

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2022/0001

BETWEEN:

**[1] SAG MOTORS LTD
[2] DESMOND CARLISLE**

Appellants

and

NATIONAL BANK OF DOMINICA

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]

Appearances:

Mrs. Cara Shillingford-Marsh and Mr. Wayne Benjamin Marsh for the Appellants
Mrs. Heather Felix-Evans for the Respondent

2023: May 10;
July 28.

Civil appeal– Judgment in default of defence – Application to set aside default judgment – Inordinate delay – Judgment debt – Statutory interest on judgment debt – Whether compound interest – Whether default judgment irregular - Finality of litigation – Sale of mortgaged property - Whether the judge erred in refusing to set aside the default judgment on the basis of delay only – Sale of land by mortgagee – Application to set aside sale of mortgaged property by public auction – Duty of the mortgagee - Good faith – Whether the judge erred in failing to deal with the application to set aside the public auction sale of the mortgaged property – Rules of the Supreme Court (Revision) 1970 Order 73.4, Order 2 rule 2(1) and Order 19 rule 9.

In 1999 the predecessor bank to the National Bank of Dominica ("the respondent") commenced a civil claim against the appellants for non-payment of a mortgage debt with the respondent bank. The claim was for the sum of \$3,900,319.27 being the balance due on a loan granted by the bank to the appellants on 8th April 1997 "inclusive of interest to 31st March 1999, with interest thereon at a rate of 10% per annum to the date of payment thereof." On 9th July 1999 the respondent entered judgment in default of defence against the appellants jointly and severally in the claim in the sum of

\$3,900,319.27 “together with interest thereon at the rate of 10% per annum from 1st April 1999 to date of judgment and thereafter at the rate of 5% per annum to date of payment and \$152.50 costs.”.

Having obtained the default judgment, the respondent bank on 3rd February 2000 sought to enforce its security by entering upon and seizing the mortgaged property comprising 0.761 acres of land and dwelling-house thereon situate at Lot D, Canefield North Estate in the Parish of St. Paul in the Commonwealth of Dominica. On 19th April 2000, the respondent bank filed a summons in the High Court of Justice to settle Articles of Sale, to estimate an upset price and to set the date for the sale of the mortgaged property. On 3rd May 2000 an order was made to sell the mortgaged property and the building thereon by public auction at an upset price of \$2,538,040.00. By December 2005 the upset price was by successive orders of the court reduced and fixed at \$2,170,024.20. On each of the several hearings before the court on application by the respondent bank to settle articles of sale and to fix a new upset price and date for the sale of the mortgaged property, the appellants and their counsel appeared. On none of these occasions was any objection taken by or on behalf of the appellants as to the terms of the articles of sale or the upset price fixed by the court, and there was no application filed by the appellants to set aside the default judgment on the ground of irregularity or otherwise.

Between 25th July 2000 and 20th April 2006, seven (7) auctions were held to sell the mortgaged property. On the first five of the auctions there were no bidders and, upon the sixth auction, the successful bidder for the mortgaged property at a bid of \$5,100,000.00 subsequently failed to pay the required deposit and the auction was declared null and void. At this auction the respondent bank had itself submitted an unsuccessful bid in the sum of EC\$5,000,000.00. At the seventh and final auction held on 20th April 2006, the respondent bank exercised its statutory right to bid for and purchased the mortgaged property for the sum of \$2,170,224.20 being \$200.00 more than the then upset price of \$2,170,024.20. The appellants protested the sale in writing contending that the respondent bank, in breach of its duty, had purchased the mortgaged property at a gross undervalue being well below its market value and the said auction sale was, accordingly, unlawful, null and void, and of no effect in law.

On 22nd November 2010, some 11 years and 4 months after the entry of the default judgment and 4 years and 7 months after the sale of the mortgaged property by public auction to the respondent bank, the appellants filed an application to set aside the default judgment obtained on 9th July 1999, and to have the sale of the mortgaged property to the respondent bank declared null and void and of no effect on the basis that it had been sold to the respondent bank at a gross undervalue. The learned judge in considering the application first concluded that since the default judgment was obtained under the old Rules of the Supreme Court (Revision) 1970 (“the RSC”), the application to set it aside must also be considered under those rules and, following rule 73.4 of the Civil Procedure Rules 2000 (“the CPR”), in determining the said application she could have regard to the principles under the CPR, in particular Parts 1 and 25.

