COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2017/CLE/gen/FP/00019
BETWEEN

CATERPILLER FINANCIAL SERVICES CORPORATION
Plaintiff

AND

GARET O. FINLAYSON
First Defendant

AND

MARK FINLAYSON
Second Defendant

AND

KURC LIMITED
Third Party

BEFORE:	The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES:	Mrs. Karen Brown for the Plaintiff
	Ms. Judith Smith for the Defendants
TRIAL DATES:	February 28, September 25, December 10, 2020 and March 23, 2021
WRITTEN SUBMISSIONS:	Plaintiff's Closing Submissions dated July 27, 2021
	Defendants' Closing Submissions submitted in July, 2021.

JUDGMENT

Hanna-Adderley, J

Introduction

1. This is an action resulting from an alleged breach of a loan agreement between the Plaintiff and the Third Party, Kurc Limited dated December 21, 2001. The loan was

secured by a 147 foot Tri-deck Motor Yacht, Hull No. SY26 ("**the Vessel**"). The First and Second Defendants by way of respective Guarantee Agreements agreed to act as guarantors of the said loan on December 21, 2001 and June 1, 2011 respectively. It is alleged that the Third Party in breach of the said loan agreement, defaulted on the said loan by failing to make the agreed loan re-payments. As a result of the alleged breach of the loan agreement and the respective guarantee agreements the Plaintiff sold the Vessel in an effort to cover the outstanding debt. This action is for recovery of the sums outstanding after the sale of the Vessel.

2. The action was commenced by a Writ of Summons filed 6 February, 2017, which was subsequently amended by an Amended Writ of Summons filed 14 March, 2017. The Defendants filed their Defence on May 25, 2017 and an Amended Defence on December 14, 2018. The Plaintiff alleges that the Third Party breached its payment obligations under the Loan as set out in the Amended Writ of Summons and the outstanding balance of principal and interest became payable. Consequently, the Defendants became indebted to the Plaintiff under the terms of the Guarantees.

3. The Plaintiff says as at the 28 February, 2017, the Defendants and the Third Party are jointly and severally indebted to the Plaintiff in the sum of US$2,763,474.78, interest and costs. The Defendants defend this action on the basis that the Plaintiff having failed to take certain steps with respect to the Vessel, the condition of the Vessel was impacted resulting in the vessel not being sold for a sum sufficient to extinguish the amount of the debt owed.

4. It is noted that the pleadings and the submissions of Counsel reveal that the First and Second Defendants and the Third Party do not dispute that the Third Party was in breach of the said loan agreement. However, what is disputed is the sale price of the said Vessel and whether the Plaintiff acting as mortgagee failed to sell the Vessel for the best price reasonably obtainable and in doing so was in breach of its obligations to the First and Second Defendants.

5. The trial of this matter began on February 28, 2020; and continued on September 25, 2020; December 10, 2020 and March 23, 2021. The Plaintiff called one witness, Mr. Robert Hughes whose evidence in chief was by way of a Witness Statement filed on January 2, 2020 and supplemented by viva voce evidence on February 28, 2020. He was cross-examined on September 25, 2020 and was re-examined on the same date.

The Defendants called one witness, Mr. Mark Finlayson whose evidence in chief was by way of a Witness Statement filed on October 20, 2018 and a subsequent Amended and Supplemental Witness Statement filed on November 21, 2019. Mr. Finlayson's evidence in chief was also supplemented by viva voce evidence on December 10, 2020. He was cross-examined on the December 10, 2020 and continued on March 23, 2021 and was reexamined on March 23, 2021.

Statement of Facts

The Pleadings

6. As previously stated, the parties' pleadings in relation to the granting of the loan to the Third Party, the guarantor agreements between the Plaintiff and the First and Second Defendants and the terms upon which all agreements were agreed between the parties are not disputed. However, what appears to be disputed between the parties on the pleadings was that the loan was secured by the Vessel; that by letter dated December 9, 2015 the Plaintiff demanded payment of all sums due and owing to the Plaintiff by the Third Party under the Loan and the Loan Documents but the First and Second Defendants have wrongfully failed and/or refused to pay the said sum and remain in breach of the terms of the guarantee agreements; that in breach of the terms of the Guaranties, the First and Second Defendants have failed to make prompt and punctual payment (or any payment), performance and / or satisfaction of the obligations of the Third Party to the Plaintiff under the Loan and / or the Loan Documents; that in consequence of the said breach the First and Second Defendants became indebted to the Plaintiff under the terms of the Guaranties; that the Plaintiff incurred collection realization expenses in the amount of $762,093.40 as at January 3, 2017 and that the Plaintiff suffered loss and damage.

7. The First and Second Defendants by their Amended Defence at paragraphs 6 to 8 state inter alia that the Plaintiff obtained leave from the United States District Court Southern District of Florida in Admiralty to make repairs to the Vessel with the expressed duty, obligation and agreement to make repairs to put the Vessel in a condition that would allow it to move under its own power thereby mitigating any potential loss by the Plaintiff preserving the vessels value to ensure it yielded its maximum sales price; that the Plaintiff its servants or agents intentionally and or

negligently failed to discharge that duty, obligation or agreement and instead used the funds to make cosmetic repairs to the Vessel; that the failure of the Plaintiff to repair the engines which were manufactured, fit and installed by the Plaintiff resulted in the Vessel being sold at substantially less than its market value; that they are not liable to pay or cause to be paid the claim as alleged or at all which obligations would have been satisfied but for the Plaintiff's breach of its duty, obligation or agreement; that the Plaintiff at all material times had an obligation to take reasonable steps to mitigate their loss and in contravention of that obligation or duty, the Plaintiff intentionally and/or negligently took the steps which resulted in the Vessel being sold for substantially less than its market value to achieve an unlawful and unjust gain.

The Loan Agreements

8. As I understand the First and Second Defendants case, they state they are not liable to the Plaintiff as the Plaintiff intentionally or negligently took steps which resulted in the Vessel being sold for substantially less than its market value to achieve an unlawful and unjust gain. For completeness however the Court provides below the relevant portions of the Loan Agreement and the Agreements of Guaranty for each respective Defendant.

9. A term of the Loan Agreement made on December 21, 2001 between the Plaintiff and the Third Party is that:

"a. The Borrower requested the Lender to establish a construction loan facility in connection with the construction of a vessel."

10. The Loan Agreement also defined the terms bellow:-

"a. Collateral defined as the Vessel and also includes individually, collectively, interchangeably and without limitation all property assets granted as collateral security for the Obligations;

b. Construction loan means in the case of the Vessel for which financing was sought, the advances in connection with the same extended to the Borrowers by the Lender in connection with the Vessel;

c. Obligations mean all indebtedness, liabilities and obligations owing, arising, due or payable from the Borrower to or on behalf of the Lender of every kind of nature, whether absolute or contingent, due or to become due, joint or several,

liquidated or unliquidated, matured or unmatured, primary or secondary, now existing or hereafter incurred arising under any of the Loan Documents and regardless of the form or purpose of such indebtedness, liabilities or obligations, including, without limitation, all of the Loan, all liabilities of the Borrower to the Lender under any indemnity, reimbursement, letter of credit, guaranty, deposit or other agreement heretofore or hereafter executed by the Borrower with or in favour of the Lender. The term includes, without limitation, all interest charges, expenses, attorneys' fees and other sums chargeable to the Borrower under any of the Loan Documents. This terms also includes al sums owed by Borrower to Lender under the Existing Loan.

d. Vessel means one (1) 44.21 meter (145') Tri-Deck Motoryacht (Hull No. SY26), powered by two (2) new 3512 Caterpillar main propulsion engine packages, plus Caterpillar auxillary engines, and along with the Vessel Equipment, to be registered under the flag of the Commonwealth of the Bahamas."

11. Also found at Section 2 of the Loan Agreement under the Heading "Credit Commitment the relevant sections state:-

"a. 2.03-The Construction Note or Permanent Note. The Construction Loan and Borrower's obligation to repay the Construction Loan shall be evidenced by and repayable with interest in accordance with the terms of the Construction Note substantially in the form shown in an exhibit to the Agreement. During the Construction Term, interest on each Construction Loan Advance shall accrue at the Construction Loan Rate from the date of such Advance. Interest payments under the Construction Note shall be due and payable monthly in arrears, in accordance with the terms of the Construction Note. The principal amount of the Construction Note shall be due and payable in full, along with all accrued and unpaid interest thereon, on the Construction Loan Maturity Date, unless converted into the Permanent Loan...

b. 2.07-Payments. Except as Lender may otherwise direct in writing, Borrower agrees to make all payments due under this Agreement, or the Notes or any other Loan Document directly to Lender by wire transfer (net of charges) to Lender's Bank Account, or such other place as the Lender may designate...

c. 2.11-Obligations Unconditional. The obligations of the Borrower under this Agreement and in respect of the Loan shall be absolute and unconditional under all circumstances and irrespective of any setoff, counterclaim or defense to payment (of any type or description, whether as a result of non-compliance with any of the provisions of Loan Documents which the Borrower may have or have had against the Lender or any other person."

