

**THE EASTERN CARIBBEAN SUPREME COURT  
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE**

**SVGHCV2004/0086A**

**BETWEEN**

In the matter of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Chapter 18 of the Laws of Saint Vincent and the Grenadines Revised Edition 1990 section 76 and Paragraphs 3 and 4 of the Barristers and Solicitors Rules Booklet 4

And

In the matter of Unprofessional Conduct by Othneil R, Sylvester a Barrister and Solicitor

And

In the matter of the Application for a Rule to issue to Othneil R. Sylvester Barrister and Solicitor to show cause why he should not be suspended or struck off the roll of Barristers and Solicitors

And

In the matter of the application of Faelleseje a private commercial foundation of Denmark

Between

**Faelleseje A Private Danish Foundation**

**Claimant**

**and**

**1**

**Lesline Bess Court Appointed Representative of the Estate  
of Othneil R. Sylvester Deceased**

**RESPONDENT**

**Appearances:**

Mr. Richard Williams for the applicant/claimant.

Mr. Parnel R. Campbell Q.C. and with him Ms. Mandella Campbell for the defendant.

Mr. Emery Robertson Snr. for Marcole Investments Ltd.

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2016: Nov.17  
Dec. 5  
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**DECISION**

**BACKGROUND**

[1] **Henry, J.:** Othneil R. Sylvester deceased was a lawyer by profession. He was struck off the rolls of barristers and solicitors in Saint Vincent and the Grenadines in May 2007<sup>1</sup> as a result of disciplinary proceedings brought against him by Faelleseje who was once his client. Faelleseje accused the late Mr. Sylvester of fraud in respect of funds he received on their behalf and misappropriated to his own use. He was found guilty by the disciplinary tribunal and ordered to repay Faelleseje to sum of \$5,212,500.00 with interest. He failed to do so. Mr. Sylvester held the majority shares in Marcole Investments Limited, ('MIL') a company which owns a commercial building in Kingstown, Saint Vincent and the Grenadines known as Marcole Plaza.

[2] For the past 9 years, Faelleseje has been trying to recover the judgment debt from Mr. Sylvester and his estate. Consequently, at different intervals, MIL has been brought into the instant case as an interested party. Ms. Lesline Bess was named as one of the executors in his will and she is the sole surviving executor. By virtue of her appointment as executor, Ms. Bess represents Mr. Sylvester's estate in the case at bar. After Mr. Othneil Sylvester's death, his daughter Nicole Sylvester became a

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<sup>1</sup> On 29<sup>th</sup> May by order of the disciplinary tribunal.

pivotal player in MIL's affairs as a director until her demise in July 2015. She also represented MIL in the court proceedings. Her mother Natalie Sylvester who was also a director also passed away.

[3] By consent order dated 22<sup>nd</sup> November, 2012 and entered on 30<sup>th</sup> November, 2012, Faelleseje, MIL and Lesline Bess as executor for Othneil Sylvester's estate agreed among other things, to the sale of Marcole Plaza and for the proceeds from the sale to be paid to Faelleseje. The order specified how Faelleseje was to apply those funds. The sale did not take place. Faelleseje has now applied for an order to sell Marcole Plaza below the market value for a minimum of \$2,600,000.00; that a commission of 3% be paid to the realtors Liberty Properties, that the Registrar be authorized to execute the conveyance and that costs of the application be assessed.

[4] MIL opposed the application and filed a counter application<sup>2</sup> to set aside the consent order on the grounds that:

- (1) it purports to sell property which belongs to MIL and is clearly wrong;
- (2) MIL is an incorporated company different from its shareholders and was not a party to the litigation with Faelleseje;
- (3) the court had no jurisdiction to make the order and that it is therefore a nullity;
- (4) MIL is awaiting the probating of Mr. Sylvester's will to determine his estate's solvency status so that his estate can be distributed in accordance with his will after payment of debts;
- (5) the court should stay the order for sale of Marcole Plaza because it does not belong to Othneil Sylvester but to MIL's shareholders.