In a written judgment, the learned judge dismissed the contention that the default judgment was void ab initio for irregularity on the basis that it had wrongly included sums for compound interest. It was not however disputed by the appellants that the principal sum and interest under the mortgage was owing. The judge also found that

the error as to the amount of interest in the default judgment raised belatedly by the appellants, would have made the default judgment sum erroneous and, on the authority of *Muir v Jenks*, would have entitled the appellants to have it set aside as of right. However, the learned judge considered that the 11 years plus delay in the filing of the application to set aside the default judgment amounted to an abuse of process and was a weighty consideration in determining whether to grant the application to set aside the default judgment. Accordingly, the learned judge found that the appellants' reason for the delay was unsatisfactory and dismissed the application to set aside the default judgment; and, as a consequence and without addressing it, the application to set aside the sale of the mortgage property to the respondent bank.

Being dissatisfied with the result, the appellants appealed to the Court of Appeal. The appeal raised two issues: (i) whether the learned judge erred in refusing to set aside the default judgment on the basis of delay only; and (ii) whether the learned judge erred in failing to deal with the substantive application to set aside the sale of the mortgaged property by public auction to the respondent bank.

Held: dismissing the appeal; and making the orders set out at paragraph 64 of the judgment, that:

1. An appellate court must exercise restraint in determining appeals that challenge the exercise of judicial discretion by a lower court. Thus, for an appeal against judicial discretion to succeed, it must be shown that in exercising his or her discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and that, as a result of the error or the degree of the error of principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

2. Where a default judgment was entered under the Rules of the Supreme Court (Revision) 1970 ("**RSC**") pursuant to rule 73.4 of the Civil Procedure Rules 2000 ("CPR") the applicable rules when considering whether to exercise the court's discretion to set aside the default judgment is the **RSC**. Order 2, rule 2(1) and Order 19, rule 9 of the **RSC** gives the court the power to set aside any judgment, order or step in any proceedings within a reasonable time. The court below was accordingly entitled or obliged to consider the delay by appellants in bringing the application to set aside default judgment. In determining such an application, a judgment debtor should not be allowed easily to set aside a default judgment where, in particular, there has been a significant or inordinate delay in applying to set aside the default judgment, unless exceptionally compelling circumstances exist as to why it ought, in the interest of justice, to be set aside. It is only in the rarest and most extraordinary cases, where the reasons for the delay are truly cogent and compelling, that a court may be persuaded to consider setting aside the default judgment where the applicant/judgment debtor has essentially slept on their rights. What constitutes a 'reasonable time' within the meaning of Order 19 rule 9 of the RSC will naturally vary from case to case, and will depend on all the circumstances including the reasons for the delay as

well as the likelihood of success of any proposed defence. The proposed defence presented by the judgment debtor would need to be remarkably robust, such that its success seems almost guaranteed. Furthermore, the court must determine that allowing the judgment to stand would result in a greater injustice than setting it aside.

Gregory Bowen et al v Dipcon Engineering Services Ltd Civil Appeal No. 12 of 2005 (delivered 22nd May 2006, unreported) followed; **Mercurine Pte Ltd v Canberra Development Pte Ltd** [2008] SGCA 38 [97] applied; **Avanesov v Shymkentpivo** [2015] EWHC 394 (Comm) applied; **Muir v Jenks** [1913] 2 KB 412 considered; **Civil Procedure Rules 2000** rule 73.4; **Rules of the Supreme Court (Revision) 1970** Order 2 rule 2(1) applied; **Rules of the Supreme Court (Revision) 1970** Order 19 rule 9 applied.