12. Section 6 of the Loan Agreement provides and lists the numerous events that amount to a default and the rights and remedies available as a result of a default. It is entitled "Events of Default; Rights and Remedies on Default." The relevant sections the Court notes are:-

"a. 6.1. Events of Default. An "Event of Default" shall exist if any of the following shall occur and be continuing, whatever the reason for such event or condition and whether it shall be voluntary or involuntary, or within or without the control of the Borrower or any Subsidiary, or be effected by operation of law or pursuant to any order or judgment of a court or otherwise:

(A) Borrower shall fail to pay any portion of the principal or interest with respect to the Construction Note or Permanent Note or of any amount under the Loan Documents within three (3) Business Days of when due:

(P) Any Guarantor shall revoke or attempt to revoke its guaranty agreement signed by such Guarantor, or shall repudiate such Guarantor's liability thereunder or shall be in default (after giving effect to any applicable period of grace) under the terms thereof or the guaranty agreement shall for any reason cease to remain in full force and effect;

b. 6.2. Acceleration of the Obligations. Upon or at any time after the occurrence of an Event of Default and during the continuance thereof, all or any portion of the Obligations due or to become due shall at the option of Lender and with notice to or demand upon Borrower, become at once due and payable and Borrower shall forthwith pay to Lender, in addition to any and all sums and charges due, the entire principal of and accrued and unpaid interest on the Obligations plus reasonable attorneys' fees.

c. 6.3. Remedies. Upon or at any time after the occurrence of an Event of Default and during the continuance thereof, Lender may exercise from time to time all of

the rights and remedies under Applicable Law, and all other legal and equitable rights to which Lender may be entitled, all of which rights and remedies shall be cumulative, and none of which shall be exclusive, and shall be in addition to any other rights or remedies contained in the Agreement, the Mortgage Documents, or any of the other Loan Documents.

d. 6.4. Remedies Cumulative; No Waiver. All covenants, conditions, provisions, warranties, guaranties, indemnities and other undertakings of Borrower contained in the Agreement and the other Loan Documents, or in any documents referred to herein or contained in any agreement supplementary hereto or in any schedule or in any guaranty agreement given to Lender by any Guarantor or contained in any other agreement among Lender and Borrower, heretofore, concurrently, or hereafter entered into, shall be deemed cumulative to and not in derogation or substation of any of the terms, covenants, conditions or agreements of Borrower herein contained. The failure or delay of Lender to exercise or enforce any rights, Liens, powers or remedies hereunder or under any of the other Loan Documents shall not operate as a waiver of any of such Liens, rights, powers or remedies, but all such Liens, rights, powers and remedies shall continue in full force and effect until the Loan and all other Obligations owing or to become owing from Borrower to Lender shall have been indefeasibly paid in full, and all Liens, rights, powers and remedies provided herein and the other Loan Documents are cumulative and none are exclusive."

13. The Loan Agreement was signed on behalf of the Third Party by its President and Director, Garet O. Finlayson, the First Defendant herein and also signed as Guarantor. The First Defendant, by the signed Guarantee and Indemnity Agreement on December 21, 2001, guaranteed the Obligations of the Third Party. The Recitals in particular provide "(B) It is a condition precedent to the advance of the said Loans by Lender to Borrower that Guarantor will grant a guarantee and indemnity to Lender in respect of the Obligations due or to become due to Lender from Borrower under the Agreement and the other Loan Documents."

14. The provisions of the Guaranty that relate to the Guarantor's obligations are set out below.

"a. Section 1. Covenant to pay. For Value Received and in consideration of and for the credit and financial accommodations extended by Lender to or for account of Borrower, Guarantor hereby irrevocably and unconditionally agrees to and by these presents does hereby guarantee to pay Lender, as pr mary obligor on demand all monies and discharge all obligations and liabilities whether actual or contingent now or hereafter incurred to Lender by Borrower under the Agreement and/or the other Loan Documents and any and all amendments thereto and/or renewals, extensions and/or refinancing thereof (referred to as Borrower's Obligations)... Guarantor agrees to pay interest (to the extent that such interest is not paid by Borrower pursuant to the Agreement) from the date of demand until payment of all monies obligations and liabilities hereby guaranteed at the relevant interest rate under the Agreement.

a. Section 2. Joint and Several Liability. For the avoidance of doubt Guarantor further agrees that his obligations and liabilities for the prompt payment, performance and satisfaction of Borrower's Obligations shall be on a "joint and several" basis along with Borrower to the same degree and extent as if Guarantor had been and/or will be a co-borrower, co-principal obligor and/or co-maker of Borrower's Obligations...
b. (Check that First Defendant Guaranty Agreement Reads the Same) Section 3. Duration: Cancellation of Agreement. This Agreement and Guarantor's obligations and liabilities hereunder shall remain in full force and effect until such time as the Obligations shall be paid, performed and/or satisfied in full, in principal, interests, costs and attorneys' fees and all outstanding commitments of Lender to Borrower (conditional or otherwise) have terminated; or until such time as this Agreement may be cancelled or otherwise terminated by Lende- under a written cancellation instrument in favor of Guarantor (subject to the automatic reinstatement provisions set forth). Nothing under this Agreement or under any other agreement or understanding by and between Guarantor and Lender, shall in any way obligate, or be construed to obligate, Lender to agree to the subsequent termination or cancellation of Guarantor's obligations and liabilities hereunder as long as Borrower's Obligations remain unpaid and outstand ng; It being fully understood and agreed by Guarantor that Lender may, within its sole and uncontrolled discretion and judgment, refuse to release Guarantor from any of its obligations and liabilities under this Agreement for any reason whatsoever as long as the

Obligations remain unpaid and outstanding, or Lender is subject to any outstanding commitment (conditional or otherwise) to Borrower.

c. Section 4. Default by Borrower: Certain Waivers of Guarantor. Should Borrower default under any provision of the Obligations (whether at staled maturity, by required prepayment, declaration, acceleration or otherwise) in favor of Lender, and/or fail to perform any covenant or agreement hereunder guaranteed, Guarantor unconditionally and absolutely agrees to pay the full then unpaid amount of the Obligations. Such payment or payments shall be made immediately following demand by Lender at Lender's offices. Guarantor hereby waives notice of acceptance of this Agreement and of any Obligations to which it applies or may apply. Guarantor further waives presentment and demand for payment of the Obligations, notice of dishonor and of nonpayment, notice of intention to accelerate, notice of acceleration, protest and notice of protest, collection or institution of any suit or other action by Lender in collection thereof, including any notice of default in payment thereof or other notice to, or demand for payment thereof on any party.

d. Section 6. Additional Covenants.

    i. Actions by Lender. Guarantor further agrees that Lender may, at his sole option, at any time, and from time to time, without the consent of or notice to the Guarantor, or to any other party, and without incurring any responsibility to Guarantor or to any other party, and without impairing or releasing the obligations of Guarantor under this Guarantee:

        1. ...
        2. Sell, exchange, release, surrender, realise upon or otherwise deal with, in any manner in any order, any collateral directly or indirectly securing repayment of Borrower's Obligations;
        3. ...
        4. Settle or compromise Borrower's Obligations;
        5. ...
        6. ...
        7. ...
        8. ...

e. Section 7. No Release of Guarantor. Subject to the determination provisions of Section 3 hereof, Guarantor's obligations under this Guarantee shall not be released, impaired, otherwise affected by and shall continue in full force and effect, notwithstanding the occurrence of any event, including without limitation any one or more of the following events:

   i. Death, insolvency, bankruptcy, arrangement, adjustment, composition, administration, receivership, disability, change in the constitution of amalgamation or reconstruction of Borrower, Guarantor or any other guarantor, surety or endorser of Borrower's Obligations;

   ii. Partial payment or payments of any amounts due and/or outstanding under Borrower's Obligations;

   iii. Any payment by Borrower or any other party to Lender that is held to constitute a preferential transfer or a fraudulent conveyance under any applicable law, or for any reason, Lender is required to refund such payment or pay such amount to Borrower or to any other person;

   iv. The unenforceability against Borrower or any other guarantor of the Loan Documents or any provisions thereof or any documents related thereto;

   v. Any dissolution of Borrower or any sale, lease or transfer of all or any part of Borrower's assets;

   vi. Any sale or assignment of the Loan Documents; and/or

   vii. Any failure of Lender to notify Guarantor of the acceptance of this Guarantee or of the failure of Borrower to make any payment due by Borrower to Lender.

f. Section 8. Enforcement of Guarantor's Obligations and Liabilities. Guarantor understands, agrees and confirms that this is a guarantee of payment when due and not of collection. Guarantor agrees that, should Lender deem it necessary to file an appropriate collection action to enforce Guarantor's obligations and liabilities under this Guarantee, Lender may commence such a civil action against Guarantor without the necessity of first (1) attempting to collect Borrower's Obligations from Borrower or from any other guarantor, surety or endorser, whether through filing of suit or otherwise, (ii) attempting to exercise against any collateral directly or indirectly securing repayment of Borrower's Obligations, whether through the filing

of any appropriate foreclosure action or otherwise, or (iii) including Borrower or any other guarantor, surety or endorser of Borrower's Obligations as an additionally party defendant in such a collection action against Guarantor. In the event that Lender should ever deem it necessary to refer this Guarantee to an attorney-at-law for the purpose of enforcing Guarantor's obligation and liabilities hereunder, or of protecting or preserving Lender's rights hereunder, Guarantor (and each of them on a joint, several and solidary basis) agrees to reimburse Lender for the reasonable fees of such an attorney. Guarantor additionally agrees that Lender shall not be liable for failure to use diligence in the collection of any of Borrower's Obligations (or any collateral security therefore), or in creating or preserving the liability of any person liable on any such Obligations, or in creating, perfecting or preserving any security for any such Obligations."