MIL's application was originally scheduled to be heard on 5<sup>th</sup> December, 2016. It was considered jointly with Faelleseje's application for sale as it is more convenient to determine them together. This court has found that the consent order is not a nullity. The sale of Marcole Plaza may accordingly proceed.

## **ISSUES**

[5] The issues are whether the:

- (1) consent order of 22<sup>nd</sup> November, 2016 is a nullity and should be set aside? and
- (2) court should make an order for the sale of Marcole Plaza at a price below the market value?

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<sup>2</sup> By Notice of Application filed on 24<sup>th</sup> June, 2016.

## ANALYSIS

### Issue 1 – Is the consent order of 22<sup>nd</sup> November, 2016 a nullity and should it be set aside?

[6] Faelleseje's witnesses were Mr. Poul Joergensen and Mr. Peter John. Mr. Trevor Sylvester was MIL's sole witness. They relied on their affidavits as their evidence in chief and were cross-examined. Mr. Joergensen is a consultant to Faelleseje's board of directors. He rehearsed the background to the disciplinary proceedings referenced previously and deposed that in 1996, Mr. Sylvester deceased received \$6,697,500.00 from the government on behalf of Windward Properties Limited, a company incorporated by Faelleseje as a holding company. Of that sum, Mr. Sylvester repaid Faelleseje only \$1,485,000.00 leaving a balance of \$5,212,500.00. The disciplinary tribunal ordered him to repay that sum with interest at the rate of 5% per annum. The outstanding balance stands at \$6,100,000.00 and attracts interest daily.

[7] The relevant portions of the consent order are contained in paragraphs 1, 2, 5, 8, 9,10, 11, 12, 13, 14 and 16. They provide:

**'IT IS ORDERED BY CONSENT as follows:**

1. It is declared that Othneil Sylvester was the beneficial owner of 71.5% of the issued share capital in Marcole Investments Limited.
2. It is declared that that (sic) the number of shares issued in Marcole Investments Limited is 563 of which 400 were issued to the Respondent Othneil Sylvester.
5. The lands situate at Kingstown, described in schedule 1 hereto ("the Kingstown Property") and owned by Marcole Investments Limited shall be sold by private treaty.
8. Caribbean International Law Firm and Williams and Williams shall have joint Conduct of such sale and power to sell the property by private treaty.
9. That the Registrar be authorized to execute the conveyance or conveyances.
10. The Properties shall be advertised in 4 consecutive issues of the local newspapers by the Firm of Caribbean International Law Firm for bids to be received by the 31<sup>st</sup> January 2012. All bids received are to be communicated to Williams & Williams within one (1) week.

11. The reserved price shall be the market value as determined by Christopher Browne, trained valuator.
12. If firm bids for the Property shall not be received at or above the reserve price then the Property shall be sold without further advertising at a reserve price of 10% less than the market price.
13. If no firm bids are received at such reduced reserved price then the Applicants shall apply to the court for an order to sell the property to the next highest bidder.
14. The proceeds of sale are to be paid to the Judgment Creditor. Upon receipt of the proceeds of sale, the Judgment Creditor shall apply them in the following priority:
  - (a) Payment of the costs and expenses of advertising and effecting sale.
  - (b) ...
16. Either party may apply to the Court to vary any of the terms of this order, or for further directions about the sale of the Property or the application of the proceeds of sale, or otherwise.'

[8] Schedule 1 to the order contains a description of the subject property as follows:

'ALL THAT Lot piece or parcel of land situate in the Town of Kingstown in the State of Saint Vincent and the Grenadines and being a portion of Lot 108 of the said Town and being in extent Three thousand Two hundred and fifty square feet (3,250 sq. ft.) and butted and bounded on the North by properties in the possession of the Roman Catholic Friendly Society also called the St. Patrick Friendly Society on or towards the South by Halifax Street on or towards the East by the property of Cable and Wireless (St. Vincent) Limited on or towards the West by the property of the Saint Vincent Building and Loan Association or howsoever otherwise the same may be butted bounded known or described and delineated on a plan approved and lodged on the 21<sup>st</sup> March, 1980 at the Land and Surveys Department of Saint Vincent and assigned Drawing No. G955 TOGETHER with the Building thereon and Together also with all structures erections ways watercourses lights and other easements and advantages thereto belonging or held used occupied and

enjoyed therewith or reputed to belong or be appurtenant thereto.’