3. In this case, the application to set aside the default judgment came 11 years and 4 months after the judgment in default of defence was entered against the appellants. During that period, the appellants did not file a defence or draft defence or sought leave of the court to extend the time to file a defence. Moreover, the appellants have never disputed liability for the claim or that they had defaulted on the loan payments under the mortgage with the respondent bank. The only challenge by the appellants to the judgment is as to the calculation of the quantum of interest on the basis that the judgment sum includes interest on interest. However, it was open to the appellants upon entry of the default judgment to apply to set it aside on this basis and to file a defence or to file an application for correction of the judgment. While it may have been the responsibility of the respondent bank to have any error or irregularity in the judgment corrected, no such error or irregularity was brought to the attention of the respondent bank until over a decade after the entry of the judgment. In these circumstances, the alleged error in the calculation of interest in the default judgment is not so extraordinary as to warrant the setting aside of the default judgment itself, and the learned judge, having considered this, was correct in her conclusion to refuse the application to set aside the default judgment. In doing so, the learned judge considered all the relevant factors and was correct to find that the very late application to set aside the default judgment was an abuse of process by the appellants. There is, therefore, no sound basis for concluding that the learned judge, in exercising her discretion, erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; such that her decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Accordingly, this limb of the appeal is dismissed.
4. Sections 75 to 97 of the **Title by Registration Act** provide that a mortgagee can seize and sell incumbered property, where a mortgagor has failed to perform the conditions of the mortgage or incumbrance. In this case, while it was within the discretion of the learned judge to dismiss the application to set aside the default judgment on the basis of delay, that was not sufficient to justify failing to deal with the application to set aside the public auction sale. The two applications, though contained in one document, were separate and distinct and

required individual consideration. Furthermore, the property was not purchased by a third-party bona fide purchaser for value, but by the respondent bank itself. Accordingly, it was incumbent on the learned judge to consider whether there had been a breach of the mortgagee's duties and whether the bank acted in bad faith or exercised any undue influence in the sale. Accordingly, the learned judge erred in dismissing the application to set aside the public auction sale and, as accepted by counsel for both parties, the Court of Appeal ought to deal with that limb of the appellants' application.

Sections 75 to 97 of **Title by Registration Act** Chap. 56:50 of the Laws of Dominica applied.

5. A mortgagee is duty-bound to act in the utmost good faith, exercising a reasonable degree of care and skill when disposing of the mortgaged property by sale. Paramount to this duty is the obligation to obtain the highest attainable price given the prevailing market conditions. However, this duty is to be balanced against the mortgagee's right to sell the property at its convenience and for its benefit. The mortgagee's mixed motives for a sale, including the objective of securing repayment, do not in themselves breach the duty as long as good faith is maintained. Likewise, as long as the mortgagee's assessment of the market value falls within an acceptable margin of error, the duty is not breached. Therefore, a pragmatic approach must be taken to strike a fair balance between the parties' competing interests.

Halsbury's Laws of England Mortgage (Volume 77 (2021)), para 459 applied; **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] 2 All ER 633 applied; **Corbett and another v Halifax plc and others** [2003] 2 All ER (Comm) 384 applied.

6. In this case, the default giving rise to the respondent bank's right to sell the mortgaged property stemmed from the non-payment of the mortgage sum by the appellants. This led to the respondent bank filing a civil claim and taking steps to and obtaining a judgment for the outstanding principal sum and interest under the mortgage, to subsequently entering upon and seizing the mortgaged property, and to applying to the High Court to have it sold by public auction. The respondent after obtaining the default judgment filed a summons in the High Court to settle the Articles of Sale, estimate an upset price, and fix the date for the sale. The auctions, the applications to fix and reduce the upset price, as well as the eventual sale of the property all took place under the control and supervision of the court and with the participation and concurrence, without objection, of the appellants. The process used was transparent and the auction was conducted with the full knowledge and participation of the appellants. It was open to the appellants to bring any concerns or considerations whether as to market value or the upset price or otherwise to the attention of the judge or master. Moreover, the second named appellant, who himself has considerable business experience, appeared in person at a number of the enforcement proceedings. He is not the average litigant in person who may not be able to understand what is taking place in enforcement proceedings or hearings to fix or reduce an upset price. Accordingly, he was more than capable of informing the court of any pertinent happenings at previous auctions and of raising the

issue of the need for an updated valuation or seeking legal advice regarding those concerns. Accordingly, the appellants' position throughout the proceedings for the sale of the mortgaged property has been one of acquiescence, and they have only raised the issues concerning the default judgment and the upset price and sale for the first time at a very belated stage. The appellants have never challenged any order of the learned judge fixing the upset price. Moreover, the subsequent valuation of the mortgaged property done by Sorrel Consulting Limited came after substantial renovations had been carried out by the respondents to the dwelling-house on the property and, allowing for some margin of error, that valuation shows that the property is not valued substantially more than the price for which the property was sold by auction to the respondent bank.