15. The Second Defendant also signed a Guaranty which set out the same terms as above.

16. By letter dated December 9, 2015 Counsel for the Plaintiff sent a demand letter to the Defendants and the Third Party setting out the parties failure to make payment in full to the Lender as agreed to and obligated by the Defendants and that the amounts were due and owed under the defaulted Loan. As such the Plaintiff demanded the immediate payment of the outstanding sums inclusive of interest.

The Witnesses Evidence

17. The parties called one witness in support of its case. These witnesses spoke to the facts of the case and in some instances gave more opinion than fact as to what they considered to be relevant to the issues of this action.

18. Considering their evidence and the Volume of documents before me, this action I find will be determined largely on the documents hereinbefore mentioned and secondly on the conduct of the Plaintiff in respect of the sale of the vessel.

19. The evidence of Mr. Robert Hughes, on behalf of the Plaintiff, in part, is that by virtue of his employment with the Plaintiff and in his capacity as Special Accounts Underwriter since September 2016 he oversees the day to day activities on past due and other special accounts with the Plaintiff. He further set out the Loan Agreements and Guaranty Agreements made between the Plaintiff and the Defendants and the Third Party; that the Third Party breached the terms of the Loan and fell into arrears; that

a demand letter by the Plaintiff dated December 9, 2015 was sent to the Third Party demanding payment of all sums due and owing to the Plaintiff under the Loan and the Defendants wrongfully failed and/or refused to pay the sums and remained in breach of their respective Guaranty Agreements; that the Defendants failed to make prompt and punctual payment, performance and satisfaction of the obligations of the Third Party to the Plaintiff under the loan. He also stated that on or about August 2016 the Vessel was sold via judicial sale to the Plaintiff for a credit bid in the sum of $100.00; that on or about December 29, 2016 the Plaintiff sold the Vessel to a third party buyer for the sum of $2,430,000.00; that the principal balance on the loan at the date of the sale was $4,208,602.41 and that the proceeds of the sale were disbursed as $202,138.69 as accrued and unpaid interest and $2,227,861.31 as principal leaving a principal shortfall of the sum of $1,980,741.10 due and payable by the Defendants to the Plaintiff plus further accrued interest and collection realization expenses.

20. Mr. Hughes also referred to numerous clauses contained in the Loan Agreements and Guaranty Agreements. Mr. Hughes also referred to Tab 10 of the Trial Bundle of Documents, Volume 1 which was entitled Florida Yacht Brokers Association Purchase and Sales Agreement for Brokerage Vessel for the purchase of the Vessel by the Plaintiff with an offer date of December 16, 2016 and the purchase price of $2,700,000.00 and the transaction was completed. Further, the document found at Tab 11 of the Trial Bundle, Volume 1 shows a grand total of $4,208,602.41 as at January 31, 2017 and was prepared to determine the amount of deficiency owed on an account when the principal and interest is outstanding up to a date and time. He referred to Tab 17 of the Trial Bundle, Volume 1 which was the Consent to Surrender Vessel however, there were two copies the first prepared by the Plaintiff and the second prepared by the Third Party; that there were differences in the clauses between the documents and that the copy prepared by the Third Party was signed by the Defendants however no agreement was reached between the parties as it related to that document. Additionally, his evidence referring to an offer of $5,500,000.00 for the Vessel at Tab 18 of the Trial Bundle, Volume 1 was that the Plaintiff would have accepted and entertained such an offer for the Vessel if the agreement for the offer was executed. His evidence referred to an offer of $4,200,000.00 for the Vessel at Tab 19 of the Trial Bundle, Volume 1 was that the Plaintiff would have accepted and

entertained such an offer for the Vessel if the agreement for the offer was executed. Further, the e-mails at Tab 12 of the Trial Bundle, Volume 1 showed that prior to the arrest of the Vessel the Plaintiff was open to hearing offers and receiving offers.

21. Mr. Hughes identified the survey of Davis & Co at Tab 24 of the Trial Bundle, Volume 1, referred to numerous paragraphs contained in the survey and stated that the survey identified the forced liquidated value of the Vessel at $4,600,000.00 as at May 20, 2016 and it would be that value the Plaintiff would consicer relevant to any sale of the Vessel. Further, at Tab 25 of the Trial Bundle, Volume 1 Mr. Hughes identified e-mail correspondence between Chris Oberholtzer of the Plaintiff and Rob Coon the Managing Director of the Plaintiff stating the difficulty the Plaintiff faced with selling the Vessel; that the Plaintiff had multiple surveys conducted to determine the average fair market value or the liquidation value and fair market value and that when considering the three surveys the forced liquidation value was between $3,000,000.00 and $4,600,000.00. Mr. Hughes further referred to e-mail correspondence between Landon Gracey, the Customer Service Manager of the Plaintiff and Rob Coon at Tab 27 of the Trial Bundle, Volume 1 whereby Mr. Gracey noted that there was a potential offer of $2,000,000.00 and it was countered by the Plaintiff for $3,900,000.00 and the offeror came back with $2,500,000.00; there was activity on the boat at the Fort Lauderdale Boat show but no real offers; that the listing data shows that from 2013 to 2016 the value of the Vessel was from $19,000,000.00 to $6,500,000.00.

22. Mr. Hughes also gave evidence of the efforts made by the Plaintiff to market the Vessel, the difficulty with selling the Vessel in its condition and any potential asking price as a result of the condition of the Vessel and referred to Tab 12 of the Trial Bundle, Volume 1. Further that by an e-mail dated November 21, 2106 from the broker to Mr. Gracey, he advised the Plaintiff that due to the condition of the boat he did not think they would get more than $2,700,000.00 for the Vessel.

23. Mr. Hughes also identified the numerous invoices related to the expenses and costs incurred as a result of maintaining the Vessel.

24. During cross-examination he stated, in part, that during his time at the Plaintiff Company he has worked in other departments; that he does not have any experience working in the boating industry in Fort Lauderdale; that when referred to Section 6 of the Guarantee Agreements whereby the Guarantors agreed for the Lender, without

the consent or notice to the Guarantor, to deal with the Vessel in any manner stated, that before initiating an action the Plaintiff speaks with their internal Counsel to determine if they can exercise their rights under the agreements in place. He continues that once determined the loan is due and the security is to be realize the Plaintiff would get a survey done to assess the condition of the Vessel, if they are going to take possession they look for a location to store the vessel, determine the potential value of the asset, what additional items might be needed to be repaired or replaced that could help increase the value so that it could be sold through the court system.

25. Further, he stated, they list the Vessel with a broker, the broker will tell them the condition of the vessel, market conditions at the time, market the vessel and update them on interested parties and potential offers. Also that the Plaintiff's management team decides which offers will be accepted and such considerations of an acceptance is how long the vessel has been in their inventory or possession, the condition of the vessel and its ongoing condition, repairs and work done and what is needed to be done, broker's insight from potential customers looking at the vessel and what they are willing to offer, what they see is being offered on the market for similar vessels.

26. He stated that the guarantor or borrower is not factored into their decision for accepted offers as at that point the vessel is in the Plaintiff's possession to satisfy the debt; that the only consideration is if the borrower or guarantor would like to come back to repay the debt in full or make an offer.

27. He continued, that the survey is used to give them an idea of the condition and value of the vessel, determine inventory value, that the surveys are in depth, that once the vessel is in their possession a more thorough condition and evaluation survey will be done where the surveyor will go through every component and compartment and list its condition, what needs to be repaired potentially, what would be required to keep it in Class and what would need to be repaired that might assist to help sell the vessel, that the survey is used as a guide and their history in the industry has shown potential buyers never offer a value close to a survey value. That they would like to get an offer as close to the survey as possible and that the surveyors provide three values, fair market value, orderly liquidation and scrap value, in an ideal world they would like the fair market value but that is typically not offered on a repossessed vessel.

