IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO.2 OF 1984

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT
THE HON. MR. JUSTICE KERR - J.A.
THE HON. MR. JUSTICE HENRY - J.A.

BETWEEN:	WILLIAM W. BECKER	APPELLANT/Second Defendant
AND:	MARGUERITE L. BECKER	APPELLANT/Third Defendant
AND:	THE BANK OF NOVA SCOTIA	RESPONDENT/Plaintiff
AND:	PARADISE MANOR LTD. (In Winding-Up)	FIRST DEFENDANT/Appellant

Mr. R. D. Alberga Q.C. and Mr. Angus Foster for first and second appellants

Mr. C. B. Cohen Q.C. and Mr, T. Shea for the respondent

Mr. C. Adams for first defendant/appellant

July 29, 30, 31, August 1, 2, 6, December 6 1985.

ZACCA, P.

On August 6, 1985 this appeal was dismissed and the Order of the Grand Court affirmed. The Respondent's notice was also dismissed. The Court ordered that the costs of the appeal should be the Respondent's and made no order as to costs on the Respondent's notice. We promised to put our reasons into writing. This I now do for my part.

On January 21, 1980 Paradise Manor Limited (hereinafter referred to as the "Company"), charged its land by way of Debenture to the Bank of Nova Scotia (hereinafter referred to as the "Bank"), to secure a loan for the construction of a 360 room hotel, shopping complex and condominium in the West Bay Beach South area. The money was advanced from time to time and by December 1981 the principal sum secured by the charges was U.S.$18,000,000.

The securities (hereinafter referred to as the "LAND"), given by the Company to the Bank in respect of the loan were:

(1) a first debenture dated 21 January 1980,by the Company including a provision charging "by way of legal charge" its land comprising Parcels 9 and 10 of Block 13A in the West Bay Beach South Registration section and creating a first floating debenture over all its undertakings, goodwill and other property;

(2) registered first charge over lands comprising Parcels 11, 12, 14, 124, 125, H61 and 125 H80, Block 13B, West Bay South Registration section.

Mr. William Becker was the Managing Director of the Company and with his wife Marguerite were the shareholders. On September 8, 1981 Mr. and Mrs. Becker executed personal guarantees in respect of the Company's liabilities to the Bank. The guarantees were limited to U.S.$11,300,000.

Construction of the Hotel commenced and by May 1981, the Hotel was partially completed. However, the Company apparently ran into financial difficulties and the Hotel was never completed.

In May, 1982, the Company defaulted in payment of interest under the loan.

On July 27, 1982, the Bank demanded in writing from the Company immediate payment of all money due. The letter of demand said in part:

> " We hereby make formal demand for payment of the monies owing by way of non revolving demand loans U.S.$15,532,806.96, and operating overdrawn accounts of respectively U.S. $12,737.81 and C.I.$90,469.72. Interest will continue to accrue on these accounts until payment is made in full.
>
> If payment is not forthcoming by noon July 28, 1982 it is our intention to proceed with whatever remedies are available to us for full recovery of our monies."

This letter was a demand for payment of principal and interest and this is confirmed in a letter dated March 15, 1983 from the Bank's Attorneys, Hunter and Hunter to the Company's Attorneys, W. S. Walker and Company. In this letter, at paragraph (c), the letter of July 27, 1982 is referred to as a final demand for payment of all indebtedness.

On July 29, 1982 a receiver was appointed under the Debenture with notice to the Debtor. The receiver took possession of all the assets charged and no further work proceeded on the Hotel.

On October 7, 1982 the Bank made demands in writing against the guarantors, Mr. & Mrs. Becker for payment of the sum of U.S.$11,300,000. All of these monies remained unpaid by the Company and the Beckers. There is no dispute that they are in default of payment.

It was then decided to sell the lands charged in the Bank's favour by public auction. Prior to the auction, extensive advertising was undertaken in leading publications in the Caribbean, North America and Europe. Brochures and information were sent to several hundred persons who had either responded to the advertisements or who might have had an interest in the auction. Attempts were also made to interest leading hotel chains in the hotel site. More will be said later on the efforts made by the Bank to advertise or sell the property.

On March 23, 1983, a valuation report was obtained by the Receiver from Bould Chartered Quantity Surveyors of Georgetown, Grand Cayman, The hotel site and adjoining lands were valued at U.S. $14,420,000.

On March 25, 1983, a public auction was held. Mr. Becker and some 119 persons attended the auction. An opening bid of U.S.$4,000,000 for the hotel, undeveloped adjoining lands and equipment was asked for by the auctioneer. This bid was eventually reduced first to US$3,500,000 and then to U.S. $3,000,000. No bids were forthcoming for the hotel site and adjoining lands. The public auction was therefore unsuccessful.

Further attempts were made after the auction to attract persons interested in the hotel site but that too was unsuccessful. On August 30, 1983 a winding-up order was made by the full Court.

An agreement for sale of the land was negotiated by the Bank, with Georgetown Associates on November 27 1984 for U.S.$7,500,000. The Bank subsequently obtained leave under section 98 of the Companies Law to seek approval of the Court for the sale.

An application was made to the Court for approval of the sale and on December 21, 1984 the guarantors were by consent added as parties to the proceedings. On February 28, 1985 Hull J, granted an order approving the sale to Georgetown Associates. The order was in the following terms:

"1. That the Bank of Nova Scotia may have leave to act upon the variations of S. 72 of the Registered Land Law contained in the registered charges made by Paradise Manor Limited as chargor in favour of the Bank of Nova Scotia as chargee in respect of certain properties, namely, those consisting of West Bay Beach South Registration section; Block 13B; Parcels 124, 11, 12, 14, 125H61 and 125H80.

2. That the Bank of Nova Scotia may have leave to sell by private treaty pursuant to an agreement dated 27th November, 1984 made between the Bank of Nova Scotia and Georgetown Associates, certain properties owned by Paradise Manor Ltd. and charged to the Bank of Nova Scotia, such properties consisting of West Bay Beach South Registration Section Block 13B Parcels 124, 11, 12, 14, 125 H61 and 125 H80, the

" proposed sale being a variation in accordance with section 77 of the Registered Land Law of a Chargee's remedies in respect of charged property.

3. That to the extent that the supplementary summons filed in this Cause on the 24th January, 1985 seeks relief additional to that sought in the summons filed on the 11th December, 1984, such additional relief is refused.

4. That the cost of the application be the plaintiff's save that the additional costs occasioned by the supplementary summons filed on the 24th January, 1985 shall be the defendants.

5. That the plaintiff has liberty to apply on ten (10) day's notice to the defendant.

It is from this order that the appeal was heard. Three grounds of appeal were argued by the appellants. These were:

"1. That the learned Trial Judge was wrong in law in holding that the Respondent/Plaintiff had complied with the mandatory provisions of the Registered Land Law as to notices required to be given by a Chargee and that consequently, it had acquired a power to sell the charged property by public auction which could be varied to allow a sale by private treaty.

2. That the learned Trial Judge was in error in concluding that if he was wrong in holding that there had been compliance with section 72 of the Registered Land Law an Order under s. 77 of the Registered Land Law dispensing with the Notice requirements of section 72 could be made by him.

3.That the learned trial judge was in error in holding that the proposed sale of the charged property to Georgetown Asssociates by the Respondent/Plaintiff for a sum of U.S.$7,500,000.00 was not a sale at an undervalue and

> "ought to have concluded that on a proper application of the accepted principles the true market value of the charged property was at least U.S.$13,180,000.00."

A fourth ground of appeal was not pursued by the appellants. This ground of appeal was:

> "That the learned Trial Judge was in error in concluding that the Respondent/Plaintiff was not obliged to consider the offer of Paradise Manor Resort Hotel Limited (being exhibit 9 to the said affidavit of Mr. William Becker filed on 18th January, 1985) and that the learned Trial Judge ought to have held that this offer was superior to the terms of the said proposed sale to Georgetown Associates."

The Court was informed that an undertaking by a Corporation known as SISCORP to make certain payments under the proposed offer by Paradise Manor Ltd. had expired.

At the hearing before Hull, J. the Respondent argued that it was perfectly proper for the Bank not to participate in such an agreement with Mr. Becker because it was against its commercial judgment to do so. The learned trial Judge agreed with this submission. In my view, having regard to all the circumstances relating to the proposed purchase by Paradise Manor Ltd., the learned trial Judge was correct in holding that the bank was not obliged to accept the offer made by Paradise Manor.

A respondent's notice relied on the following grounds:

> "i. The Learned Trial Judge erred in law in failing to find:
>
> (a) that the Bank was at liberty to sell the lands concerned to the proposed purchaser under the terms of the debenture ("Indenture") of the 21st January, 1980.
>
> (b) that upon the conclusion of such a sale the purchaser would be entitled to be registered as the proprietor of

" the lands concerned.

ii. The Learned Trial Judge erred in law in failing to find that the Bank could dispose of the Registered title to the lands concerned without adhering to the provisions of the Registered Land Law by means of the power of sale exercisable under the debenture.

iii. The Learned Trial Judge erred in law in holding that a registered proprietor could not charge his registered title except in accordance with the provisions of the Registered Land Law.

iv. The Learned Trial Judge erred in law in holding that the provisions of Section 77 of the Registered Land Law relates solely to powers exercisable under registered charges.

v. The Learned Trial Judge erred in law in holding that he had no jurisdiction to entertain an application under section 77 of the Registered Land Law to vary the provisions of section 70, 72, 73, 74 and 75 of the Registered Land Law pursuant to the powers contained in the debenture.

The arguments on behalf of the Respondent's notice may be briefly dealt with before dealing with the appellant's groundsof appeal. It was submitted by Counsel for the Respondent that under the debenture the Bank could have been given the power to appoint a receiver and to sell the lands if there was default by the Company and that these powers could be exercised independently of the provisions of the Registered Land Law as it affected registered land. It was further submitted that the Bank had the power to sell the lands despite the Registered Land Law. This issue was argued before the Learned Trial Judge who rejected the contention put forward by the respondents.

