful evidence that the bank failed to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell (per Cooke J. A. in Jobson at paragraph 14).*

*87. In deciding on the remedy in this case, I had erred during my oral judgment when I awarded damages and also setting aside the sale to Harley Corporation. Mr. Kelman, Miss Smith and Mr. Batts, indicated, quite politely, that it was not usual for the court to award both. The rationale, was that if the sale was set aside then the mortgagor would have his equity of redemption restored to him but if the sale was not then he received the difference between the market value and the sale price at the time when the power of sale was exercised.*

[80] This was the principle followed by Palmer Hamilton in the **Bruce James v JMMB** case where at paragraph 72 she set out the law:

*“[72] It is settled law where a sale was set aside then the mortgagor would have his equity of redemption restored to him. Conversely, where the sale was not set aside then the mortgagor would receive the difference between market value and the sale price at the time when the power of sale was exercised.”*

- [81]** I do not find favour with the submissions advanced by the Claimant with respect to the computation. Firstly, in the cases relied on, it is the difference between the market value and the sale price that they mention and not the difference between the forced sale value. Secondly, the principle to be extracted from the cases is that the measure of damages must be calculated as at the time of sale.
- [82]** All three (3) properties have been sold to third parties in respect of whom there is no allegation that they were not bona fide purchasers for value. There is no question then regarding setting aside these sales. Therefore, the measure of damages should be arrived at by ascertaining the difference between the market value at the time of sale and the actual sale price.
- [83]** I do not find merit in the 1<sup>st</sup> Defendant’s submission that there should be no set aside as against the balance due to the Claimant. If there is no set aside, then the 1<sup>st</sup> Defendant would not have satisfied the extent of the debt that he incurred. How then should this set aside be done? Counsel for the Claimant’s suggestion to set-off the total amount of the difference from the amount currently due on the Claimant’s claim would be a flawed approach as the court would be using the sum currently due to the Claimant after the interest over the years has been added to it and using the sum due to the 1<sup>st</sup> Defendant at the time of sale. There must be equality of the positions. In the same way that the measure of damages is to be calculated at the time of sale, I am of the view that any set-off should be done taking into account what was owed to the Claimant at the time the sales were completed.

[84] On the question of interest continuing to accrue, although the Claimant is now advancing that this should continue to accrue after each sale, when the Member Activity Report prepared on behalf of the Claimant is examined, the addition of interest ceased after the end of the first sale. The last interest sum added to the balance was on November 27, 2014. This accords with the submissions advanced on behalf of the 1<sup>st</sup> Defendant that no interest should accrue after completion of the sale. I find merit in this submission. It is supported by the authorities of **Bruce James v JMMB**.

[85] In both the **Rudolph Daley v RBTT Bank** and **Bruce James v JMMB** cases, only one (1) property was in question. In this case there are three (3) properties and so they did not have to consider the question of when to do the calculation. It had been my view that the correct approach would be to do the calculation at the date of each sale rather than at the end of the sale of all three (3) properties, however, counsel for the Claimant pointed out that if this method was approached, the costs and sums previously deducted would not be taken into account. I am therefore of the view that the simplest method of calculation is to use the method utilized in the cases relied on.

[86] I am prepared to make an award which reflects the difference between the market price at the time of sale and the sale price which has been accepted to be as follows:

<b>Lots</b>	<b>Market Value</b>	<b>Sale Price</b>	<b>Difference</b>
<b>Lot 2</b>	<b>\$6,000,000.00</b>	<b>\$3,000,000.00</b>	<b>\$3,000,000.00</b>
<b>Lot 13</b>	<b>\$6,000,000.00</b>	<b>\$3,000,000.00</b>	<b>\$3,000,000.00</b>
<b>Lot 10</b>	<b>\$5,500,000.00</b>	<b>\$2,800,000.00</b>	<b>\$2,700,000.00</b>
<b>Total</b>			<b>\$8,700,000.00</b>

**[87]** The 1<sup>st</sup> Defendant also sought additional for Negligence, however in light of my finding that he is entitled to the set off, I am not prepared to award any additional sum for Negligence.

**[88]** My Orders are as follows:

1. Judgment on the Claim is for the Claimant in the sum of \$10,058,755.55
2. Judgment on the Counterclaim is for the Counterclaimant/1<sup>st</sup> Defendant in the sum of \$8,700,000.00
3. The 1<sup>st</sup> Defendant/Counterclaimant is entitled to set off the sum of \$8,700,000.00 as against the sum owing to the Claimant. Interest on the balance at 6% per annum from today to the date of payment.
4. Each party to bear its own costs.

.....  
Stephane Jackson-Haisley  
Puisne Judge