28. That when referred to Tab 9 (Title to Vessel) and Tab 31 (Motion for Entry of Order Authorizing Repairs to Vessel) Mr. Hughes stated that the action those documents relate to is about the repossessing of the vessel and the survey evaluation identified the repairs needed and they sought permission from the court to get the vessel in a better condition which would bring a better price in the market, that the Plaintiff instructs the attorneys advising them they need to repossess a vessel due to non-payment and have them take the steps needed to proceed with those actions. That pursuant to the Order at Tab 31 the Plaintiff made several repairs such as repairing the engine, and AC system, that this was done during the process of obtaining title of the vessel, that he does not know whether there was a sea trial of the vessel before it was listed for sale with Bradford Marine or after it was listed, that a sea trial is not necessarily that important when determining the value of the vessel as many times when they repossess a vessel it could run on its own power, a prospective buyer may request a sea trial with the broker and most times it is granted. That during the surveys an engine test would be done but not necessarily a sea trial if they were not comfortable with the conditions of the engine, that from the reports the Plaintiff was satisfied based on the reports of the persons who did the repairs and the surveys that the engines were able to move the boat to operate under its own power. That a sea trial is taking the vessel out on the water to see that the major systems are operating properly such as the engine and AC system, navigation system but if the engine or navigation system does not work a sea trial would not happen.

29. He also stated that under section 3 of the Loan Agreement the Third Party would and the Plaintiff would have received plans and specifications for the Vessel as a condition of the Loan Agreement, that to get advancements the Defendants had to certify that certain things had been done, that when the Plaintiff listed the Vessel with Bradford Marine it was aware of design issues and some emails in evidence shows there was talk about the same. Mr. Hughes was referred to Tab 23 and continues that the Vessel was insured for $8,000,000.00 as at April 22, 2016, that they insure the Vessel for the estimated fair market value from the survey. He was also referred to Tab 22 and stated that the vessel in the picture and the Defendants Vessel look similar. That the documents at Tab 17 was the Consent to Surrender Vessel with one unsigned and one signed; that the document is sent to the customer before repossession to get the

customer to consent to turn it over and if they do not consent the Plaintiff would repossess the vessel without their consent; that he did not know why the Plaintiff did not agree to the amendments made and/or suggested by the Defendants and Third Party.

30. During his re-examination Mr. Hughes stated, in part, that definitions in reference to the value definition of a vessel and found on page 6 of the Davis and Company survey, "scrap value" relates to salvage value; that when referred to Tab 31 (Motion for Entry of Order Authorizing Repairs to the Vessel) stated that the order did not mandate the Plaintiff to effect repairs but to get permission to effect repairs and once permission was obtained the Plaintiff could elect whether to effect repairs or not; that it would have been in the Plaintiff's best interest to fetch a higher price; that the second copy of the Consent to Surrender Vessel was not signed by the Plaintiff and is not a fully executed document.

31. The evidence of Mr. Mark Finalyson, on behalf of the Defendant, in part, was that he is the Secretary of the Third Defendant and also the Second Defendant herein. He states that the Third Party was the owner of the Vessel and the Third Party entered into a loan with the Plaintiff. He further states that he became a Guarantor of the Loan in 2011 at the request of the First Defendant, his father. Additionally he states that the Third Party received the Vessel in 2006 and between 2006 and 2012 the Vessel was used extensively; had a full time captain from 2006 until arrested. His evidence continues that he was not aware of any major issues with the Vessel when it arrived in The Bahamas; that it was moored at various docks in the Bahamas; was chartered commercially; that the Vessel sailed to Fort Lauderdale in 2012 for maintenance and was not used commercially or extensively after that; and that in 2016 the Vessel was photographed by the Third Party as part of the efforts to sell it. He states that the First Defendant had a relationship with the Plaintiff since 1979; that when the Third Party was unable to service the loan the plan was to sell the Vessel and the proceeds of the sale would be sufficient to satisfy the loan; that the Third Party had spent over $1,200,000.00 in repairs and the Vessel was in good condition.

32. Mr. Finalyson further states that on or around October 9, 2014 the Third Party entered into a Listing Agreement with Florida Yacht Brokers Association Inc for Brokerage of the Vessel between the Third Party and Bradford Marine; that the asked price agreed

to by Bradford Marine and the Third Party was $14,000,000.00 and Tucker Fallon was the agent. He states that on or around November 13, 2015 the Plaintiff requested of Bradford Marine to be allowed to survey and inspect the Vessel; that the Plaintiff intentionally and wrongfully withheld the survey report from the Defendants and the Third Party. It is his evidence that by an email dated March 24, 2016 from Chris Oberholtz to the First Defendant, Mr. Oberholtz asked the Third Party and the Defendants to sign the Consent to Surrender Vessel Agreement which sought to change the governing law of the terms of surrender to the "substantive law of the State of Tennessee and the United States of America, without regard to the conflict of law provision thereof"; that the Consent to Surrender also called for the Third Party and Defendants to agree "that the Lender may dispose of the Vessel as it shall determine in its sole discretion subject only to its agreement to act in good faith"; that after consultation with their attorney the Third Party and himself signed the document on the condition that the governing law would be that of the Bahamas and "that the Lender may dispose of the Vessel as it shall determine in its sole discretion, subject only to its agreement to act in good faith and subject to its taking due care to obtain the best price reasonably obtainable in the circumstances" and " any remaining surplus shall be paid to the Borrower or as the Borrower may in writing direct". He continues that given the extraordinary amount spent by and at the expense of the Third Party, over $1,200,000.00 between July 2012 and January 2015 and assuming without conceding the Plaintiff spent a father amount of $443,767.70 on repairs the Vessel should have gotten full market value at the time of the sale or enough to cover the outstanding mortgage. That on or around April 7, 2016 the agent Tucker Fallon sent him the first of two "bottom feeder's offer" from Ted Hallard for $5,500,000.00 (bottom feeder's offer is an offer at or slightly above the forced liquidation value); that on or around April 25, 2016 Tucker Fallon sent the second of two bottom feeder offers from Serenty Waves Inc. for $4,200,000.00; that both offers were adequate to cover the outstanding sums to the Plaintiff at the time. He states that by an email dated June 17, 2016 Tucker Fallon informed him of the Plaintiff's request to see the listing agreement originally signed by the First Defendant on behalf of the Third Party and he provided the permission to do so by email on the same date.

33. It is also his evidence that on or around September 9, 2016 he received via an email a Confirmation of Sale from the United States District Court of Southern District County in Admiralty Clerk in regard to the Vessel; that soon thereafter he received notice that the Vessel had been sold for $2,400,000.00; that the sum was and remains a price well below market value for a custom built 2006 147 foot mega yacht with recent repairs and upgrades in excess of $1,200,000.00. He continues that the Plaintiff did not provide the Defendants with a copy of the contract of sale at the time of the sale. He states that the Plaintiff had a duty of care to act in good faith and to obtain the best price reasonably obtainable in the circumstances; that the Plaintiff should have been guided by the May 2016 survey commissioned by the Plaintiff which estimated the market value at $16,000,000.00, estimated replacement cost at $20,500,000.00; the orderly liquidation value at $7,500,000.00 and the forced liquidation price at $4,600,000.00; that it is hard to fathom the Plaintiff satisfied its fiduciary duty to act in good faith and obtain the best price reasonably obtainable in the circumstances as agreed in the Consent to Surrender Vessel Agreement by selling the Vessel for less than 12% of its replacement value.

34. Mr. Finalyson's viva voce evidence was that he only signed as Guarantor to the loan on the condition that the Vessel would be sold; that the Vessel was used as a source of entertainment on behalf of Burns House Limited (a company the Second Defendant was president of at the time); that the Vessel was sent to the United States in 2012 so that it could be sold; that he accepted the invoices at Tab 13 of the Trial Bundle Volume 1 was in respect of repairs done to the Vessel, docking fees and towing fees; that when the boat was sent over it was on the condition that it would be sold for the minimum amount of $4,600,000.00 (the forced liquidation value identified in the May 2016 survey). He states that they never tried to get out of paying the debt when they surrendered the Vessel. He continues that as far as he was aware a sea trial of the Vessel was ever done; that it is important to test out the engine by way of a sea trial and very few people would buy a boat without a sea trial.

35. His evidence in cross-examination, in part, is that there is nothing in the Guaranty Agreement at Tab 7 that speaks to his evidence that his cosigning was on the understanding that the Vessel would be sold; that Counsel for the Plaintiff referred him to the numerous invoices at Tab 13 of the Bundle that shows the fees and services

paid by the Plaintiff; that Counsel for the Plaintiff advanced that there is no mention of the effecting of repairs and the cost amounting to $1,200,000.00 as claimed by the Defendants and his response was that all of the fees and services are all apart of effecting repairs.