[9] The draft consent order was signed by Richard Williams, Faelleseje’s solicitor; Samuel E. Commissioning solicitor on record for MIL and Lesline Bess representative of the estate of Natalie Sylvester; Nicole Sylvester director of MIL; Nicole Sylvester, director of MIL; and Parnel Campbell Q.C. solicitor for Lesline Bess representative of Othneil Sylvester’s estate. It was signed and settled as an order of the court by the presiding judge, the Honourable Justice Gertel Thom on 22<sup>nd</sup> November 2012. It was subsequently entered as an order of the court on 30<sup>th</sup> November, 2012 minus the signatories of the legal practitioners and Ms. Sylvester. In accordance with CPR 42.8, ‘an order of court takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date.’ It stands to reason that the order became an order of the court when it was settled on 22<sup>nd</sup> November, 2012. It was not subsequently invalidated by the filing without the referenced signatures.<sup>3</sup>

[10] Mr. Joergensen deposed that pursuant to the referenced consent order, Marcole Plaza was advertised for sale in 4 consecutive issues in the News, Searchlight and Vincentian newspapers on 4<sup>th</sup>, 11<sup>th</sup>, 18<sup>th</sup> and 25<sup>th</sup> January 2013 requesting submission of offers by close of business on 31<sup>st</sup> January 2013. No offers were received. He indicated that the cost of advertising amounted to \$3,376.40 and was borne by Faelleseje. At Faelleseje’s instance, the property was further advertised for sale in August 2014, by realtors Liberty Properties and internationally with real estate agents Margaret Jones of Jones Lang LaSalle and Kent Schwartz of Colliers in the United States of America; Ole Vestergaard of Colliers in Denmark; Chris Roderichs of CRE Colliers in the UK; and Tony Campbell of SmitsGore in Tortola.

[11] In another bid to sell the property, Faelleseje obtained a valuation from licensed valuator Mr. Chris Browne dated 4<sup>th</sup> August, 2015. Mr. Joergensen produced a copy of the valuation which ascribed a value of \$4.79m or a capital value of \$3.33m. By advertisements in four consecutive issues of the News, Searchlight and Vincentian newspapers in October and November<sup>4</sup>, 2015, Marcole Plaza was

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<sup>3</sup> CPR 26.9.

<sup>4</sup> On 16<sup>th</sup>, 23<sup>rd</sup> and 30<sup>th</sup> October and 6<sup>th</sup> November.

again offered for sale soliciting offers on or before 16<sup>th</sup> November, 2015. The associated costs of advertisements amounted to \$3,376.00 and were borne by Faelleseje. Mr. Joergensen deposed that the best offers received were in the sum of \$2,600,000.00 from two separate investors. He averred that the offers were presented to MIL for approval but were refused by its managing director Mr. Trevor Sylvester as being too low. As a result, Faelleseje has sought the court's approval for sale at that price.

[12] In MIL's sole affidavit in opposition<sup>5</sup>, Mr. Trevor Sylvester deposed that he is a shareholder in MIL and a director. He asserted that he became aware of the referenced consent order only after the deaths of his father Othneil R. Sylvester, his sister Nicole Sylvester and step-mother Natalie Sylvester. It is worth noting that the named deceased were at some point directors of MIL. Mr. Trevor Sylvester holds 10 shares in MIL. The remaining shares are held by the estates of Othneil R. Sylvester, Nicole Sylvester and Natalie Sylvester. Mr. Trevor Sylvester acknowledged that he was a director sometime in the past but was removed without his knowledge. He deposed that he has sought legal advice and was advised that while his late father was indebted to Faelleseje, and although he held shares in MIL, MIL is a separate legal entity which is not indebted to Faelleseje. He averred that for this reason, the consent order is invalid. He was adamant that the parties to the consent order had no authority to bind MIL and that he as a shareholder never gave consent for the order to be made. He indicated that he first learnt of it after Nicole Sylvester's death. Mr. Sylvester testified further that he was aware that his father's properties were being sold but he was never aware that MIL's properties were also being sold and he never had a meeting with his sister Nicole regarding sale of any of the properties.