7. An almost five year delay in seeking to set aside a court connected sale is inordinate. The respondent, to its detriment, made significant improvements to the property and has been utilizing it for its own purposes. To set aside the sale after such a significant passage of time would cause great injustice to the respondent bank, and the appellants have not made out a case to justify the court setting aside the said sale. In light of the foregoing, the respondent bank did not act in bad faith during the sale of the mortgaged property, and the appellants have not made out a case to be compensated in damages. This limb of the appeal is also dismissed.

JUDGMENT

- [1] **FARARA JA [AG]:** This appeal stems from the decision of Stephenson J (“the learned judge”) delivered in a written judgment on 22nd September 2022 in which she dismissed the appellants’ application to set aside a default judgment and to set aside the sale of the appellants’ property by way of public auction. This matter is one of considerable vintage, the default judgment having been entered some 24 years ago on 9th July 1999. The salient background leading up to the hearing of this appeal is set out below.

Background

- [2] On 7th April 1999, Bank Francaise Commerciale Antilles Guyane, the predecessor of the respondent, filed a statement of claim pursuant to the **Rules of the Supreme Court (Revision) 1970** (“the RSC”) for a debt it alleged to be due and owing by the appellants.¹ The respondent claimed the sum of \$3,900,319.27, being the balance allegedly due and owing on a loan

¹ See Vol 2 Bundle of documents inadvertently left out of appeal bundle, pg 29.

granted on 8th April 1997 'inclusive of interest to 31st March 1999, with interest thereon at a rate of 10% per annum to the date of payment thereof'. In the particulars of the claim, the respondent cited the amount of the original loan as \$3,850,281.70; but after accounting for the accrual of interest and the total amount paid towards the debt by the appellants, the respondent arrived at the sum of \$3,900,319.27, which it alleged was the final sum owed.

- [3] On 9th July 1999, judgment in default was entered against the appellants in the following terms:

"No Defence having been served by the [appellants] herein It Is This day Adjudged that the [appellants] do pay to the [respondent] the sum of \$3,900,319.27 together with interest thereon at the rate of 10% per annum from 1st April, 1999 to date of Judgment and thereafter at the rate of 5% per annum to date of payment and \$152.50 costs."²

- [4] On 3rd February 2000, the respondent sought to enforce the judgment and entered upon and seized the appellants' property. On 19th April 2000, the respondent filed a summons to settle Articles of Sale, estimate an upset price, and fix the day of the sale. On 3rd May 2000, it was ordered, inter alia, that the mortgaged property, along with the building erected thereon, be sold by public auction and that the upset price was fixed at \$2,538,040.00. Auctions were held on 27th July 2000 and 26th April 2001, with no bidders. On 25th July 2001, the upset price was reduced by 5% from \$2,538,040.00 to \$2,411,138.00. Another auction was held on 30th August 2001, again with no bidders. On 14th August 2003, the upset price was reduced by 10% from \$2,411,138.00 to \$2,170,024.50.

- [5] On 14th August 2003 and 13th May 2004, two more auctions were held and once again, there were no bidders. On 22nd December 2005, the sixth auction was held. The respondent bid \$5,000,000.00 and was outbid by a third party who bid \$5,100,000.00. The third-party bidder never made the required deposit. The bid was accordingly cancelled and another auction was scheduled. On 20th April 2006, the final auction was held and the respondent purchased the property for the sum of \$2,170,224.20; approximately two

² See Vol 2 Bundle of documents inadvertently left out of appeal bundle, pg 32.

hundred dollars over the upset price. The appellants have maintained that the sale price was well below the market value of the mortgaged property and that the upset prices were fixed without reference to a recent valuation, the last one being dated 3rd October 1996.