36. Mr. Finlayson continues that the Vessel in or around 2016 had just over a thousand hours of running time; that they extensively used the Vessel from when they received it in 2006 through 2010; that according to several e-mails (between Whit Kirtland and Chris Oberholtzer dated October 31, 2016; between Timothy Hammer to Chris Oberholtzer dated November 1, 2016-Tab 60 in Plaintiff's Second Supplemental Bundle of Documents) the Vessel was being advertised for sale and there was someone showing interest; that the asking price of $14,000,000.00 stated in the agreement dated October 14, 2016 between the Third Party and Bradford Marine was agreed by Bradford Marine as that was a condition of Caterpillar taking the Vessel; that the owners initialed the agreement but there was no signature for the broker. He further states that by an email dated January 8, 2016 (Tab 12) from Tucker Fallon at Bradford Marine addressed to himself he was advised that the Vessel had been shown to prospective buyers; that the position of the Vessel as at that email was correct; that the engine room and pilothouse were not ready for sea trial, the engines would not start, the batteries from the port engine could barely turn the engine, there was a problem with the generator that did not allow it to turn over without jumping it; that by an email dated March 3, 2016 from Tucker Fallon told him the prospect was slow and it was not likely in his estimation to be able to sell the vessel in its condition but he did not accept that the prospect of selling the Vessel was slow due to its condition at the time.

37. Mr. Finlayson was referred to Tab 19 of the Trial Bundle and accepts that the said offer contained in that Letter of Intent (in or around April, 2016) was subject to the conditions of a survey/sea trial; that during that time efforts were being made for potential buyers for the Vessel; that the sales agreement at Tab 18 of the Trial Bundle only has the seller's initials and not the buyer's initials; that that offer fell through because the Plaintiff refused to allow potential buyers on the Vessel and they frustrated the sale; that the sales agreement at Tab 19 of the Trial Bundle was not signed by the seller; that he accepts the Vessel was sold for $2,700,000.00 and not

$2,400,000.00; that to his knowledge the tender and jet skis remained with the Vessel when it was surrendered and that such removal would lower the value of the Vessel.

38. Mr. Finlayson also states that the surveyor is the one who makes the ultimate decision as to the advertised price of the vessel and did not accept that it is the owner's decision; he did not agree that the market will pay what it chooses regardless of the contents of the survey; he did not accept that just because an owner or broker lists a vessel at a particular price it does not mean that they are going to fetch a purchaser for that listing price; that when referred to the Davis and Company survey at Tab 24 of the Trial Bundle, he did not accept that the circumstances of the Vessel would have been a forced liquidation sale; that the document at Tab 30 of the Trial Bundle was an order ordering the Plaintiff to do repairs to the AC, compressors, engines and related equipment. He continues that the evidence submitted by the Plaintiff shows that it was them and not him who engaged Bradford to conduct the survey.

39. Mr. Finalyson during re-examination states, in part, that his understanding of the documents at Tabs 30 and 31 of the Trial Bundle and the proceedings was that the Vessel was under control of the Plaintiff and it made an application to repair the Vessel, were given the Order to do repairs to the Vessel but they never complied with the Order; that he disagreed with the suggestion that an owner has the ultimate decision when putting the boat up for sale. As the Vessel is being put up for sale and the Vessel is being arrested, the creditor or the person seeking relief is obligated to be guided by the survey and the survey stated very clearly the minimum prices and what period the Vessel was to be sold. He continues that he agreed with the email at Tab 12 from Tucker Fallon to himself dated March 3, 2016 and within days the Vessel was surrendered to the Plaintiff as being an engine company they could do the repairs to the engine and have a sea trial. He states that a sea trial is a must in the business because without a proper sea trial and a proper engine the Vessel is a floating house. That in reference to the invoices referred to him by Counsel for the Plaintiff he accepts that on a number of invoices reference was made to another Vessel owned by the Third Party, known as Martini 12 and the total sum for the repairs would actually be $1,000,000.00 and not $1,200,000.00.

Analysis

Jurisdiction of the Court

40. Ms. Brown has submitted and the Court accepts that the Court has jurisdiction to hear and determine an action by a lender for the enforcement of an agreement or security relating to money lent. (See Order 73 Rule 1, *Rules of the Supreme Court.* She also referred the Court to the well known and instructive Bahamas Court of Appeal case of **Citibank N.A. v. Major** [2001] BHS J. No. 6 where Ganpatsingh, JA stated as follows:

> *"It is pellucidly clear therefore that there could be no power in the Court to vary contractual rights or to deny one party the benefit of the remedies which flow from the default of the mortgagor. The mortgagee in such an event is entitled not only to possession, but as well the mortgage moneys which become presently payable as a lump sum and no longer by installments. The mortgagor in order to get relief must necessarily raise an action on the mortgage transaction itself."*

41. Ms. submitted and I accept that it is settled law that in the absence of a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud on or irregularity n the exercise of the power of sale, the Courts will not intervene to prevent a mortgagee from exercising its lawful rights under the mortgage deed.

Breach of the Terms of Loan/Guarantee Agreements

42. The Defendants in their Amended Defence admit that the Third Party was in breach of the terms of the Loan and had fallen into arrears and as such the outstanding balance of principal and interest became payable. However, the First and Second Defendants position as I understand the pleadings and their Amended Defence is that they would have satisfied the obligations as set out in the Loan Documents if the Plaintiff had not breached its duty, obligation or agreemert and as such are not liable to pay or should be liable to pay the claim as alleged as the Plaintiff.

43. Counsel for the Plaintiff, Ms. Karen Brown submits, in part, that the Plaintiff is entitled to Judgment in respect of the claimed sums as the provisions of the Loan Documents spell out the agreed terms between the parties. These include:-

a. clause 2(3) of the Third Amendment, the Third Party agreed to pay all outstanding principal, together with any other amounts then due on the Loan on 1 May 2016;

b. clause 6(1)(A) of the Loan Agreement that an event of default shall exist if the Third Party fails to pay any portion of the principal or interest or any amount due under the Loan Documents within 3 business days of the due date;

c. clause 6.2 of the Loan Agreement it was agreed that on the occurrence of an event of default, at the option of the Plaintiff, any and all sums and charges due, the entire principal of and accrued and unpaid interest on the Loan together with reasonable attorneys' fees, shall be forthwith paid by the Third Party to the Plaintiff;

d. Section 1 of the Guarantee and Indemnity Agreement which the First Defendant acknowledged and agreed that any statement of account of the Borrower signed as correct by a duly authorized officer of Lender shall be conclusive against the Guarantor of the Obligations of Borrower, save in the event of manifest error. Further, the evidence of Robert Hughes, Special Accounts Underwriter employed by the Plaintiff is that the sum referred to in his evidence is correct and no error in the statement of the Defendants' account, manifest or otherwise, has been proven by the Defendants. Therefore, the sum provided by Mr. Hughes is conclusive of the amount due and owing by the Defendants to the Plaintiff.

44. Ms. Brown further submits that neither the Defendants nor the Third Party have disputed the principal or interest balance due under the Loan.

45. In all of the circumstances before the Court, the Defendants did not adduce any evidence showing that the respective Guaranty Agreements were entered into fraudulently, under duress or mistake and as such the Defendants have not advanced any argument that they were not bound by the terms of the Agreements.

46. To my mind, the Defendants accepting that the Third Party is in breach of the loan agreement (by way of their pleadings) is by extension the Defendants admitting and/or accepting that they are obligated by way of their respective Guaranty Agreements to repay the outstanding sums on behalf of the Third Party.

Sale of the Vessel

47. As provided by the provisions of the Loan Agreement, the remedies available to the Plaintiff after the occurrence of an event of default during the continuance of the same are those rights and remedies under the Applicable law. By virtue of Section 8.6. of the Loan Agreement the Borrower irrevocably agreed that any legal action or proceeding brought against the Borrower arising out of or relating to any Loan Document may be instituted at the election of the Lender in any court in The Bahamas; **or where the Vessel or any collateral is located** or registered, or in any state or federal court of competent jurisdiction located in the State of Tennessee, the United States and the Borrower agrees to be bound by any Judgment as a result of the same. The provisions of both Guaranty Agreements provide the same. (**Emphasis mine**)

48. While a Consent to Surrender of Vessel dated March 29, 2016 between the Plaintiff, the Third Party as Borrower and the First and Second Defendants as Guarantors was adduced before the Court the evidence of the Plaintiff was that the realization of the Plaintiff's security was by Judicial sale by the United States District Court Southern District of Florida In Admiralty, which was concluded on September 9, 2016, and not pursuant to the Consent to Surrender.

49. On or about November 21, 2016 the Plaintiff accepted the offer for the sale of the Vessel in the amount of $2,700,000.00.