[13] Mr. Sylvester also deposed that through his legal counsel, he has made an offer to purchase Othneil R. Sylvester's shares in MIL at a price of \$1,804,676.00. He indicated that his offer is based on a valuation prepared by an accountant Ralph Baynes. He averred further that MIL's articles stipulates that its shares must first be offered to existing shareholders before being offered to members of the public. He averred that the company is offering its shares to the public in order to keep its most valuable asset intact. He indicated further that MIL is awaiting the probate of Othneil Sylvester's will

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<sup>5</sup> Filed on 24<sup>th</sup> June, 2016.

to determine the solvency or financial state of the estate. He urged that the court stays the order of sale of Marcole Plaza as to do otherwise would be to enforce a sale to satisfy one creditor to the prejudice of others. He indicated that he has been advised to apply to have paragraph 5 of the consent order discharged on the ground that the parties had no authority to bind the company.

[14] Faelleseje responded by affidavits to the assertions made by Mr. Sylvester on MIL's behalf. The affidavits were sworn to by Mr. Joergensen and Mr. John. Mr. Joergensen deposed that MIL did make an offer to purchase Othneil Sylvester's shares for the sum of \$1,804,676.00 to which a response was sent by learned counsel Mr. Richard Williams. He attested that Faelleseje was not made aware of the valuation of the shares prepared by Mr. Baynes until they had sight of Mr. Sylvester's affidavit and that they are not privy to the contents of the valuation. He produced a Certificate of Status of MIL as at 16<sup>th</sup> August 2012 which reflects that MIL's directors at that date were Natalie Sylvester, Nicole O. M. Sylvester and Peter L. John. He averred that Natalie Sylvester died on 16<sup>th</sup> October, 2016 leaving two directors – Nicole Sylvester and Peter John. The record reveals that Natalie Sylvester died in 2011<sup>6</sup> and not 2016. Mr. Joergensen also pointed out that this is not the first property which has been sold pursuant to the consent order. In this regard, he referenced the sale of Windsor in 2015 and exhibited copies of 3 cheques<sup>7</sup> payable to Mr. Trevor Sylvester and customer payment receipts from the Bank of St. Vincent & the Grenadines reflecting transmission of monies from Simon Kamara to Trevor Sylvester. He described those documents as proof that Mr. Sylvester received his 1.8% share of the purchase price in respect of that sale. Mr. Sylvester did not deny receipt of those payments.

[15] For his part, Mr. Peter John deposed that he was appointed director of MIL on 22<sup>nd</sup> September 2004 and its secretary on 2<sup>nd</sup> January, 2007 and resigned from both offices in September 2015. He averred that he was aware of the impugned consent order. He attested that he and Nicole Sylvester had a directors' meeting before the order was executed and at that meeting they agreed that the property should be sold and that the proceeds should be distributed as stipulated in the order. He added that a resolution was prepared evidencing their agreement for sale of Marcole Plaza and

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<sup>6</sup> See death certificate of Natalie Sylvester exhibited to affidavit of lanthea Leigertwood-Octave filed on 4<sup>th</sup> May, 2016.

<sup>7</sup> Dated 02/01/2015, 24/04/2015 and 22/06/2015.



accordingly MIL authorized Ms. Sylvester to execute the consent order. He testified that he signed the resolution.

[16] MIL's challenge to the consent order includes an oblique request for an order staying the sale of Marcole Plaza. It did not apply for an order of stay in its application. However, if the consent order is set aside the sale would in effect be stayed. Although Faelleseje's application preceded MIL's chronologically, it is more expedient to first consider the later application which I now proceed to do.