Section 3 of the Registered Land Law provides:

"Except as otherwise provided in this Law, no other law and no practice or procedure relating to land shall

"apply to land registered under this law so far as it is inconsistent with this law."

If the contention of the Respondent is correct then there would have been no necessity for the Bank to apply to the Court for the sale to be approved. The Registered Land Law makes provisions for the disposition of Registered Land. Section 37 provides as follows:

"37 (1) No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this law, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this law shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised."

Although section 37 does not affect the contractual rights of parties, the proposition that the Bank may dispose of the Registered Title to the land by reason of the terms under the debenture without complying with the provisions of Division 3 of the Registered Land Law cannot be sustained. The debenture could therefore operate as a contract but any power of sale conferred by it cannot extend to the Registered Land and such land cannot be sold without complying with the provisions of the Registered Land Law.

The Respondent's notice therefore fails.

For the Appellants it was argued:

(i) That the right to sell by public auction under s. 75

of the Registered Land Law had not arisen and therefore there could be no variation to allow for a sale by private treaty. It was further submitted that the Bank had failed to comply with the mandatory procedure requirements as to notice under the Registered Land Law and the right to sale had not yet arisen.

(ii) That the learned trial Judge was in error in exercising his discretion under s. 77 of the Registered Land Law in dispensing with the notice required under s. 72 of the Registered Land Law.

(iii) That the proposed sale to Georgetown Associates was at an undervalue and was not essentially at arms length transaction. It was contended that the market value having regard to a valuation based on the application of the recognized principles of a valuation was at least U.S.$13,000,000.00.

(1) NOTICE

It was contended by the Bank that S.64 (2) of the Registered Land Law only relates to default in payment of principal and since there is a default in the payment of interest no notice was required.

Section 64 of the Registered Land Law states:

"64. (1) A proprietor may, by an instrument in the prescribed form, charge his land or lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, contain a special acknowledgment that the chargor understands the effect of section 72, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where

> "no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.".

The debenture dated 21st Janaury, 1980 made provisions for the repayment of principal and interest. The registered collateral charges to the debenture provided for a charge to secure the payment of principal and interest as provided for in the debenture.

The Company agreed with the Bank under the debenture to the following provisions:

> " To pay to the Bank on demand the principal sum and interest hereby secured and pending such demand to repay the principal sum by paying to the Bank 95% of the sale price of each apartment sold provided that any balance of the principal sum then remaining unpaid shall be repaid to the Bank on the 31st day of May, 1981."

It is not disputed that on 31st May, 1981, principal and interest were due. It is also common ground that no demand for repayment was made on 31st May, 1981.

The findings of the learned trial Judge that s. 64 (2) of the Registered Land Law does not relate to interest is in my view incorrect. The words in s. 64 (2) "a date for the repayment of the money secured" clearly includes principal and interest.

The Bank not having demanded repayment on the 31st May, 1981, the money becomes due three months after the service of a notice in writing demanding payment. It was therefore necessary for the Bank to serve a notice to the Company under s.64 (2). It is submitted by Counsel for the appellants that the notice should specify the exact date of repayment. The section clearly states that the money is due three months after the service of the demand in writing and is unnecessary to specify the exact

date in the notice. By operation of law the money becomes due, three months after the service of demand in writing. Has the Bank complied with s. 64 (2) of the Registered Land Law? The appellants conceded that the letter of July 27, 1982 could constitute a notice under s. 64 (2).

The letter insofar as is relevant stated:

> "We hereby make formal demand for payment of the monies owing by way of non revolving demand loans U.S.$15,532,806.96, and operating overdrawn accounts of respectively U.S.$12,737.81 and C.I.$90,469.72. Interest will continue to accrue on these accounts until payment is made in full."

I am of the view that the letter of 27th July, 1981 can be regarded as a demand in writing under s. 64 (2) and that it relates to both principal and interest. The letter of 27th July,1981 was therefore not a "notice in writing to pay the money owing" under s 72.

The Bank having complied with s. 64 (2), was now required to serve a notice under s 72. S.72 of the Registered Land Law is as follows:

> "72 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.
>
> (2) If the Chargor does not comply within three months of the date of service, with a notice served on him under subsection (1), the chargee may -
>
> (a) appoint a receiver of the income of the charged property; or
>
> (b) sell the charged property;
>
> Provided that a chargee who was appointed a receiver may not exercise the power of sale unless the chargor fails to

"comply, within three months of the date of service, with a further notice served on him under that sub-section."

The Bank failed to serve a notice under s. 72. At the hearing of the summons it was submitted by Counsel for the Bank that the learned trial Judge had the power to order a variation and that the service of the notice under s. 72 could be dispensed with.

Section 77 of the Registered Land Law provides for the variation of certain sections. It states as follows:

"The provisions of sections 70 (2) and (3), 72, 73, 74 and 75 may in their application to a charge be varied or added to in the charge:

Provided that any such variation or addition shall not be acted upon unless the Court, having regard to the proceedings and conduct of the parties and to the circumstances of the case, so order."

The learned trial Judge therefore had the power to vary s. 72. He also had the power to vary s. 75 which is as follows:

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

It was submitted by counsel for the appellants that such an application to vary s. 72 could not be heard by the learned trial Judge on the summons before the Judge. The application before the Judge was for an Order approving a sale of the land by private treaty. In considering

the application, the learned trial Judge was competent to consider all sections of the Registered Land Law which were relevant to the granting or rejection of the application. The summons was wide enough to allow a consideration of s. 77. Both parties were given an opportunity to address the learned trial Judge on this issue. All the relevant facts were before the Judge for his consideration and it has not been suggested that there were other matters which could be placed before the Judge for his consideration in deciding whether he should exercise his discretion in varying s. 72.

This application was being heard some two and one half years after the notice under s. 64 (2) had been served on the company.

In fact the registered collateral charges to the debenture provides in paragraph 6 as follows:

> "In the event tht the chargor shall fail to discharge all monies and liabilities in full pursuant to the terms of the Debenture or shall be in breach of any of the covenants or obligations in the Debenture contained whether express or implied or in the event thatthe Chargor goes into liquidation (other than a voluntary liquidation for the purposes of re-construction only the terms of which have been previously approved in writing by the Bank) or suffers the appointment of a receiver over any part of its assets then in any such event, the whole of the principal sum, interest and any other monies owing to the Bank under the debenture or hereunder shall immediately become due and payable and the provisions of s. 72 and s. 75 of the Registered Land Law, 1971 shall apply subject to the modifications hereinafter set forth and the Bank may also exercise such remedies and powers under the provisions of the debenture as it may think fit;
>
> (i) the power of sale and appointing a receiver and any other remedies available to the Bank shall become immediately exercisable without further notice;

(ii) in addition to remedies provided by section 72 of the above law the Bank shall have the right to foreclose or enter into possession of the charged premises or both in the same circumstances as would allow the Bank to exercise its powers of sale or appoint a receiver;

(iii) in the event that the Bank does appoint a receiver or enter into possession of the charged premises the Bank shall be entitled to exercise its powers of sale or foreclosure or entry into possession at any time thereafter without further notice;

(iv) upon the power of sale arising the Bank shall have the right to sell the charged premises by private treaty as well as by public auction.

The parties have in fact agreed for the provisions of s. 72 to be varied as it relates to the registered charges. What it does is to allow the Bank where there has been default in payment of principal or interest under the Debenture, to sell the lands without giving the notice required under s. 72. The agreement also allows the Bank to sell by private treaty or by public auction.

The company must have been aware of the amount of their indebtedness. They were aware of the Bank's intention to sell the land. Notice of the intention to sell the land by public auction was given to the company. Mr. Becker attended the auction in March 1983. The company was given every opportunity of either paying off their indebtedness or of entering into any agreement with the Bank to purchase the land. It was not until November 1984 that the sale to Georgetown Associates was negotiated.

The company had ample notice of their indebtedness and the fact that they were required to settle their debt. The time which passed between the serving of the demand on 27th July, 1982 and the hearing of the summons was far greater than the seven months required under the

Law assuming that the proper notices under s. 64 (2) and s. 72 had been served, before the Bank could have offered the land for sale.

The summons before the learned trial Judge was for an order approving a sale by private treaty the proposed sale being a variation in accordance with section 77 of the Registered Land Law. Under s. 77 both s. 72 dealing with notice and s. 75 dealing with a sale by public auction may be varied.

The parties agreed to this modification of s. 72 in their contractual agreements.

It cannot be said that it would be unfair or unreasonable, having regard to all the circumstances, for the learned trial Judge to have considered a variation of s. 72 under the summons before him.

In my view the learned trial judge correctly exercised his discretion in allowing the variation of s. 72 and in dispensing with the notice requirement to be given under s 72. In the circumstances I would not interfere with the order made in this regard.

(11) UNDERVALUE:

It was submitted by counsel for the appellants that the evidence before the learned trial Judge demonstrated that the proposed sale to Georgetown Associates was at an under value.

In March 1983 prior to the public auction, the land was valued by Bould on behalf of the Bank for U.S.$14,420,000.00. In October, 1984 just prior to the negotiations with Georgetown Associates the land was valued again by Bould for U.S.$7,560,000.00.

An affidavit filed on behalf of the company in the name of Mr. Stephen Williams was submitted on behalf of the appellants. In his affidavit, Mr. Williams stated that he was requested by Mr. Becker to

comment on the fair market value of the land with particular reference to the two reports by Bould. He concludes by stating that the value would be in the region of U.S.$13,180,000.00. It would seem therefore that Mr. Williams is in agreement with the first valuation made by Bould in March, 1983. It is true that the valuations by Bould differ in valuation greatly. The second valuation was done after every effort to sell the land had failed. The hotel was incomplete and required large sums of money for its completion. It was obviously not an attractive proposition. The public auction was held on March 25, 1983 and no bids were offered. The Auctioneer eventually requested the bidding to start as low as U.S.$3,000,000.00 and still there were no bids. Some 119 persons attended the auction. Mr. Becker was present but did not himself offer any bids.