50. The First and Second Defendants contend that the Plaintiff failed to take reasonable care to sell the vessel for the best price reasonably obtainable and in doing so, the Plaintiff was in breach of its obligations to the First and Second Defendants. However, the Plaintiff asserts that it discharged its duty of taking reasonable care in obtaining the best price reasonably obtainable at the time.

Issues

51. The issues before the Court in its determination are whether (i) the Plaintiff in the exercise of its power of sale exercised the power in a prudent way with due regard to the Borrower's interests in the surplus money; (ii) the Plaintiff exercised its power in good faith for the purpose of realizing the security and; (ii) the Plaintiff took reasonable precautions to secure a proper price.

The Law as relates to the duty of a Mortgagee

52. Halsbury's Laws of England, Fourth Edition, Volume 32, paragraph 726, under the rubric "Mortgagee not in a fiduciary position" states:-

"A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale; he has been so described, but this only means that he must exercise power in a prudent way, with a due regard to the mortgagor's interests in the surplus sale money. **He has his own interest to consider as well as that of the mortgagor, and so long as he keeps within the terms of the power, exercises the power in good faith for the purpose of realizing his security and takes reasonable precautions to secure a proper price, the court will not interfere, nor will it inquire whether he was actuated by any further motive...A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, so long as the amount is fixed with due regard to the value of the property. It is sufficient if the mortgagee complies with the terms of the power and acts in good faith, but good faith requires that the property is not to be dealt with recklessly.** If the sale is in good faith and he charges himself with the whole of the purchase money, he may sell on the terms that a substantial part, or even the whole is to remain on mortgage. **The mortgagee is apparently not bound to watch the market so as to sell at the highest price**...

If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale. However, if the mortgagee does not sell with proper precautions, he will be charged in taking accounts with any loss resulting from it." (**emphasis mine**)

53. The parties helpfully referred the Court to the authority of **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949 which outline a mortgagee's duty to a mortgagor.

54. Salmon L.J. at pages 643 and 644 in **Cuckmere Brick Co Ltd.** (supra) set out the mortgagee's duty to a mortgagor. He stated:-

"I will now turn to the law. **It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the**

mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. 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 exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.

...It is impossible to pretended 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 de Trafford* with *Tomlin v Luce* ((1889) 43 ChD 191 at 194). The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. **Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee.** The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee **and** that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale." (**emphasis mine**)

55. As I understand the authorities in determining whether a mortgagee rightly exercised its power of sale, the Court is obligated to consider all of the relevant circumstances. Therefore, it is only on consideration of the circumstances that transpired in this matter that the Court addresses its mind to.

Findings of Fact

56. The evidence before the Court on behalf of the parties consisted of the respective Witness Statements, viva voce evidence from the stand and numerous documents which each party advances is relevant. The Trial Bundle consisted of the documents upon which the Plaintiff relied and which were not disputed by the Defendants. The following are the Court's findings of fact from the, Witness Statements, the said documentary evidence and viva voce evidence of the witnesses.

57. I accept that the Third Party received the Vessel in 2006 and between 2006 and 2012 the Vessel was used extensively including that it was chartered commercially. That the Vessel sailed to Fort Lauderdale in 2012 for maintenance and was not used commercially or extensively or at all after that; and that in 2016 the Vessel was photographed by the Third Party as part of the efforts to sell it.

58. I accept that on or about October 9, 2014 the Third Party by virtue of a brokerage agreement between itself and Bradford Marine Yacht Sales granted Bradford Marine Yacht Sales the exclusive right and authority to manage the sale of the vessel, that the gross asking price was $14,000,000.00 and that the sales executive acting on behalf was Tucker Fallon.

59. I accept that a series of e-mail correspondence between the Defendants and Tucker Fallon show that prior to the purported surrender of the Vessel, Mr. Fallon advised the parties as to the state of the Vessel, possible remedies to the issues and the difficulties faced with selling the Vessel in the state it was in. In his e-mail dated January 8, 2016 he states that selling the Vessel "as is" would not be in their best interest as the offer price would be rock bottom. In another e-mail dated March 3, 2016 he advised that activity for clients to look at the Vessel was very slow as most of the brokers were aware that the boat had not run for years and that brokers were reluctant to show the boat as they were concerned to lose their clients.

60. I accept that the Plaintiff on or about April 19, 2016 filed a Motion for Entry of Order Authorizing Repairs to Vessel in Case No:16-cv-60705-WJZ in the United States District

Court Southern District of Florida in Admiralty so that the repairs as outlined in the said Motion would be effected to preserve and maintain the Vessel to help yield the maximum sales price. I also accept that on or about May 16, 2016 the said Motion was granted and it was ordered inter alia that the substitute custodian be authorized to make or cause to make the necessary inspection and/or repairs to the Vessel including the a/c system, compressors, engines and related equipment and to keep a log of any equipment removed from the Vessel and ensure that the equipment is timely returned to the Vessel or maintained within his/her care, custody, or control following any assessment or repair to the equipment.

61. I accept that by letter dated April 28, 2016 from Tucker Fallon, Sales Executive for Bradford Marine to Chris Johnson and Chris Oberholtzer of the Plaintiff advised the Plaintiff of the Vessel's valuation and the issues regarding the operation of the boat.

62. I accept that on or about May 20, 2016 a survey of the said Vessel was conducted by Davis & Company and that an inspection of the Vessel for the purposes of ascertaining the condition and value of the Vessel. I also accept the narrative as found on page 5 of the survey report that states:- "The vessel is currently inoperative and being prepared for sale after being recovered by a financial institution. The sale price of the vessel will be greatly affected by the amount of inoperative equipment that is returned to operating condition. There have been no reported losses in the last two years and no major hull damage reported however information is scarce. No engine service or warranty records available. Vessel was reported to have been modified for a draft reduction and no computations by a naval architect are available. Our office recommends at least a simplified stability test and computation of wind heel by a qualified naval architect. As the Atlantic hurricane season is approaches our office advise expediting the process of returning the vessel tc service and conducting a thorough sea trial to render the vessel capable of evacuating the area ahead of any approaching storm if necessary."

63. I accept that the survey estimated the value of the vessel at $16,000,000.00 as the estimated market value; the estimated replacement cost at $20,500,000.00; the orderly liquidation value at $7,500,000.00 and the forced liquidation value at $4,600,000.00. I also accept that the survey on page 7 noted that due to the condition of the vessel at the time of the inspection the surveyors' opinion was that the value of

the value in its present condition was at the forced liquidation value of $4,600,000.00 and that the survey defines forced liquidation value as "the estimated gross amount expressed in terms of money that could be typically realized from a property advertised and conducted public auction, with the seller being compelled to sell with a sense of immediacy on an as-is, where-is basis, as of a specific date."

64. I accept that on or about September 21, 2016 the Court in the action before the United States District Court Southern District of Florida confirmed the sale of the said Vessel conducted by the United States Marshall on or about September 9, 2016.

65. I accept that further e-mail correspondence between the Plaintiff and Whit Kirtland, Certified Professional Yacht Broker, Bradford Marine Yacht Sales in or around October 18, 2016 sought to address the issues relating to the desirability of the Vessel and the pricing of the Vessel as a result with possible pricing at $4,990,000.00 with it being ready to go (survey, sea trial, systems mostly working) or "as is where is" in the $2-2.5 million range.

66. I accept that the further e-mail correspondence between the Plaintiff and Bradford Marine Yacht Sales shows that the parties considered a possible offer at $2.7 million, the subsequent deadline and that while he (Rob Coon) did not like the broker for Bradford Marine Yacht Sales pushing for the sales price at almost $2 million he appreciated the negative image attached to the Vessel as a result of the Vessel not sailing for several years.

67. I accept that there have been several offers for the sale of the Vessel however, those offers were subject to a survey and sea trial. I accept that those offers expired. I also accept that the e-mail correspondence showed that clients were reluctant to purchase the Vessel due to the condition of it.

68. I accept that at the time of the sale the Vessel was not in running condition and could not undergo a sea trial.

69. I accept that the Third Party spent $1,000,000.00 on repairs to the Vessel and the Plaintiff in excess of $700,000.00 on additional repairs to the Vessel. I also accept that despite these repairs the Vessel could not undergo a sea trial. I further accept that to make the Vessel ready to undergo a sea trial may have entailed a further expenditure by the Plaintiff of $500,000.00 at a monthly holding cost of $25,000.00.

70. I accept that the Vessel was advertised for sale by the Defendants as early as 2013 and subsequently Bradford Marine Yacht Sales, Bradford Maine Inc., and Real Deal on behalf of the Plaintiff. The Court accepts that it was shown to prospective buyers by Captain Timothy Hammer and at the Fort Lauderdale Boat Show in October of 2016.