[17] It is common ground between the parties and it is also recognized that MIL is a separate legal entity from Othneil Sylvester and its other shareholders. MIL contended that it was not a party to the litigation with Faelleseje. Faelleseje did not adduce evidence of any involvement by MIL as a party to the litigation. However, it did address this contention in its submissions by reference to the record. Faelleseje submitted that MIL was brought into the litigation as an interested party in 2012<sup>8</sup> when Faelleseje filed an application in the present suit seeking among other things declarations that Othneil Sylvester is the beneficial owner of 400 shares or 71.5% of the shares in MIL and that MIL is the trustee of US\$150,000.00 being funds misappropriated by Mr. Othneil Sylvester from Faelleseje. Faelleseje submitted further that in July 2012, it obtained a provisional charging order against Mr. Sylvester's 400 shares in MIL in respect of the payment of \$9,737,669.00 owed to it.

[18] Faelleseje indicated out that on 27<sup>th</sup> September, 2012, MIL consented to the provisional charging order being made final and this was effected by consent order to that effect on the same date. Faelleseje submitted further that all outstanding matters arising from the charging order and the application made by it against MIL (as an interested party) were settled by the impugned consent order. These representations are reflected in the court record and were not disputed by MIL.

[19] MIL countered that a company is a separate legal entity to its shareholders and the learned judge erred in making the order against MIL's property. It submitted that Marcole Plaza did not belong to Mr. Othneil Sylvester. It cited **Salomon v Salomon**<sup>9</sup> in support. Having regard to the undisputed and

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<sup>8</sup> 1<sup>st</sup> June, 2012.

<sup>9</sup> (1895-1899) All ER 33.

recorded background to the making of the consent order, I have no difficulty in finding that MIL was a party to the proceedings in which the subject consent order was made. In those circumstances, the court was not prohibited from making the consent order involving MIL.

[20] I accept Mr. John's testimony that MIL's directors passed a resolution granting permission to Nicole Sylvester to execute the consent order to this effect on its behalf, which she did. Interestingly, during the hearing, MIL objected to Mr. John providing evidence of this 'confidential information' on the basis that he acquired such knowledge while functioning as a director of MIL at the directors' meeting and accordingly owed MIL a fiduciary duty not to divulge its confidences. The testimony was admitted in recognition of the ongoing duty of disclosure owed to the court by litigants. Quite tellingly, MIL did not refute the existence of the resolution or that the meeting did take place. I infer that MIL had no basis on which to challenge Mr. John's testimony. By extension, I infer that Mr. John's recollection is accurate. MIL's failure to disclose this information on its own is in direct violation of its duty to the court, is quite disturbing and is frowned upon.

[21] The Companies Act<sup>10</sup> vests directors with responsibility for management of a company including if necessary, execution of documents on the company's behalf. The consent order was signed by one such MIL Director – Nicole Sylvester and its solicitor Mr. Samuel Commissiong. Faelleseje submitted that a solicitor on record has general authority to compromise an action on his client's behalf provided he acts with *bona fides* and reasonably and not in defiance of his direct and positive instructions. They relied on the case of **Development Bank of Saint Kitts and Nevis v Michael Hanley et al**<sup>11</sup> in which Ramdhani J. (Ag.) applied learning from **Waugh v H. B Clifford and Sons**<sup>12</sup> to such effect. This is indeed good law and it is accordingly applicable to the facts of this case. I am therefore satisfied that MIL was a willing and competent signatory to the consent order, that the order is therefore binding on MIL and is not a nullity.

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<sup>10</sup> Cap. 143 of the Revised Laws of Saint Vincent and the Grenadines, 2009, sections 22 and 58.

<sup>11</sup> SKBHCV2012/0273.

<sup>12</sup> [1982] 1 Ch. 374, (C.A.).

[22] MIL argued that it is necessary to await the administration of Mr. Sylvester's estate before his debts can be paid. They cited no cases in support. It is established in law that a creditor who obtained judgment against a deceased may enforce the judgment against the deceased estate. There is no requirement for Faelleseje to await conclusion of what appears to be a stalled administration, before it can proceed to realize the fruits of its almost decade old judgment. It is worth noting that while Faelleseje's application for sale effectively seeks to recover a debt owed by Mr. Sylvester personally, the instant application and the proceedings to which they relate were against MIL as an interested party and not against Mr. Sylvester's estate, although this judgment will have implications for the latter.