Subsequent to the auction, efforts were made to find a purchaser for the land and the only real offer came from Georgetown Associates in November, 1984. The offer from Mr. Becker was not considered commercially feasible and as has been pointed out earlier the undertaking by SISCORP under the proposed offer had expired.

Valuations may be some guideline as to what value had been put in the incomplete building. It is one thing to say that a building would cost 'X' dollars for construction. It is another thing to fetch that sum on a market which was obviously not a vibrant one. Whatever the valuations the hard fact is that for some three years the only real offer was the one from Georgetown Associates.

How much longer was the Bank to wait to realise some part of the loan? Interest on the loan was increasing.

What was the duty of the Bank and the standard of duty in exercising its power of sale? The Bank must show that the sale was made in good faith and that the Bank had taken all reasonable precautions to obtain the best price reasonably obtainable at the time.

In Tse Kwong Lam v Wong Chit Sen and others 1983 3 All E.R. 54, Lord Templemen at p. 59 states:

> "In view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time."

In Cuckmere Brick Co. Ltd. and another v. Mutual Finance Ltd., 1971 2 All E. R. 633, in considering the duty of a Mortgagee, Salmon, L.J. at p. 636 states:

> "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 its 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 these 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."

What steps did the Bank take in securing the best price reasonably obtainable? The affidavit of John Dinan dated 12th December, 1984 is of assistance. In the affidavit he states:

"1. I am a Chartered Accountant and a partner in the firm of Coopers and Lybrand, Cayman Islands.

2. Pursuant to the provisions of a debenture entered into between

"Paradise Manor Ltd., a company incorporated and existing under the laws of the Cayman Islands, and the Bank of Nova Scotia, dated the 21st day of January, 1980. I together with Christopher Johnson, was appointed Receiver and Manager of the assets secured by the said debenture. The debenture is now shown to me and marked as Exhibit "A" to this my affidavit.

4. In an attempt to realise under the Bank's debenture, the hotel, adjoining lands and a number of condominiums were offered for sale by public auction on the 25th day of March 1983. Despite extensive advertising several months in advance, which will be hereinafter described, and the presence at the auction of some 119 people, only three condominium units were sold. The hotel was not sold, nor were the adjoining lands or the balance of the condominiums and in fact no bid was received at all in respect of the hotel and adjoining lands. Brochures and information on the project were sent prior to the auction to some 173 people who responded to the advertisements or whom we thought might be interested in the project.

5. Prior to the auction extensive advertising was undertaken in various publications, including the Caymanian Compass, the Wall Street Journal, La Presse, The Globe and Mail, the London Sunday Times, the London Financial Times and the Economist. Now shown to me and marked Exhibit "B", to this my affidavit is a folder indicating some of the efforts to publicize the sale.

6. Both before and after the auction, attempts had been made to interest major hotel chains in acquiring the hotel site. Included in chains contacted were American Hotels, Princess Hotel Group, CN Hotels, Four Season Hotels, Delta Group, York Hanover Group, Holiday Inns, Trust House Forte Hotels, Howard Johnson, Groupe Novotel, Penta Hotels, Ramada Inn, Sonesta Hotels, THF International, Westin Hotels, Mariott Hotels, Best Western Hotels, Hilton Hotels Corporation,

Hyatt International Hotels and Sheraton Corporation. None of these chains were prepared to acquire the property. There is now produced and shown to me as Exhibit "C" to this my affidavit a Schedule detailing all people (being in excess of 250 in number) to whom we have sent information on the project either as a result of enquiries made to us by such people or whom we thought might be interested in purchasing the hotel.

7. While several individuals and groups evidenced interest in purchasing the hotel, no firm offers with a deposit have ever been received with respect to the hotel.

8. Despite all our efforts, no other serious prospective purchasers have come forward in the last several months."

It is clear from the affidavit of Mr. Dinan which was not disputed that the Bank extensively advertised the property for sale in a number of influential international newspapers. Individuals and companies, including real estate agents, were also advised of the intention to sell. Several hotel chains were written to advising them of the need to sell the property.

This was not a hasty sale. For several years the Bank attempted to sell the property, first by public auction and then by private treaty without success. Finally in November 1984 the sale to Georgetown Associates materialised. This was the only real offer that the Bank had. For the first time the Bank had an opportunity to realise some of the outstanding loan.

Mr. Becker himself had been given every opportunity, even after the proposed sale with Georgetown Associates, to come up with a better deal. He was unable to present any proposals which were acceptable to the Bank.

This incomplete hotel site required further large capital expenditure to complete the building. It was not an attractive proposition. Whilst one may argue that the proposed sale price might appear to be on the low side, market conditions have to be taken into acccount. There were no other purchasers.

There was no evidence, and, it cannot be suggested that the Bank did not act in good faith. A Bank is in the business of lending money and receiving interest on the loan. This large sum of money owing to the Bank had been tied up for several years and there was no suggestion that the company was in a position to pay either the interest accrued or the principal sum outstanding.

The disparity in the two Bould valuations is not proof that the best possible price was not obtained.

It was also submitted on behalf of the appellants that the agreement with Georgetown Associates included a participation by the Bank in the project. This was in the form of a partnership or joint venture and included financing.

It may very well have been necessary for the Bank to provide financing in order to obtain a sale. It was argued that this participation by the Bank was some evidence that the sale was at an undervalue.

The learned trial Judge correctly in my view rejected this submission. There was no evidence to support a contention that the sale price agreed upon was influenced by the Bank's participation.

I hold that the Bank made every reasonable effort and took all the necessary steps to obtain a sale of the property. In my view the Bank took reasonable precautions to obtain the best price reasonably obtainable at the time of the sale. It cannot therefore be said that the sale to Georgetown Associates was at an undervalue.

It is for these reasons that I dismissed the appeal and the Respondent's notice.

KERR, J.A.:

On the 6th day of August 1985, we dismissed the appeal and affirmed the judgment of Hull J. and the Orders made pursuant thereto.

The following are the decisive Orders relevant to the questions raised on apepal:

> "1. That the Bank of Nova Scotia may have leave to act upon the variations of Section 72 of the Registered Land Law contained in the registered charges made by Paradise Manor Limited as Chargor in favour of the Bank of Nova Scotia as Chargee in respect of certain properties, namely, those consisting of West Bay Beach South Registration Section; Block 13B; Parcels 124, 11, 12. 14, 125 H61 and 125H80.
>
> 2. That The Bank of Nova Scotia may have leave to sell by private treaty pursuant to an Agreement dated 27th November, 1984 made between the Bank of Nova Scotia and Georgetown Associates certain properties owned by Paradise Manor Ltd. and charged to the Bank of Nova Scotia, such properties consisting of West Bay Beach South Registration Section; Block 13B, Parcels 124, 11, 12, 14, 125 H61 and 125 H80, the proposed sale being a variation in accordance with section 77 of the Registered Land Law of a Chargee's remedies in respect of charged property."

In 1980 Paradise Manor Limited (The Company) embarked upon an ambitious and extensive project, namely, to build a hotel and apartments on land owned by the Company in West Bay Beach, South Area, Grand Cayman. The venture was financed by loans from the Respondent Bank of Nova Scotia (The Bank). The loans were backed by the following securities:

(i) A first debenture dated 21st January 1980 by the Company - it contained a provision charging "by way of legal charge" land of the Company comprising Parcels 9 and 10 of Block 13A in the West Bay Beach South Registration Section and created a floating charge over all its undertaking, goodwill and other property; and

(ii) Complementary and collateral registered first charges over lands comprising Parcels 11, 12, 14, 124, 125 H61, 125 H80, Block 13B West Bay Beach South Registration Section.

The appellants William W. Becker and his wife Marguerite L. Becker are the shareholders of the Company, with William being the Managing Director.

The Bank made advances on the loan as the project progressed. By 8th September 1981 the principal sum under the loan had been increased to US$11.3 million.

The Bank sought and the Beckers granted personal guarantees in respect of and to the extent of this amount. By December 1981 exclusive of the guarantees the principal sum secured amounted to US$18 million.

The project foundered and came to a halt before completion. In May 1982, the Company was in default in its payment of interest. The Bank took action: On July 27, 1982 a written demand was made by the Bank on the Company for immediate payment in full. By July 29, a Receiver was appointed under power to do so conferred by the Debentures. By October 7, 1982 a written demand was made on the guarantors. All monies remained unpaid. On March 25,1983, the Receiver attempted to sell by public auction. Notwithstanding extensive advertising and correspondence with persons seeking information, the attendance of about one hundred and nineteen persons, the auctioneer inviting an opening bid of as low as US$3 million in the face of a valuation of US$14 million, save for the sale of three condominium units the auction failed for want of bidders.

Towards the end of 1984 the Bank entered into negotiations with George Town Associates. Mr. Becker intervened through his newly founded Paradise Manor Resort Hotel Limited with certain proposals. These were not accepted by the Bank, but more on this anon. By November 27, 1984, The Bank and George Town Associates had entered into an agreement for the sale and purchase of the hotel, and adjoining land, and the two condominium units for US$7.5 million and to purchase materials and equipment as per inventory.

Now in the Cayman Islands all lands have been brought under registration and any "disposition" of land is subject to the provisions

of the Registered Land Law (The Law) therein, " 'Disposition' means any act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer lease or charge.

Accordingly, respectful of the provisions of the Law, on 11th December 1984, the Bank applied for and was granted leave under Section 98 of the Companies Law "to seek an Order under Section 77 of the Law permitting" the sale by private treaty pursuant to the agreement with George Town Associates.

The Bank then made the application to the Court for an Order in terms and for such further or other Order as the Court may seem fit.

Quite properly and by consent on 21st December, 1984 the Beckers were made parties to the proceedings.

There and then as here and now before us, the matter was warmly contested. The consistent questions raised and argued on behalf of the appellants were:

(1) The Bank not having complied with the requirements of the Law as to a demand notice to the Company of default in payment of principal and interest the right to sell had not arisen and therefore there could be no variation of the non-existent to permit sale by private treaty.