The Law

71. Counsel for both parties submit that in exercising its power of sale over mortgaged property, a mortgagee must act in good faith and is under a general duty to take reasonable care to obtain the best price reasonably obtainable at the time. They both outline the principles that the Court should consider when determining if a mortgagee has discharged their duty. Jervis Kay, QC in Close Brothers Ltd v AIS (Marine) 2 Ltd (in liquidation) and another [2018] Lexis Citation 97 at paragraph 12 accepted that the relevant authorities provided by Counsel for the Second Defendant demonstrated:- "12. It is, I think, helpful to consider the relevant principles applying the relationship between a mortgagee and mortgagor with respect to the sale of property of which a mortgagee has taken possession in the exercise of its rights under the mortgage deed. At the hearing for summary judgment Mr. Rivalland submitted and I accepted that the relevant authorities demonstrate the following:

a. The mortgagee of a ship owes the same duty of care in relation to the sale as any other mortgagee owes, see Gulf and Fraser Fisherman's Union v Calm C Fish Ltd [1975] I Lloyds Rep 188.

b. The mortgagee owes a duty in equity to take reasonable care to obtain the best price reasonably obtainable at the time, see Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349 at 1355 and others, which has been equated with the true market value Cuckmere Brick Co v Mutual Finance Ltd [1971] Ch 949.

c. Although the timing and the manner of sale is a matter for the mortgagee, he will be liable to the mortgagor if he fails to act with reasonable care to obtain a proper price. The property must be fairly and properly exposed to the market, absent cases of real urgency, see Silven Properties Ltd v Royal Bank of Scotland [2003] EWCA Civ 1409.

d. The mortgagee will not be adjudged to be in default unless he is 'plainly on the wrong side of the line'. A hue market value can have an acceptable margin of error, Michael v Miller [2004] EWCA Civ 282 where a bracket between£ 1.6 million and £1.9 million was permissible.

e. The mortgagee must behave as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold, see McHugh v Union Bank of Canada [1913] AC 299. (Cases predating McHugh are to be treated with caution for the reasons that appear in Cousins The Law of Mortgages 3rd ed. at 25-52ff)

f. If the mortgagee breaches his duty, the remedy is not common law damages, but an order that the mortgagee account to the mortgagor, not for what he actually received, but what he should have received.

g. The mortgagee must act fairly towards the mortgagor. He can protect his own interests but he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor. He must take reasonable care to maximize his return from the property, Palk v Mortgage Services Funding pic [1993] Ch 330.

h. The mortgagee owes the same duty to a guarantor, Standard Chartered Bank Ltd v Walker [1982] 1 WLR 1410; China and Southsea Bank Ltd v Tan [1990] 1 AC 536.

i. The mortgagee's duty, to take care to sell for the best price reasonably obtainable, is not delegable. He does not perform his duty merely by appointing a reputable agent to conduct the sale, see Raja v Austin Gray [2002] EWCA Civ 1965 at [34].

j. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off the debt': Lightman J sitting in the Court of Appeal in Silven Properties.

k. A sale at just above the sum required to discharge the mortgage may be looked at carefully by the court, although there may well be occasions when that is the proper price or true market value, as suggested by Fisher and Lightwood's Law of Mortgage at 30.254.

l. The mortgagee cannot sell to himself, either alone or with others, or to a trustee for himself, nor to anyone employed by him to conduct the sale unless the sale is

ordered by the court and he has obtained permission to bid, Farrar v Farrars Ltd (1888) 40 ChD 395 at 409, and

m. Where the mortgagee sells to a 'connected' person, the burden of proof is reversed and the mortgagee must prove that he took reasonable care to obtain the best price, Saltri Ill Ltd v MD Mezzanine SA Sicar & ors [2012] EWHC 3025.

n. The reason for considering whether the mortgagee and the purchaser are or may be 'connected' is the need to guard against unconscious bias as well as the risk of other forms of skulduggery, Australia & New Zealand Banking Bangadilly (1978) 139 CLR 195, quoted with approval in Alpstream AG & ors v PK Air Finance SARL & ors [2013] EWHC 2370."

Submissions

72. Counsel for both parties have provided the Court with very fulsome submissions. In that vein the Court will only summarize those submissions that it finds to be relevant to the issues.

73. Ms. Brown makes the following observations, contentions and assertions in support of the Plaintiff discharging its duty:-

a. That at the time of the sale the Plaintiff had three surveys that reflected the forced liquidation value of the Vessel as between $3,000,000.00 and $4,600,000.00; that the undisputed evidence at trial was that the Vessel was not in running condition and could not undergo a sea trial; that the value of the Vessel was put between $2,000,000.00 and $2,500,000.00 as the "as is where is" value due to its condition; that the Vessel had numerous issues; that it was recommended by Mr. Kirtland that the Plaintiff accept an offer of $2,700,000.00 for the sale of the Vessel as that was the best offer it would receive due to the condition of the boat;

b. That the Vessel was advertised on numerous occasions and showed to prospective buyers from as early as 2013 until its sale;

c. That the Plaintiff did not have a duty to improve the property for sale as the provisions of the Loan Agreement (Section 5.1 (H)) placed such an obligation on the Third Party; that the Plaintiff effected such repairs to make the Vessel sea ready although it was not under any contractual or other obligation to so and that it was entitled to sell the Vessel "as is";

d. That the burden of proving that the Plaintiff breached its duty rests on the Defendants; that the burden requires the Defendants to prove the Plaintiff was plainly on the wrong side of the line, that the fact that a higher price might have been obtained does not constitute a breach of duty; the Defendants did not adduce any evidence as to the value of the Vessel in December 2016; Sections 6(A)(2) and 6(B) of the Defendants respective guaranty agreements authorized the Plaintiff to sell the Vessel without incurring any liability to the Guarantors or to any other party and without impairing or releasing the obligations of Guarantors under the Guarantees; the relationship between the parties is governed by the Loan Documents and the Plaintiff was entitled to exercise its rights and powers notwithstanding any rule of law or equity to the contrary; that the Defendants must also show that in the course of carrying out the sale of the Vessel the Plaintiff impaired the value of the Vessel. See Section 82 of the Evidence Act; Cuckmere Brick Co. v Mutual Finance (supra); Close Brothers Ltd v AIS (Marine) 2 Ltd (in liquidation)(supra); Den Norske Bank ASA v Acemex Management Co Ltd. (supra).

74. Ms. Smith on behalf of the Defendants make the following observations, assertions and contentions:-

a. That there were several failures on the part of the Plaintiff to comply with the laws of the Bahamas in that it failed to have regard to the interest of the mortgagor. These include the conduct of the Plaintiff by accepting the recommendation of the Plaintiff's customer service manager to sell the Vessel for $2.95 million dollars in the face of the May 2016 survey which placed the forced liquidation value at $4 million dollars. That the Plaintiff's evidence shows that the Plaintiff was only intent on selling the Vessel before the close of the year;

b. That the Plaintiff was under a duty to have the broker Whit Kirtland explore the possible selling of the Vessel to another contact (as evidenced by an e-mail chain between Kirtland and the Plaintiff's customer service manager) and as such the Plaintiff owed a duty to take reasonable care to obtain the best price reasonable at the time or obtain true market value. See Cuckmere Brick Co v Mutual Finance Ltd (supra) and Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349 at 1355;

c. That the Plaintiff's sale price of $2.7 million dollars was unreasonable given that the Second Defendant's evidence that the Vessel (now named the Golden Touch

II) was being listed for $12,350,000.00 as of August 2019 and that demonstrates that the Plaintiff did not sell the Vessel for the right price because it felt that the guarantor would make up any shortfall. See Close Brothers Ltd v AIS (Marine) 2 Ltd (in liquidation) and another (supra).

Analysis and Discussion

75. The Court takes into consideration the principle that a mortgagee must act in good faith and is under a general duty to take reasonable care to obtain the best price reasonably obtainable at the time.

76. Taking into account my findings of fact as outlined in the above paragraphs I accept the submissions of Ms. Brown that the Plaintiff discharged its general duty to take reasonable care to obtain the best price reasonably obtainable at the time and acted in good faith.

77. The Defendants I find have not adduced any credible evidence such as any report or survey done in or around the time when the Vessel was in their possession to show the state of the Vessel and any possible sale value of the Vessel. While the Defendants adduced a brokerage agreement in or around October 2014 with a gross asking price of $14,000,000.00, based on the Defendants own evidence via email correspondence, the Defendants were advised from as early as January 2016 of the state/condition of the Vessel and that any potential sale in its "current" condition would attract an offer price that would be "rock bottom". Further, based on the evidence that is before the Court and my findings of fact above, it is evident from the Plaintiff's actions of (i) attempting to agree to the consent to surrender the vessel, (ii) requiring and requesting an updated survey as at May 2016 to ascertain the condition of the Vessel and recommendations to bring the Vessel from a state of disrepair,(iii) of obtaining a court order to effect the necessary repairs, and (iv) of entering into a subsequent brokerage agreement after being in possession of the Vessel with the intent of selling and considering the advice from the brokers as to the possible offer and accepted prices as a result of the condition of the Vessel "as is", I am satisfied on the evidence that the Plaintiff took reasonable care to obtain the best price reasonably obtainable at the time. I am also satisfied that the evidence before the Court shows that in the circumstances the Plaintiff acted reasonably in the exercise of its power of sale in securing a proper price for the Vessel especially in the condition it was in. Further, the

Defendants have not provided any credible evidence to satisfy the Court that the Plaintiff acted recklessly in its dealings with the Vessel. I also accept the submissions of Ms. Brown that the Defendants have failed to provide any evidence that a higher price could have been procured for the Vessel in its 'as is where is' condition without a sea trial.