### Setting Aside Consent Order

[23] What of MIL's application to set aside the order for sale of Marcole Plaza? The court may set aside a consent order only:

'... on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons',<sup>13</sup> or

'... if good grounds for doing so are shown.'<sup>14</sup>

Faelleseje and MIL accepted this to be the sole basis for doing so. They also submitted that the only ways of challenging a consent order:

'... once it has been drawn up and sealed are by appeal from the judgment or order or by bringing a fresh action to set it aside.'<sup>14</sup>

[24] Faelleseje concluded that MIL has set out no basis for revoking the consent order. MIL argued that the court's case management powers coupled with the overriding objective 'have enlarged the court's power of interference with interim and final consent orders.' In this regard, they referenced CPR 30.9 which is non-existent. There is no merit to this limb of MIL's submissions.

[25] MIL submitted further that paragraph 16 allows the parties to apply to vary the order. It is remarkable that MIL for the purposes of this submission considers itself a party to the order but not in respect of

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<sup>13</sup> De La Sala v De La Sala [1980] AC 546 at 561.

<sup>14</sup> Purcell v F.E. Trigell Ltd. [1971] 1Q.B. 358.

its binding force. Be that as it may, MIL is still met with and has not surmounted the previously referenced difficulties, which are attendant on setting aside a consent order.

[26] MIL contended further that the order is ambiguous and could be interpreted to mean that either that it evidenced a real contract between the parties or merely that the parties did not object to the order being made. I find no such ambiguity in the order. It is outlined in plain English which contains several overlapping and interconnected provisions governing the proposed sale. There can be no misunderstanding as to the parties' clearly articulated intentions that Marcole Plaza be sold and the major part of the proceeds paid to Faelleseje. I apprehend no such confusion.

[27] MIL also submitted that the consent order purports to oust the court's jurisdiction. It stopped short of explaining in what way the order achieves this. I make no such finding. MIL also argued that the orders were at variance with one another and signified that the parties were not in agreement. MIL further contended that if the order for sale is not set aside MIL will be destroyed. No evidence of either assertion was supplied. The latter was not pleaded. I therefore make no finding that the parties were at variance with each other or that MIL will be destroyed if MIL is sold.

[28] It is trite law that this court cannot sit as an appellate court on decisions made by another judge in its co-ordinate jurisdiction. Based on the foregoing findings and applicable legal principles, I find that MIL has failed to establish good grounds for setting aside the impugned consent order. I therefore make no order to set aside the consent order or any part of it. MIL did not apply for a stay of the order. Its indirect request for a stay is accordingly not considered.

## **Issue 2 – Should the court make an order for the sale of Marcole Plaza at a price below the market value?**

[29] The consent order is an agreement between the parties which was made an order of court. Either party may enforce the terms and conditions of the agreement in accordance with the rules and practice of court. The order outlined certain pre-conditions to the sale including advertisement in the local media based on a valuation report. Admittedly, the August 2015 valuation report may be considered dated, having been prepared just over a year ago. Faelleseje has performed the other

agreed requirements precedent to the sale as rehearsed previously. The matter is before the court because the best price offered for the building and property falls short of the market value ascribed by Christopher Browne in his most recent valuation.

[30] The law imposes certain obligations on a mortgagee who is desirous of exercising its power of sale over mortgaged property. Faelleseje has submitted that the court should extrapolate those principles and apply them in the instant case. MIL did not make a contrary submission. I am inclined to agree with Faelleseje that the principles applicable in a mortgage situation are equally applicable as between a judgment creditor and a judgment debtor since a judgment creditor's interest in a judgment debtor's property is similar to a mortgagee's interest in property which is the subject of a mortgage. This application will be determined on that basis.

[31] A lender who proposes to sell mortgaged property owes the borrower certain equitable duties of care and must act in good faith when exercising its power of sale. The English case of **Cuckmere Brick Co. v. Mutual Finance Ltd.**<sup>15</sup> elucidated the legal principles. The mortgagee in such a case must take:

- (1) the mortgagor's interests into account when considering what constitutes a reasonable sale price; and
- (2) reasonable precaution to obtain a price which reflects the true market value of the mortgaged property.<sup>16</sup>

[32] The lender must not act with reckless disregard to the borrower's interest and must operate honestly in this regard. It is settled law that the lender must seek to 'obtain the true market value of the mortgaged property' at the point of sale,<sup>17</sup> however, he is not required to subvert his interests in favour of the borrower. However, he is entitled to give preference to his own interests<sup>17</sup> if their respective interests conflict. The applicable legal principles are adopted and applied in the instant case.