(2) (a) The proposed sale was at an under value.

(b) The agreement with George Town Associates was not essentially an at arms length transaction because of the participation of the Bank to the extent of 20%.

(c) A better offer had been made by Paradise Manor (Resort) Ltd.

The learned trial Judge rejected all those contentions and as an additional plinth to his judgment held in effect that the Law permitted

parties to agree to the waiver of notice under Section 77 of the Law, that there was such stipulation in the relevant charges and that it was just and equitable to the Court to approve of such waiver.

The exercise of this jurisdiction is the subject of a separate ground of appeal.

With respect to "Dispositions" - section 37 of the Law provides:

> "(1) No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this Law, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge."

And in relation to notices to a chargor in default and the remedies of a chargee the following provisions are pertinent:

Section 64

> "(1).....
>
> (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.
>
> (3).....
>
> (4)A charge shall not operate as a transfer but shall have effect as a security only."

Section 72

> "(1) If default is made in payment of the principal sum of any interest or any other periodical payment or of any part thereof, or in the performance or observation of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be
>
> (2) If the chargor does not comply within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -
>
> (a) appoint a receiver of the income of the charged property; or
>
> (b) sell the charged proeprty;
>
> Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection."

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> Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection."

Now by letter dated July 27, 1982, the Bank made a formal demand for the payment of the "monies owing by way of a non-revolving demand loan US$15,532,806.96 and operating over-drawn accounts respectively US$12,737.81 and CI$90,469.72. Interest will continue to accrue on these accounts until payment made in full."

The letter also advised that if payment was not made by noon the following day it was the Bank's intention to proceed with whatever remedies available for the recovery of the monies owing and on the 29th July, the Receiver was appointed.

It had been the contention throughout on behalf of the appellants and communicated to the Bank's lawyers before the sale by public auction that the requirements of the Law as to notice had not been met.

In dealing with this question Hull, J. after considering the conduct of the parties and the arguments on the interpretation and effect of the relevant provisions of the Law held (i) that the letter of the 27th July was sufficient notice under Section 64 (2) and, (ii) in any event, there was default in payment of interest and therefore no notice under Section 64 (2) was required.

Mr. Alberga in support of his contention that the requirements of notice had not been met and that compliance was essential to confer on the chargee a power to sell, adverted our attention to the comparative legislation in Kenya and the commentaries on that Law by Rayton Simpson (1978) pp. 464 - 606. Further Section 64 (2) as well as Section 72 applied to both principal and interest and therefore the trial Judge erred in holding that a notice was not required when interest was in default.

Mr. Cohen in reply contended that there was a right to sell under the Law - a statutory right to sell - but there could also be a contractual right to sell as in the instant case, provided there was approval by the Court.

Further the
/ notice required by Section 64 (2) is in respect of principal

and as the default in May 1982 was in respect of interest no notice was necessary. That being so the letter of July 27, was a notice under Section 72 and three months thereafter a sale may be effected. Alternatively the letter of July 27, was a sufficient notice under section 64 (2).

Now it is self-evident that the intent of the Law is to control or put certain restraints on the disposition of land in these Islands, to provide a time-table for certain dispositions and to confer on the Court a watching jurisdiction.

In that regard section 77 provides:

> "The provisions of sections 70 (2) and (3), 72, 73, 74 and 75 may in their application to a charge be varied or added to in the charge.
>
> Provided that any such variation or addition shall not be acted upon unless the court, having regard to the proceedings and conduct of the parties and to the circumstances of the case, so orders."

Section 64 is therefore not a section in which variation is permitted and on the principle of construction expressed in the maxim "expressio unius exclusio alterius", the provisions of Section 64 cannot be avoided by terms or stipulations in a contract.

Section 64 is plain and unambiguous - the money secured by the charge must surely include the interest. In any event, Section 67 (a) seems to put the matter beyond debate thus:

> "There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the chargor -
>
> (a) to pay the principal money on the day therein appointed and, so long as the principal money or any part thereof remains unpaid, to pay interest thereon, or on so much thereof as for the time being remains unpaid, at the rate and on the days and in manner therein specified."

A fortiori when, as in the instant case, the charges expressly stipulate:

> "The principal sum shall be repaid on demand together with interest then due."

Accordingly, I am of the view that the learned trial judge erred when he held that no notice is required when interest is in default. However, having regard to the terms of the letter of July 27, it was reasonable to hold that that would be a demand notice sufficient to meet the requirements of section 64 (2).

On such a finding then it follows inescapably that there was no notice sufficient to meet the requirements of Section 72.

This brings to me the challenge to the exercise of the jurisdiction conferred by Section 77 as outlined in the following ground of appeal:

> "That the learned trial Judge was in error in concluding that if he was wrong in holding that there had been compliance with section 72 of the Registered Land Law an order under Section 77 of the Registered Land Law dispensing with the notice requirements of Section 72 could be made by him because:
>
> (a) No leave had been sought by or given to the Respondent/Plaintiff under Section 98 of the Companies Law to apply for such an order.
> (b) The Respondent/Plaintiff did not make any such application in its originating Summons of 11th December, 1984 in this matter and no notice of any such application was given.
> (c) Different principles are involved in an application for leave to dispense with notices required under the Registered Land Law than those which are involved in an application for leave to sell by private treaty instead of by public auction which latter was the application made by the Respondent/Plaintiff herein.
> (d) The Respondent/Plaintiff's original application for leave to commence proceedings under Section 98 of the Companies Law and its application by originating Summons dated 11th December, 1984 in this matter were not wide enough to cover an order varying Section 72 of the Registered Land Law by dispensing with the notice requirements thereof.

Now between the date of the demand 27th July, 1982, and the auction in March 1983 nearly eight months had passed. The appellants' Attorneys timeously had drawn the attention of the Bank's lawyers to the provisions of the Law relating to notice. It would be but prudent then to give the requisite notice which would perhaps result in deferring the auction for a month or two. The Bank and their Lawyers mulishly refused to budge from their stand. Indeed, no specific pleading for such a remedy was included in the respondent's formal and written pleadings.

It was introduced by the Bank's Attorney in the course of his

argument in the nature of a last resort:

> "In any case permission under section 77 exists to vary.
>
> Under Cayman Law, private power of sale can be given 2
>
> distinct powers
>
> (1) Express
>
> (2) Power by statute which can be varied.
>
> There must be a notice of default and make a demand.
>
> That has been done here."

Hull, J. reviewed the proceedings prior to this oral application thus:

> "The original application under section 98 of the Companies Law sought an order for'leave to sell by private treaty' the properties in question 'the proposed sale being a variation in accordance with section 77 of the Registered Land Law of a Chargee's remedies in respect of charged property'.
>
> It also sought such further or other order as the Court might think fit. Mr. Berven's affidavit of 3 December, 1984 in support referred to the existence of the debenture and charges and the amount owing to the plaintiff. In paragraph 4 he refers to the plaintiff's having entered into the agreement 'for the sale of inter alia' the lands to which the securities relate and goes on to say 'which agreement, I am advised by my attorneys-at-law, involves a variation of a chargee's remedies under the Registered Land Law and cannot be put into effect unless this Honourable Court so orders under Section 77 of the Registered Land Law.' The only other part of the affidavit that I think I need refer to is in its conclusion where it indicates that the application is for leave to commence proceedings 'for approval of the said proposed sale.'
>
> On 11th December, 1984 the learned Chief Justice made an order granting leave 'to commence proceedings to seek an under Section 77 .....permitting the sale by private treaty' of the properties. There is nothing in the record to show that at that stage, the scope of that application had been wider or narrower than it appeared from the papers themselves.
>
> The present application before me was drafted in the same terms. It also contained the usual prayer for such further or other order as the Court might think just, which prayer is in my view permissible as long as it does not widen the scope of the proceedings beyond that for which leave was given."

And after considering the arguments pro and con said:

> ".....
>
> Strictly I think that the original application for leave and the present applications are wide to cover orders confirming variations of sections 72 and 77. They are simply applications for the approval of an agreement for sale and purchase, such a sale being a variation of a chargee's remedies. Although it is true that they refer to a sale by private treaty, they nevertheless do not themselves expressly specify the nature of the variation.
>
> I must also say that so far as the issue of notice goes

> "I am inclined towards Mr. Cohen's argument that the court should lean towards enabling the bank to realise the security. In all the circumstances of this case, the objections taken by the defendants as to the alleged defects in notice are in my opinion technical. The legislature has laid down a requirement. Thus three months notice must be given before the power of sale may be exercised. But it also provided that where the parties have agreed, the court may sanction a variation of this requirement. It has gone further than that. In considering whether to do so, the court may have regard to the proceedings and conduct of the parties and the circumstances of the case.
>
> This was a transaction between a commercial institution on the one hand and a layman on the other. All parties had commercial experience. That in itself would not be enough to persuade me of the merits of sanctioning a variation although I do think that the requirements for notice serve the most obvious purpose when the borrower lacks commercial expertise. But the facts of this case go beyond that. It involves a very substantial business transaction. The parties agreed to the modification of section 72 at the outset.
>
> The parties have been taking legal advice for some considerable time. Two things were apparent from the exchanges of letters in March 1983. One was that the second defendant was objecting to the validity of the notice so far given of the bank's intention to sell the properties and that the receivers were aware of this. The second was that the bank, in the knowledge of this, intended to proceed, on the basis that there had been default in payment of interest and that the second defendant and the receivers knew this.
>
> The bank has adduced evidence (which has not been challenged by evidence in rebuttal) that at the auction in April 1983, Mr. Becker intimated to the Georgetown manager of the bank he would not object to the sale of the company's assets.
>
> When leave was sought under section 98 of the Companies Law, no objection in limine was taken by the company on the ground of notice. It was not until 18 January, 1985 that the second third defendants filed a notice to that effect.
>
> For the reasons I have given, I think that the applications have been drafted in terms that strictly speaking are sufficiently wide to cover the possibility of an order under section 77 sanctioning both the agreed variations of the requirement for notice under section 72 and the requirement for sale at public auction. The sealed order granting leave under section 98 in an order 'permitting the sale by private treaty and I think the truth is that this was at that stage the issue in the plaintiff's mind, but the original minute for the order was 'Leave granted on terms sought.'"