78. As I understood the Defendants pleadings in their Amended Defence at paragraphs 6, 7 and 8, they asserted that the Plaintiff was obligated to make repairs to put the Vessel in a condition that would allow it to move under its own power mitigating any potential loss and preserving the Vessel to ensure it yielded its maximum sales price subject to the Florida Court Order dated May 16, 2016. Further, they alleged that the Plaintiff negligently or intentionally failed to discharge that duty and used the funds to make cosmetic repairs to the Vessel which resulted in the Vessel being sold for substantially less than its market value. To my mind, these allegations were not proven by any evidence adduced on behalf of the Defendants. Taken at its highest, the Plaintiff's duty as mortgagee was to act in good faith and to my mind, the Plaintiff's request to repair the Vessel so that it could realize its security, shows the Court that it took mitigating steps to ensure that the Vessel could procure a reasonable price given the market.

Damages

79. The Plaintiff in its Amended Writ of Summons at paragraph 26 lists the particulars of loss and damages suffered as a result of the Defendants and Third Party's breach and state at 26(j) that the Plaintiff has expended the sum of $764,656.89 in collection realization efforts as at February 28, 2017.

80. The Defendants submit in part that the Plaintiff is not entitled to recover this amount as it is a claim for special damages and that must be specifically pleaded and proved and the Plaintiff has failed to do so; that the Plaintiff exhibited invoices but there is no proof that the invoices were paid and such failure to do so renders the sums unrecoverable; that the Plaintiff only exhibited invoices for Bradford Marine and there were no exhibited invoices or proof of payment to Tim Hammer, JDV, Yacht Tech, Ocean Marine, Legal, Williams Marine and Bishop Marine and such failure to provide the same renders the sums unrecoverable; that any invoice issued prior to the Plaintiff

being vested with the title be disallowed as the Plaintiff's ownership was effective September 9, 2016.

81. In response, the Plaintiff submits in part that the Loan Documents, in particular Section 8.3 provide that the Borrower agreed to pay all reasonable losses, costs and expenses incurred by the Plaintiff as a result of the Third Party's failure to perform its obligations under the Loan Documents. Further, that by Section 1 of the respective Guaranty Agreements, the Defendants agreed to pay to the Plaintiff all moneys and discharge all obligations and liabilities incurred to the Plaintiff by the Third Party under the Loan Documents and that by Section 4 of the respective Guaranty Agreements, the Defendants agreed to pay any unpaid amounts in respect of the obligations or covenants on the part of the Third Party not performed.

82. During the course of these proceedings the Defendants have not alleged that they entered the loan agreements fraudulently or under duress or under mistake and as such they accept that the terms of the loan agreements were and are binding on all of the parties. The Defendants assertion that the Plaintiff should not be able to recover the amounts claimed at 27(j) in its Amended Writ of Summons, as it has not proven that the invoices were paid, I find is not in line with the nature of special damages. In **Odger's Principles of Pleadings and Practice in Civil Actions in the High Court of Justice, 27th Edition at pages 170-171**, under the heading "The Claim for Damages" it states in part:-

> *"Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct...No general rule can be laid down as to the precise degree of exactness necessary in a claim of special damage..."*

83. Therefore, considering the Plaintiff's submissions, the invoices produced in the Trial Bundles and the viva voce evidence of Mr. Hughes and the authority above in the circumstances, I accept Ms. Brown's submissions and find that the Plaintiff is able to recover the losses as particularized at paragraph 26(j) in the Amended Writ of Summons.

Disposition

84. Therefore, having heard the submissions of Counsel and accepting the submissions of the Plaintiff for the most part, having heard and considered the evidence, having read and considered the relevant authorities I find that Plaintiff is entitled to recover the sums claimed in its Amended Writ of Summons.

85. The Court on May 30, 2022 gave a provisional view on the question of interest and invited the parties to provide their respective submissions on the issue.

86. Mrs. Brown submits that the contractual provision upon which the Plaintiff relies for its position that the contractual rate of interest applies to the date of full payment is found at section 1, paragraph 2 of the Guarantee and Indemnity (Plaintiff's Bundle Tab 1) which reads:

> "Guarantor agrees to pay interest (to the extent that such interest is not paid by Borrower pursuant to the Agreement) from the date of demand until payment of all moneys obligations and liabilities hereby guaranteed (as well after as before judgment) at the relevant interest rate under the Agreement.

87. Further, she submits section 2.14 of the Loan Agreement provides that, upon default, interest shall be calculated at the Permanent Loan Rate (5.12%) plus 9%. Additionally, section 6.2 provides that, upon default, the entire Obligations become due and payable, together with all interest and other expenses. Accordingly, upon default, the interest rate is crystallized at the then-prevailing Permanent Loan Rate plus 9% (aggregating, 14.12%).

88. Mrs. Smith submits in response Section 3 of the Money Lending Act allows the Court to consider whether the interest being charged is excessive and give relief. Therefore, the Court is not bound to adhere to the terms of the contract. Also, the Court is asked to find that the interest charged is excessive (14.12%) because it represents unjust enrichment and the Defendants' contend that the Plaintiff is entitled to a return given that the funds were not available for its use, and this should be the only consideration. The Plaintiff avers that the contract allows it to recover all costs, fees and reasonable attorney fees. Therefore, the Plaintiff does not have to recover these costs and fees from the interest to be paid by a defaulting borrower (i.e. the borrower will pay these costs, fees etc) so a 14% interest rate is excessive. It is her submission that if the

court is minded to award interest, then a rate of 4.25% p.a. which is the prime rate since 2017 according to the Central Bank of the Bahamas site should be awarded.

89. Further she submits that the Plaintiff has not produced any evidence for the basis of its calculation of the base rate of 5.12% as found in the Loan Agreement as the Permanent Loan Rate with respect to months 37 through permanent note maturity date is defined in as a variable rate of interest equal to the One month LIBOR plus 3% per annum and that the "One Month LIBOR" is calculated on the day that is two London Banking Days preceding (i) the disbursement date, and (ii) the date of each payment installment period thereafter. Therefore, it is proposed that the rate should be 4% p.a. for the reason already mentioned.

90. Ms. Brown in reply submits that as for the Defendants' contention that the Plaintiff has not produced any evidence for the basis of its calculation of the base rate and proposed that the rate should be 4% p.a. for the reason already mentioned, this figure was pleaded and not disputed at trial by the Defendants. Further, the trial having concluded, there is no basis or requirement for the Plaintiff to adduce additional evidence at this point. Moreover, the statutory rate has been taken to be prime plus 2% per annum; which would be 6.25% per annum. Additionally, in any event, she refers to section 2 of the Civil Procedure (Award of Interest) Act, 1992, which states that:

> "Provided that nothing in this section shall apply in relation to any judgment debt upon which interest is payable as of right, whether by virtue of an agreement or otherwise."

91. Lastly, she submits, where there is a contractual agreement relative to post judgment interest, that post judgment arrangement applies.

92. Having reviewed the submissions of Counsel on this issue, I accept the Plaintiff's submissions and award interest at the rates as set out in the Submissions, that is, Section 2.14 of the Loan Agreement provides that, upon default, interest shall be calculated at the Permanent Loan Rate (5.12%) plus 9%. Additionally, section 6.2 provides that, upon default, the entire Obligations become due and payable, together with all interest and other expenses. Accordingly, upon default, the interest rate is crystallized at the then-prevailing Permanent Loan Rate plus 9% (aggregating, 14.12%) and is due from the date of demand until payment of all moneys obligations

and liabilities hereby guaranteed (as well after as before judgment) at the relevant interest rate under the Agreement. I so order.

93. Costs are usually in the discretion of the Court and the general principle on the award of costs is that it follows the event. I see no reason to depart from this general principle and order that the Defendants pay the Plaintiff's costs to be taxed if not agreed.

94. Further, as the Court indicated the orders that the date on which this Judgment takes effect is as at today's date (Order 42, Rule 3(2) of the RSC).

95. On one final matter, that of the delay in delivering this Ruling, the disruptions caused by the Covid 19 pandemic greatly interfered with the Court's writing schedule and I apologize profusely for the delay in this matter.

Dated this 10th day of June, 2022