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<sup>15</sup> [1971] Ch. D. 949.

<sup>16</sup> Ibid. per Salmon LJ at pg. 646 of the Cuckmere Brick case.

<sup>17</sup> Ibid. per Salmon LJ at pg. 646 of the Cuckmere Brick case.

[33] Having regard to the extensive attempts made by Faelleseje to identify a buyer for Marcole Plaza and in view of the contents of the valuation report, I am satisfied that Faelleseje has performed its duties to MIL. There is no evidence that they have not acted in good faith throughout. In fact they have exercised diligence in identifying a purchaser and I daresay tremendous patience. Although the two best offers are below the market value shown in the valuation report, it appears that that amount is what the market can bear at this time. In view of the length of time that has passed since the instant application was filed, I do not know if either offer is still subsisting. I am prepared to grant the order in terms of the application with one stipulation, that a further valuation be conducted to advise the parties of any changes which have taken place in the property's condition and value since August 2015 when the last valuation was obtained. Faelleseje shall be at liberty to sell Marcole Plaza by private treaty to a willing purchaser for the minimum sum of \$2,600,000.00 if the value has remained within a 15% range of the August 2015 value. If the value has changed beyond that margin, Faelleseje is required to apply to the court for further directions. Faelleseje is entitled to recover its costs in these proceedings.

#### Miscellaneous

[34] Faelleseje sought orders which were already granted as part of the impugned consent order. In this regard, they applied for orders that the moneys received from the sale of Marcole Plaza be distributed as per the terms of the consent order and that the registrar be authorized to execute the conveyance. It is unnecessary to make identical or similar orders. Faelleseje also applied for an order that a 3% commission be paid to Liberty Properties. Mr. Joergensen deposed that Mr. Kamara of Liberty Properties was paid 3% on the sale of a previous property. He did not indicate how this arrangement was concluded save to aver that it is the 'usual 3% for his services'. In the absence of specifics, no such order is made, there being no provision in the consent order for such payment. Faelleseje is at liberty to apply for a consequential order on provision of relevant data. The December 5<sup>th</sup> hearing date fixed for consideration of MIL's application has become redundant. It is vacated.

#### **ORDERS**

[35] It is accordingly ordered:

1. Faelleseje shall be at liberty to sell Marcole Plaza by private treaty to a willing purchaser for the minimum sum of \$2,600,000.00 if the value has remained within a 15% range of the August 2015 value. Faelleseje is required to apply to the court for further directions if the value has changed beyond that margin.
2. Before finalizing negotiations and conducting the sale Faelleseje shall:
  - (1) arrange for licensed valuator Mr. Christopher Browne to conduct a valuation of Marcole Plaza; and
  - (2) file and serve a copy of the said valuation;  
within 15 days of today's date, (i.e. on or before 22<sup>nd</sup> December 2016).
3. MIL shall on receiving at least 24 hours' advanced notice:
  - (a) grant access to Faelleseje, its servants and agents, to conduct a valuation of the Marcole Plaza; and
  - (b) arrange for its servants, agents, licensees and tenants (if any) to grant similar access to Faelleseje, its servants and agents.
4. Faelleseje shall within 7 days of today's date (i.e. on or before 15<sup>th</sup> December, 2016) serve a copy of this judgment on each occupant of Marcole Plaza, and file proof of such service.
5. MIL shall pay costs to be assessed on application to be made by Faelleseje on or before 15<sup>th</sup> December, 2016, pursuant to CPR 64.11.
6. Liberty to the Faelleseje to apply for further consequential orders.
7. The December 5<sup>th</sup> 2016 hearing date fixed for consideration of MIL's application to set aside the order for sale, is vacated.

[36] I wish to thank counsel for their helpful written submissions.

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**Esco L. Henry**  
**HIGH COURT JUDGE**