This turn of events must have been disconcerting to Mr. Alberga. He had undoubtedly been industrious in research in relation to the questions arising from the pleadings. He had come prepared with confidence and optimism to argue those questions. To have been met at this stage with a plea for the exercise of a jurisdiction that clearly was not in contemplation when proceedings were introduced but which jurisdiction undoubtedly existed must have been an unpleasant surprise. Notwithstanding the pivotal point is - was the exercise of the jurisdiction unfair to the appellants?

I am constrained to answer in the negative. The reasons advanced by Hull, J. are compelling. The defendants were aware of their default and demand was made for payment of the money due and owing some three years before and thereon no payments were made to date. The agreements were between parties at arms length with legal advice at their beck and call.

The applicant was asking for no more than was agreed. It could never be urged with reason and good sense that a party is taken by surprise, when the other party in whose favour stipulations are made, asks that effect be given to such stipulations. Nor have I been adverted to any sort of consideration beyond the matters so fully aired at the hearing that could evoke a favourable affirmative response to that question.

The final ground argued was that the learned trial Judge was in error in holding that the proposed sale of the charged property to George Town Associates by the Bank for a sum of US$7.5 million was not a sale at an undervalue and ought to have concluded that on a proper application of the accepted principles the true market value of the charged property was at least US$13.18 million. In support of this ground Mr. Alberga referred to the evidence of the valuators, in particular, the valuations of Bould tendered on behalf of the Bank and that contained in the affidavit of Stephen Williams, tendered on behalf of the appellants. He submitted that Williams' evidence was destructive of Bould's valuation on which the Bank relied and that on a proper application of the accepted methods Williams' valuation was nearer to the true value. Williams was of the opinion that using Bould's data that a proper valuation would be US$13.6 million. Reference was also made to a Graham report but on the face of it this report seems too highly theoretical to be of much use.

I do not propose nor do I think it necessary to indulge in a detailed review of the evidence tendered by the valuators - Bould and Williams; it is enough to refer to certain particulars and salient features.

In March 1983, the Bank's Receiver, Mr. John Dinan engaged Bould, a

firm of Quantity Surveyors, to make a valuation. This was obviously for the purpose of the forthcoming auction. The value of the partly-finished two hundred and ninety room hotel was assessed at US$11.3 million and the adjacent land for US$3.12 million - a total value of US14.42 million. In October 1984 the Bank requested Bould to prepare a valuation having regard to current market conditions with respectto the hotel condominium vacant lands and materials and equipment. In response valuations were made by applying the following methods:

(1) Costs approach method.

(2) Income approach method.

(3) The market data approach method.

Bould prepared and submitted a detailed/comprehensive report which included the following valuations summary in relation to the Hotel:

"VALUATION
PARADISE MANOR HOTEL
WEST BAY BEACH SOUTH
BLOCK 13B PARCEL 124
OCTOBER 1984

5.0 VALUATIONS SUMMARY

Page			US$	US$
		Costs Approach	6,605,000	
		Income Approach		
27	*	- Completion as Condos only	4,801,077	
30		- " " Condos/Timeshare	4,676,266	
35	*	- " " Apartments	4,747,395	
37		- " " High Class Hotel	3,966.458	
39	*	- " " Dive Resort Hotel	4,880,337	
41		Market Data Approach US$	5,549,558	

The above summary appears to indicate that the income approach results in lesser values than the costs approach. Assuming a purchaser will be looking for the better of the alternative uses, in our opinion, a fair market value, taking the average of the best three (i.e. see above marked thus *), would be in the region of US$4,809,603 rounded off to:-

FOUR MILLION EIGHT HUNDRED AND NINE

THOUSAND DOLLARS (US$4,809,000)

for partially completed hotel and land."

And a "Main Valuation Summary" thus:

		US$
"Apartment # 118	say	150,000.00
" # 123	say	140,000.00
Vacant land, parcel 11, valued as amenity facility only for hotel		750,000.00
Vacant land, parcels 12 & 14 valued combined		1,430,000.00
Existing land and partially completed 290 room hotel		4,809,000.00
Materials, plant & equipment on site		281,000.00
		7.560,000.00 "

Between these two valuations at the instance of the Receiver, Bould in November 1983 furnished a defect report.

Mr. Stephen Williams is a Quantity Surveyor of impressive learning and considerable experience. While admitting that the valuation methods used by Bould were the accepted ones, unreservedly criticised Bould's later valuation as a wrong application of those methods.

On this issue Mr. Williams submitted that Mr. Bould's first valuation ought to be preferred to the second as no good reason was advanced for the depreciation of fifty percent in so short a time. Accordingly, the learned trial Judge ought to have given greater attention to the evidence of Mr. Stephen Williams.

In reply Mr. Cohen contended that the buildings were incomplete and deteriorating; that to put them at a stage capable of earning income (the purpose for which they were being built) would require a considerable amount of money US$9-14 million. It is therefore difficult to find purchasers as

the failure of the auction indicated; that valuations by Quantity Surveyors was not a science but expressions of opinion. A uniform product in an active market is easy to sell. In the instant case there was not market for this partially built hotel requiring so much money to complete it. The valuators devise schemes and methods of valuation. Of these the most reliable was the income approach as this was the most applicable to this particular project. The difference in Bould's valuation was as a result of a different approach. Bould at the second valuation had the experience of the auction and awareness that this was a "product difficult to sell and deteriorating". Ultimately the true value was what was obtainable in the market. Williams' report was merely a critique of Boulds. Accordingly, he was of the view that the learned trial Judge accepted his submissions which were along the same lines as presented in reply here.

Now the learned trial Judge in his judgment carefully reviewed the evidence of the valuators, Bould and Williams. He considered the difference in Bould's two valuations, Williams' criticisms of Bould's October valuation and of the valuation of Graham and Associate's relied on by the appellants. He then expressed his opinion of the arguments put forward on behalf of the Bank thus:

> "Mr. Cohen made the point that the Georgetown offer is a real one, and that it is the only real offer the bank has received after more than two years effort by it to attract buyers. The appraisals, he said, are no more than that. They are theoretical. The only real evidence of the properties' worth is the Georgetown offer."

And then went on to say:

> "This is not a case in which a mortgagee has sought to realise its security in haste, and in order to do so, has held a public auction in unfavourable conditions. There is unrefuted evidence that, quite apart from the degree of forebearance it had shown to the defendants, the bank went to considerable lengths to obtain an attractive offer. The availability of the properties and the holding of the auction were made known to a substantial number of people, including many leading hotel operators, by extensive publicity. A large number of people actually attended the auction. There is no evidence that it was held at an adverse time. It is true that there is a substantial difference between the first and second Bould valuations. In the meantime,

> the abortive auction had been held.
> Valuations are at the end of the day, for all the reasoning that they may contain, appraisals. They involve judgment. There are likely to be variations in judgment amongst values, depending on their terms of reference and the parties they represent. Those variations are likely to be greater, and the margins of error in successive valuations by the same individual are likely to be the greater, where the market is small or the property is nearly unique. To say that a valuation may be affected by the point of view of the person for whom it is obtained it is not a reflection on the professional standing of the valuer concerned. It is a fact of life, demonstrated every day in the courts when valuations have to be settled between opposing parties. It means no more than that the terms of reference and the presentation of the report from the most favourable point of view of the client are factors."

In my view the learned trial judge has taken a commendably practical approach. The valuation for the auction was understandably generous. The intent was to invite a better offer and to leave the auctioneer a comfortable range within which to accept bids. What transpired at the auction was indicative that those who attended regarded the project as a "white elephant". For a particular purpose a man may obtain from liberal valuators a generous appraisal of his property but the true test of its present worth is what it will fetch in the market place. The learned trial judge was not a little influenced by this consideration and I share his regard for the realities.

On accepted principles Mr. Alberga submitted that the chargee was under a duty in exercising his power of sale in relation to the charged property to obtain the best price reasonably obtainable - [Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. (1971) 2 All E.R. 633]. That that duty was owed not only to the chargor but to the guarantors - [Standard Chartered Bank v Walker (1982) 3 All E.R. 938]. That in the instant case the chargee Bank had failed to take all reasonable precautions to obtain the best price reasonably obtainable - [Tse Kwong Lam v Wong Chit Sen (1983) 3 All E.R. 54].

In support Mr. Alberga adverted attention to the offer of Paradise

Manor Resort Hotel Limited. He submitted that it was on the face of it a better offer than that of George Town Associates and ought to be accepted.

Secondly, because of their active participation and interest in George Town Associates they were bound to take all reasonable precautions. They ought to have consulted estate agents about the method of securing the best price and about the level of the reserve price. This the bank failed to do.

After a failure of the auction the Bank made no further advertisements for the sale of the property. Accordingly before granting approval for the sale by private treaty the Court must be satisfied that the price is not at an undervalue and at the best price reasonably obtainable and in that regard the burden of so proving rested on the appellants' Bank.

Mr. Adams adopted the submissions of Mr. Alberga that the property was being sold at an undervalue. He adverted attention to the amount of US$7,570,000 owing to the unsecured creditors as set out in the affidavit of the liquidator Jeffrey M. Parker dated March 11, 1985 and that a sale at the price offered in the agreement with George Town Associates would leave the unsecured creditors without remedy or redress; that the offer of the Paradise Manor Resort Hotel Ltd. contained certain provisions for the unsecured creditors and ought to have been preferred. In all the circumstances the Court should not have approved of the sale by private treaty. The appointment of a Receiver was an alternative remedy to the exercise of a right of sale.

Mr. Cohen in reply reviewed the history of the transactions between the Bank, the Company and the Beckers and submitted that the Bank had acted reasonably, properly and with due regard for the rights of all parties and has discharged the duty as defined in the cited cases.

As pointed out the Receiver was definitely appointed under powers

conferred by the debentures and the ambit of his duties embraced matters not within the scope of the charges. In my view having regard to all the circumstances and in particular to the time which elapsed since the appointment of the Receiver, such an appointment can be no bar or impediment to this application seeking approval for sale by private treaty. It is beyond debate that the duty of a chargee to a personal guarantor in exercising his powers of sale in respect of charged property is the same as that owed to the chargor, because "the liability of the guarantor depended on the amount which was realised by the assets and he was therefore within the test of sufficient proximity" to be owed a similar duty - [Standard Chartered Bank Ltd. v. Walker (1982) 3 All E.R. p. 939.

In the Cuckmere Brick Co. Ltd. v. Mutual Finance the Court of Appeal had to consider the nature of the duty owed by a mortgagee to the mortgagor. Salmon, L. J. in the course of his judgment after reviewing the facts said (p. 643):

> "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 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 so 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."

He then considered conflicting dicta concerning the duty of a mortgagee to the mortgagor thus (P. 643):

> "It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that, in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it."

And in that regard he referred to Kennedy v de Trafford (1897) A.C. 180 and Tomlin v Luce (1889) 43 Ch. D. 191 and continued (pp. 643-4):

> "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. Some of the textbooks refer to the 'proper price', others to the 'best price'. Vaisey J in Reliance Permanent Building Society v Harwood-Stamper [(1944) 2 All E. R. 75 at 76, 77; (1944) Ch. 362 at 364, 365], seems to have attached great importance to the difference between these two descriptions of 'price'. My difficulty is that I cannot see any real difference between them. 'Proper price' is perhaps a little nebulous, and 'the best price' may suggest an exceptionally high price. That is why I prefer to call it 'the true market value'."

He then quoted with evident approval the opinion of the Board in McHugh v. Union Bank of Canada (1914) A.C. 299 as expressed by Lord Moulton thus (p. 645):

> "It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold."

While Lord Cairns with concise clarity identified the question thus (pp. 652-653):

> "(1) Does the duty of a mortgagee to a mortgagor on the sale of the mortgaged property include a duty to take reasonable care to obtain a proper price or is it sufficient for the mortgagee to act honestly and without a reckless disregard of the interests of the mortgagor?"

And in seeking an authoritative answer said (p. 653):

> "I find it impossible satisfactorily to reconcile the authorities but I think the balance of authority is in favour of a duty of care. That there is such a duty was certainly the view of Kekwich J and of the Court of Appeal in Tomlin v Luce; also of the Judicial Committee of the Privy Council in McHugh v.

"Union Bank of Canada."

And after considering dicta to the contrary in Kennedy v. deTrafford (1896) 1 Ch. at 772, concluded thus (p. 653):

> "I therefore consider that Tomlin v Luce is the stronger authority and I would hold that the present defendants had a duty to take reasonable care to obtain a proper price for the land in the interest of the mortgagors."

In my view the weight of authority is in favour of a duty to take such care in realizing the true market value on the sale of the charged property as a reasonable man would in his own private affairs.

It is this standard of care and diligence that in my mind should be applied to the instant case. In so doing I prefer as descriptive of the requisite realization the terminology "true market value" used by Salmon, L.J. in the Cuckmere case to the indefinite "best possible price" in the Standard Chartered case .

Under the arrangements with the George Town Associates, the Bank's participation included that after fifty percent of the finance provided by the Bank had been repaid, there would be a form of profit sharing. Now there was no challenge to the statement expressed in the Tse Kwong Lam case that "there was no inflexible rule that a mortgagee could not sell to a company in which he had an interest.

What is being urged, that this is a factor to be considered in determining whether or not the sale was at an undervalue, having regard to the offer of Paradise Manor Resort Hotel Ltd. and whether or not the requisite precautions to obtain the best price reasonably obtainable had been taken.

The Paradise Manor Resort Hotel Ltd. (The PMRH) was registered in Cayman and its certificate of incorporation is dated 18th October 1984. By the following day, the appellant, William Becker, had acquired by registered transfer ninety eight percent / of the issued shares. The issued shares being one hundred at $1.00 each.

The name of the new Company had a familiar ring. The Bank had so far had an unhappy experience with the principal shareholder. A cautious approach to the PMRH offer was to be expected. Accordingly enquiries were made concerning the proposed principal financier of the Company, The Savings and Investment Corporation of America (SISCORP). Mr. Alberga frankly informed us that the SISCORP commitment had expired in the interim and in that regard he could not urge the same considerations as when it existed.

Of this offer by PMRH the learned trial Judge had this to say:

> "On 18th January, 1985 this company's lawyers submitted to the bank's lawyers a bundle of documents (Exhibit W.W.B.9 of Mr. Becker's affidavit of that date) which he describes in that affidavit as an offer to purchase the hotel project and the adjoining undeveloped land for US$12,000,000. So on its face, it is for a higher consideration than that in the Georgetown agreement. Moreover under this proposal, the bank is not liable to pay the three percent real estate commission that it has agreed to pay to Georgetown Associates, and PMRH will pay the bank what amounts to a commitment fee of US$240,000 and interest at 14 percent per annum. As these last two features indicate, the sum of US$12,000,000 is not, however, to be paid at once. The amount which the bank will receive on acceptance is rather less than that. It is in fact a deposit of US$100,000 and the 'commitment' fee of US$240,000. And the balance is to be deferred for two years. During that period PMRH will pay the bank interest on the balance at 14 percent per annum payable monthly. It will also give the bank a registered first charge over the property to secure payment. It will not be an exclusive first charge however. Mr. Becker says that PMRH is also obtaining finance from the Savings Investment Service Corporation ("SISCORP") in Oklahoma by way of a construction loan and a take out loan which will enable PMRH to complete the hotel project within 12 to 14 months. So SISCORP would be joint registered first chargee with the bank.
>
> Nevertheless, the bank would be assigned the rights and interest of PMRH under its loan and commitment agreements with SISCORP and it was also said that SISCORP would pay the interest due to the bank under the deferred payment provisions.
>
> Moreover, Mr. Becker will secure PMRH's performance of its obligations by his personal guarantee, and the bank's existing securities over other properties in respect of Paradise Manor Limited would remain unaffected.
>
> There were other arguments put forward in favour of this proposal, one of which was that unsecured creditors would be offered a ten percent shareholding in the new company.
>
> Mr. Cohen advanced a number of arguments against the work of the PMRH proposal, none of which to my mind were stronger than the bank's fundamental objection that it would not participate in such a transaction with Mr. Becker because it was against its commercial judgment to do so. That is

> in my view a sufficient argument by itself to meet the second and third defendants."

He then referred to other grounds for rejecting the PMRH proposals:

> ".....that the bank was being asked to forego an exclusive first charge, and that the taking of a joint first charge with SISCORP would involve a substantial negotiating of such an arrangement with SISCORP. There was nothing in the offer by way of a proposal from SISCORP to cover this, nor any satisfactory proof that SISCORP would in fact ensure that the interest due from PMRH to the Bank would be paid.
>
> He (Mr. Cohen) also pointed out that the offer was not available at the time when the Georgetown agreement had been concluded on 27th November, 1984, that (as Mr. Alberga acknowledged to some extent) there were clearly points in the PMRH offer that would require further negotiation between it and the bank (quite apart from SISCORP) and that if the Georgetown sale was not sanctioned, the bank would at once lose bargaining power in relation to the PMRH proposal."

And concluded that:

> "Its terms are such that it is not an offer that the bank has any obligation to seriously consider or accept, it is not a better offer than the Georgetown offer, and it is not in my view bona fide evidence of the fact that the Georgetown sale is at an under-value."

In my view the finding of Hull, J. on this cannot be faulted; to have accepted the PMRH proposal with its uncertainties and deferred payments in preference to George Town offer would be as imprudent as the proverbially unsagacious dog that dropped the bone in mouth for its reflection in the stream.

In support of his contention that the proposed sale was at an undervalue, Mr. Alberga referred to the facts in Tse Kwong Lam and the Cuckmere Brick Co. cases as illustratively helpful.

In my view these cases are clearly distinguishable. In the Tse Kwong Lam case, the mortgagee had made demand of the mortgagor for payment of principal and interest in default and had given notice of his intention to exercise his power of sale if payment was not made on a fixed date. When the mortgagor failed, the mortgagee made arrangements

for the mortgaged property to be sold by public auction and placed advertisements in three newspapers on three separate days giving notice of the auction and a minimum description of the property. The particulars and conditions of sale contained only the bare legal requirements and disclosed there would be a reserve price and that the vendor reserved himself the right to bid generally or withdraw the sale. The mortragee without consulting the auctioneer or other estate agents about the sale or the reserve fixed the reserve at £1.2m. At the auction, the only bid came from the mortgagee's wife who bid the reserve price. This bid by her was made pursuant to a decision previously taken at the Board meeting of a Company of which the mortgagee, the wife and his son were the directors. In dealing with the mortgagor's contention that the sale was at an undervalue it was said at p. 61:

> "A reader of the first advertisement had just 15 days in which to make detailed inquiries and investigations and to organise his finances so that he was prepared to engage in competitive bidding possibly with a vendor and with a borrower who knew all about the property and might be puffing the sale. There was no evidence that anyone took the elementary precautions which a purchaser of a building for a sum in excess of $1m would expect to take before venturing to bid at an auction.
>
> The mortgagee could have consulted estate agents about the method of sale and about the method of securing the best price. At the very least he could have consulted an estate agent about the level of the reserve price. The auctioneer was not informed of the reserve price until immediately before the auction and in evidence he very properly declined to comment on the reserve because he had not valued the property."

In the instant case there were valuations prior to and and after the public auction by qualified Quantity Surveyors. There was extensive advertising in local and foreign newspapers. Both before and after the auction attempts had been made to interest hotel chains and other persons exceeding two hundred and fifty to whom information had been sent but no firm offers were received. Those persons included local and foreign real estate agents.

In the Cuckmere case, the plaintiffs had borrowed £50,000 on the security of a mortgage on a site on the outskirts of Maidstone

for which they had planning permission for the erection of one hundred flats with garages. Adverse economic trends rendered the project more costly and with the concurrence of the mortgagee/defendants,

they obtained planning permission to erect thirty three houses instead. Before building commenced the defendants gave notice calling in the mortgage and took possession in 1966. In January, 1967 the defendants put the site in the hands of Estate Agents who advised that the planning permission for flats had lapsed and valued the site with the permit for erection of houses at £30,000 later revised to £35,000, and that in their opinion the development with flats would not be an economic proposition as there is considerable sale resistance. The estate agents were not shown a letter subsequently written the defendants stating that the site with permission to erect flats was worth £50,000 - £70,000. The defendants went ahead with plans for the sale of the site by auction in June. There were advertisements in national and local press, by posters, and particulars sent to developers. The material featured planning permission for houses but no mention made of flats. On June 14, the plaintiffs sought postponement of the auction sale to enable particulars of the planning permission of flats to be circulated. The estate agents by then were informed by defendant's solocitor of the later valuation. Nevertheless, the auction went off as planned and the sale realized £44,000. The defendants were held liable in negligence.

In the instant case no fresh information or new factor capable of enhancing the value of the property had come to the knowledge of the Bank. The security was depreciating while the debt was increasing. The interest according to Bruce M. Berven, Assistant Manager of the Bank, in his affidavit of 4th January, 1985, was accruing at a floating daily rate of over US$6,000.00. Indeed the George Town offer was the only concrete one.

In my view there is ample evidence to support (i) the finding that the objections individually as well as cumulatively are insufficient to show that the purchase price agreed on in the George Town contract was at an undervalue and (ii) the ultimate conclusion that the Bank had taken

all reasonable steps to obtain the best price reasonable obtainable.

For these reasons I concurred in dismissing the appeal and affirming the judgment of Hull, J.

HENRY, J.A.

On January 21, 1980, Paradise Manor Ltd. ("the Company"), the First Defendant Appellant, entered into an agreement with the Bank of Nova Scotia ("the Bank"), the Plaintiff Respondent, for a loan by the Bank to the Company for the purpose of constructing apartments on land registered as parcels 9 and 10, Block 13-A of the West Bay Branch South Registration section of Grand Cayman. Repayment of the loan and interest thereon was secured by a debenture containing inter alia a floating charge over the assets of the Company and by collateral charges over the land on which the apartments were to be built. Subsequently collateral charges were created in favour of the Bank in respect of lands ("the lands") registered as parcels 124, 11, 12, 14, 125H61 and 125 H80 of Block 13B, as additional security. All the collateral charges were duly registered under the Registered Land Law (Revised). Mr. William Becker, the Second Defendant Appellant and his wife Marguerite Becker, the Third Defendant Appellant, are the shareholders in the Company, Mr. Becker being the managing director. On September 8, 1981, at the request of the Bank, they signed a guarantee for the repayment by the Company to the Bank of the loan and interest in the sum of US$ 11,300,000. The Company failed to repay the loan and interest and on July 27, 1982 the Bank made a written demand for payment, followed on October 7, 1982 by a demand on the guarantors, Mr. & Mrs. Becker. The Bank made unsuccessful efforts to obtain a purchaser for the lands and on March 25, 1983 a public auction was held. Some 119 persons attended, but there were no bids. On August 13, 1983 the Company went into liquidation. Ultimately the Bank reached an

agreement with George Town Associates for sale of the lands. Having obtained the necessary leave under section 98 of the Companies Law the Bank sought the approval of the court of the sale. On December 21, 1984 the guarantors were by consent added as parties to the proceedings and on February 28, 1985 approval of the court was granted by an order in the following terms:

"1. THAT The Bank of Nova Scotia may have leave to act upon the variations of section 72 of the Registered Land Law contained in the registered charges made by Paradise Manor Limited as Chargor in favour of the Bank of Nova Scotia as Chargee in respect of certain properties, namely, those consisting of West Bay Branch South Registration Section; Block 13B; Parcels 124, 11, 12, 14, 125H61 and 125H80.

2. That The Bank of Nova Scotia may have leave to sell by private treaty pursuant to an Agreement dated 27th November, 1984 made between the Bank of Nova Scotia and Georgetown Associates certain properties owned by Paradise Manor Ltd. and charged to the Bank of Nova Scotia, such properties consisting of West Bay Beach South Registration Section; Block 13B, Parcels 124, 11, 12, 14, 125H61 and 125H80, the proposed sale being a variation in accordance with Section 77 of the Registered Land Law of a Chargee's remedies in respect of charged property.

3. That to the extent that the Supplementary Summons filed in this cause on the 24th January 1985 seeks relief additional to that sought in the Summons filed on the 11th December 1984, such additional relief is refused.

4. That the costs of this application be the plaintiff's save that the additional costs occasioned by the Supplementary Summons filed on the 24th January 1985 shall be the defendants.

5. That the plaintiff has liberty on ten (10) days notice to the defendants."

It is this order which is the subject of this appeal.

Basically two questions arise on this appeal. The first is as to the application of the Registered Land Law (Revised) with particular reference to sections 37, 64, 72 and 77.

The second is as to the price at which the Bank has agreed to sell the lands.

One of the arguments advanced on behalf of the Bank was that the Bank had by the debenture been given the power to appoint a receiver and to sell the lands in the event of default by the Company and that these powers were exercisable independently of the provisions of the Registered Land Law (Revised) ("the Law") as regards registered land. Consequently, it was argued, the Bank had the power to sell the lands notwithstanding any restrictions imposed by the Law. This argument was rejected by the learned trial judge and it was repeated before us in support of the Respondent's notice.

If the argument is correct there was no need to apply to the court for leave to proceed with the sale and an application for that purpose coupled with an allegation that no leave is required appears self contradictory and futile. But this apart I do not consider that there is merit in the argument. Section 3 of the Law provides that "Except as otherwise provided in this Law, no other law and no practice or procedure relating to land shall apply to land registered under this Law so far as it is inconsistent with this Law."

Section 37 of the Law so far as is relevant provides as follows:

> "37. (1) No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this Law, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.
>
> (2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest

> in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorized."

Section 64 provides for a charge to be in the prescribed form and to be completed by its registration. Section 105 provides that "every disposition of land...shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits". "Disposition" is defined in section 2 to mean "any act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer lease or charge".

By applying the definition of "disposition" to section 37, the meaning that emerges is that no right of a proprietor in or over his land, lease or charge registered under the Law shall be capable of being affected except in accordance with the Law and the system of registration established by it. This does not prevent a proprietor from entering into an agreement to transfer, lease or charge registered land but where such an agreement is unregistered or is otherwise not in accordance with the Law it can only operate as a contract. Any attempt to affect the right of the proprietor otherwise than in accordance with the Law is ineffectual for that purpose. It seems clear therefore that the intention is that only those charges in the prescribed form which are registered under the Law should have effect for the purpose of affecting the rights of a proprietor of registered land. An unregistered instrument can have effect only as a contract. As a contract it may be enforced by applying to the court for specific performance compelling the other party to the contract to execute an

instrument in the prescribed form containing the relevent terms of the contract and registering it under the Law. But it cannot by itself and independently of the Law confer any power affecting the rights of a proprietor of registered land. It should also perhaps be observed that in so far as a charge is concerned the extent to which it may modify the provisions of the Law is limited by section 77. Consequently a clause in an unregistered charge which purported to make some other modification could not be included in a registered charge and could not therefore be enforced. Section 77 is as follows:

> "77. The provisions of sections 70 (2) and (3), 72, 73, 74 and 75 may in their application to a charge be varied or added to in the charge;
>
> Provided that any such variation of addition shall not be acted upon unless the court, having reguard to the proceeding and conduct of the parties and to the circumstances of the case, so orders."

In the instant case the deventure was not in the prescribed form and was not registered under the Law. It could therefore operate as a contract with the consequences I have indicated, but any power of sale conferred by it would not extend to registered land and any attempt to sell the lands by the purported exercise of such a power independently of the Law would by virtue of section 37 (1) be "ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land." For these reasons the grounds relied on the Respondent's notice, which are as follows, could not succeed:

> "(i) the learned trial judge erred in law in failing to find:
>
> (a) that the bank was at liberty to sell the lands concerned to the proposed purchaser under the terms of the debenture ("Indenture") of the 21st January, 1980.
>
> (b) that upon the conclusion of such a sale the purchaser would be entitled to be registered as the proprietor of the lands concerned.
>
> (ii) the learned trial judge erred in law in failing to find that the bank could dispose of the registered title to the lands concerned, without

adhering to the provisions of the Registered Land Law, by means of the power of sale exercisable under the debenture.

(iii) the learned trial judge erred in law in holding that a registered proprietor could not charge his registered title except in accordance with the provisions of the Registered Land Law.

(iv) the learned trial judge erred in law in holding that the provisions of Section 77 of the Registered Land Law relate solely to powers exercisable under registered charges.

(v) the learned trial judge erred in law in holding that he had no jurisdiction to entertain an application under Section 77 of the Registered Land Law to vary the provisions of Sections 70, 72, 73, 74 and 75 of the Registered Land Law pursuant to the powers contained in the debenture."

In so far as the grounds of appeal are concerned, the two which related to the application of the Law are:

"1. That the learned trial judge was wrong in law in holding that the [Bank]...had complied with the mandatory provisions of [the Law] as to the notices required to be given by a charge and that consequently it had acquired a power to sell the charged property by public auction which could be varied to allow a sale by private treaty.

2. That the learned trial judge was in error in concluding that if he was wrong in holding that there had been a compliance with section 72 of [the Law] an order under section 77 of [the Law] dispensing with the notice requirements of section 72 could be made."

Counsel for the Appellants submitted that before the Bank could apply for leave to sell the lands by private treaty (a variation of the power to sell by public auction mentioned in section 75) it must first have acquired the power to sell by public auction. That power, it was submitted, only arose after necessary notice or notices under secion 72 had been

given and not complied with, and no such notice had been given. Furthermore, it was submitted, the right to issue a notice under section 72 only arose when default in payment had continued for one month and under section 64 that default could not arise until 3 months after a notice of demand had been made because, in the case of the principal, no demand for payment had been made on the date specified in the registered charge for repayment and, in the case of the interest, no date for repayment was specified in the registered charge.

Sections 64 and 72 so far as is relevant are as follows:

"64. (1) A proprietor may, by an instrument in the prescribed form, charge his land lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall contain a special acknowledgement that the chargor understands tha effect of section 72, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee."

"72. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continued for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.

(2) If the chargor does not comply within three months of the date of service, with a notice served on him under sub-section (1), the chargee may-

(a) appoint a receiver of the income of the charged property; or

(b) sell the property;

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection."

The registered collateral charges to the debenture each provided for a charge to secure the payment of principal and interest "payable as provided in the Debenture." Under the debenture the Company agreed "to pay the Bank on demand the principal sum and interest...provided that any balance of the principal sum then remaining unpaid shall be repaid to the Bank on the 31st day of May, 1981." No demand for payment was made on that date. In these circumstances under section 64(2) of the Law "the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee". It was argued before the learned trial judge that the notice given by the Bank in July could not operate as a demand in writing under section 64(2) because any such demand would have to specify the date three months later when the money would become repayable. The learned trial judge, correctly in my respectful view, rejected this argument, holding that "once demand is made, by operation of law the repayment date is immediately fixed at three months thereafter". The argument was not pursued before us. The learned trial judge however also held that section 64(2) does not relate to the payment of interest but is a provision to determine the date on which the principal sum under a charge is to become repayable. Consequently he concluded that although a notice under section 72 should specify separately the principal moneys and interest outstanding, the notice on July 27 which did not so specify was not invalid on that account because the Appellants knew how much principal

money had been advanced to the Company and they would also have known how much interest the notice related to. There is much to be said for the argument that the legislature could not have intended that in order to be able to exercise his remedies for the payment of interest under a charge, the chargee must demand in writing the payment of such installment of interest on the day on which it falls due. Nevertheless I do not, with respect, agree with the conclustion of the learned trial judge that section 64(2) does not relate to the payment of interest. It seems to me that the repayment of both principal and interest may be secured by a charge. Consequently on a plain reading of section 64(2) "repayment of the money secured by a charge" must relate to interest as well as principal where the payment of interest is secured by the charge. In the instant case the payment of interest was secured by the registered charges. The charges did not in fact specify the date on which interest was payable, but merely provided by reference to the debenture that it "shall be charged to the Borrower's loan account on a monthly basis". Consequently in my view a demand in writing under section 64(2) was required in order to fix the date on which the interest was deemed to be payable. It has been conceded before us that the notice of July 27 could properly be regarded as a demand in writing for the purpose of section 64(2) in relation to both principal and interest. The date for payment having been fixed under section 64, the next step under the Law towards acquiring a power of sale would be a notice under section 72.

In so far as section 72 is concerned, if the notice of July 27 is a demand in writing under section 64 it cannot also be a "notice in writing to pay the money owing" under section 72. Even if the learned trial judge was correct in holding that no demand under section 64(2) was required in respect

of interest, I do not consider that the notice of July 27 could be a proper notice under section 72 as regards interest because it failed to specify the amount of money claimed to be owing for interest. I do not consider that the fact that the chargor may be aware of the amount owing would obviate the need for a notice under the section or validate a notice which is defective for lack of particularity. There being no notice under section 72 I have next to consider whether the provisions of the section have in their application to the registered charges been varied in those charges, whether having regard to the proceedings and conduct of the parties and to the circumstances of the case it is proper for the court to order that these variations be acted upon, and whether the summons before the court was wide enough in its terms to cover an application for such an order.

The registered collateral charges to the debenture each provided inter alia that

> "in the event that the chargor shall fail to discharge all monies and liabilities in full pursuant to the terms of the Debenture...the whole of the principal sum, interest and any other monies owing to the Bank under the Debenture or hereunder shall immediately become due and payable and the provisions of section 72 and 75 of the Registered Land Law 1971 shall apply subject to the modifications hereinafter set forth...
>
> (i) the power of sale and of appointing a receiver and any other remedies available to the Bank shall become immediately exercisable without further notice;
>
> (ii) in addition to the remedies provided by Section 72 of the above Law the Bank shall have the right to foreclose or enter into possession of the charged premises or both in the same circumstances as would allow the Bank to exercise its power of sale or appoint a receiver;

(iii) in the event that the Bank does not appoint a receiver or enter into possession of the charged premises the Bank shall be entitled to exercise its power of sale or foreclosure or entry into possession at any time thereafter without further notice;

(iv) upon the power of sale arising the Bank shall have the right to sell the charged premises by private treaty as well as by public auction."

It is clear from these provisions that the provisions of section 72 have in their application to the registered charges been varied in those charges. Those variations permit the Bank, once there has been default in payment of interest or principal under the Debenture, to sell the lands without giving notice under section 72. The variations also permit the Bank to sell by private treaty as well as by public auction.

It is clear that the Company and the Guarantors have had ample notice from the Bank of the total amount claimed to be owed to the Bank for principal and interest and of the Bank's intention to sell the lands for the purpose of recovering as much as it could of the amount owed. Written demands for payment were made on the Company and on the guarantors on July 27, 1982 and October 7, 1982 respectively. On July 29, 1982 the Bank appointed a receiver under the debenture and notice of intention to sell the lands was served on the Appellants. On March 15, 1983 the Bank's solicitors wrote to the Company giving notice of the intention to sell the lands by public auction, and on March 25, 1983 that auction was held, Mr. Becker being one of the persons attending. No bids for the lands were made. In all the circumstances it appears to me proper for a court to order that the variations of section 72 contained in the registered charges be acted upon.

The summons before the court requested that the Bank "have leave to sell by private treaty certain properties owned by Paradise Manor Limited...the proposed sale being a variation in accordance with section 77 of the Registered Land Law of a chargee's remedies in respect of charged property." It is true that this summons did not specifically seek an order that the variations of section 72 and in particular the variation permitting a sale without the notice required by section 72, be acted upon. It seems to me however that the summons was wide enough in its terms to include such a request and to justify the making of such an order in so far as it was necessary to do so for the purpose of granting the leave sought in the summons.

For these reasons grounds 1 and 2 fail.

The grounds of appeal which relate to the price at which the Bank has agreed to sell the lands are as follows:

> "3. That the learned trial judge was in error in holding that the proposed sale of the charged property to George Town Associates by [the Bank] for a sum of US$ 7,500,000.00 was not a sale at an undervalue and ought to have concluded that on a proper application of the accepted principles the true market value of the charged property was at least US$ 13,180,000.00.
>
> 4. That the learned trial judge was in error in concluding that [the Bank] was not obliged to consider the offer of Paradise Manor Resort Hotel Limited...and that the learned trial judge ought to have held that this offer was superior to the terms of the proposed sale to George Town Associated."

The latter ground of appeal was not pursued before us because at the time of the hearing of the appeal an undertaking by a corporation known as SISCORP to make certain payments under the proposed agreement had expired. I should however observe that in my view the learned trial judge was correct in holding that the terms of the offer were such that the Bank had no obligation "to <u>seriously</u> consider or accept" it (emphasis mine).

In support of the other ground of appeal counsel for the appellants referred to the several valuations made by Bould Chartered Quantity Surveyors and S.G. Williams and a report by Marshall F. Graham and Associates. The first Bould valuation in March 1983 valued the lands at US$ 14.42 million, the second in October 1984 at US$ 7.56 million. Mr. Williams expressed the opinion that applying the principles used in the Bould valuation a more accurate valuation of US$ 13.18 million would result. The Graham report gave an estimate of the value of the lands upon completion of the buildings at US$ 44 million.

There can be no doubt that there is a considerable difference between the two Bould valuations made 19 months apart. Counsel for the appellants argued that the second valuation was tailored to suit the offer made by George Town Associates and to justify the Bank's decision to accept it. This may, of course, be so. At the same time it must be borne in mind that any valuation is merely an estimate of the amount which the seller may expect to obtain or the purchaser to pay. Subsequent to the March 1983 valuation the Bank, having failed after extensive advertising to obtain any written offer for the lands, held the auction previously referred to which 119 people attended but at which no bids were made in spite of invitations from the auctioneer to bid even US $3 million. A partially completed hotel complex which will require a major capital investment to complete it before any income return may be expected is not a particularly attractive venture. This is reflected in the fact that the Bank failed to receive any offers although it advertised inter alia to hoteliers and real estate agents who were, or might be expected to be in contact with potential purchasers. It may well be, as the learned trial judge suggested in his

judgment that "the valuer must have placed a good deal of weight on the failure of the auctions, and of subsequent efforts to sell, when preparing his second report". In the final analysis the Bank's obligation is that imposed by section 75 of the Law to "act in good faith and have regard to the interests of the chargor". This however does not mean that the Bank is required to put the chargor's interest before its own. The Bank must take all steps reasonably necessary to ensure that it obtains the true value of the property to be sold. But the true value is essentially the price which the property will fetch at the particular time on the open market. The only realistic offer which the Bank has been able to obtain is that in respect of which the approval of the court has been sought. This is not a case in which the chargee has rushed precipitately to sell the property at an inopportune time to the disadvantage of the chargor. The Bank has gone to considerable trouble and expense with a view to ensuring that the property could be sold for its true value. It has acted with restraint and forbearance and in good faith, to the extent of possibly jeopardizing the proposed sale while allowing the chargor and the guarantors further time to make satisfactory financial arrangement. In my view the Bank has carried out its obligation in relation to the proposed sale. In all the circumstances it does not seem to me that the proposed sale by the Bank can be regarded as a sale at an undervalue.

For these reasons ground 3 also fails.