[6] On 22nd November 2010, the appellants filed an application to set aside the default judgment obtained 11 plus years prior, and by amended application filed on 6th May 2011, the appellant further requested the setting aside of the public auction sale of the mortgaged property in 2006. The notice of application requested the following orders:

- (i) The continuation of an interim injunction granted on 10th December 2010 until the hearing and determination of the application.
- (ii) That the default judgment obtained by the respondent on 9th July 1999 contained an award of compound interest and was irregular, unlawful, null and void.
- (iii) That the said default judgment was excessive, irregular, unlawful, null and void.
- (iv) That the order of interest at the rate of 10% from 1st April 1999 to the date of the judgment was wrong in law.
- (v) An order that the default judgment should be set aside ex debito justitiae (as a matter of right).
- (vi) That all enforcement proceedings including the sale which have been taken in the matter is of no effect in law based on the fact that the default judgment obtained was irregular, null and void.
- (vii) For the caveat lodged on the Certificate of title to the property registered in Book of Titles L7 Folio 71 of the Registrar of Titles to be reissued to the appellants and a further order that the Certificate of title issued to the respondent be set aside.

(viii) Costs.

Judgment in the court below

- [7] In her written judgment, the learned judge identified four issues for determination. As a preliminary point, the learned judge first considered which rules applied to the application: the **Civil Procedure Rules 2000** (“the CPR”) or the RSC. She noted that the proceedings were commenced and default judgment was obtained under the RSC, but that the application to set aside the judgment and the sale was made under the CPR. She concluded that the application ought to be dealt with under the RSC, however, in accordance with rule 73.4 of the CPR, she was entitled to take into account the principles set out in the CPR, in particular Parts 1 and 25, in the exercise of her discretion. On appeal from the judge’s decision, neither party has taken any issue with the judge’s determination of this preliminary issue.
- [8] The learned judge then went on to consider whether the default judgment was void, voidable or irregular. She determined that the judgment was not void ab initio as the court was seized with the jurisdiction to entertain the claim and to make such an order. Instead, she found that the alleged error as to the amount of interest on the judgment, which error was raised for the first time by the appellant years after the default judgment had been obtained, would make the judgment erroneous. She relied on the authority of **Muir v Jenks**³ to conclude that the appellants are entitled to have an irregular judgment properly obtained under the relevant rules set aside as of right, however, based on the authority of **Hughes v Justin**,⁴ this right is subject to the exercise of the power of amendment and the futility of interfering with the judgment. In this respect, the judge considered it to be relevant that during the passage of time since the judgment was obtained the mortgaged property has been sold and the proceeds of sale applied to the judgment debt.
- [9] Upon submissions by counsel for the respondent, the learned judge first dealt with the issue of delay as she noted that the initial application to set aside the

³ [1913] 2 KB 412.

⁴ (1894) 1 QB 667.

default judgment was made some 11 years and 4 months after the entry of the judgment. The reason presented by the appellants for this delay was that they were awaiting the ruling of the Court of Appeal in another matter to inform whether or not to make the application. The learned judge noted however that the appellants and their counsel, as well as a financier on the appellants' behalf, had participated fully in the enforcement proceedings.

- [10] The learned judge, upon considering the authorities and the facts of this case, was of the view that the appellants had made a deliberate decision not to apply to set aside what they claimed to be an excessive judgment in a timely manner. They acquiesced in the enforcement proceedings by fully participating in the hearings and at the auctions through a third-party financier. She found that the appellants' actions amounted to an abuse of process and this extensive delay of 11 years in applying to set aside the judgment was a decisive factor and a weighty consideration in deciding whether or not to grant the application to set aside the default judgment. To allow the application, in her view, would cause great injustice to the respondent as there must be an end to litigation. Accordingly, the application was dismissed in its entirety on the basis of delay and the learned judge did not go on to consider the merits of the application to set aside the default judgment or the public auction sale of the mortgaged property.

The appeal

- [11] The appellants have called on this Court to set aside the orders of the learned judge and to consider and determine both limbs of the application afresh. Accordingly, two broad issues fall to be determined by this Court: (i) Whether the learned judge erred in refusing to set aside the default judgment on the basis of delay only; and (ii) Whether the learned judge erred in failing to deal with the substantive application to set aside the public auction sale of the mortgaged property.

Issue 1: Whether the learned judge erred in refusing to set aside the default judgment on the basis of delay only

Appellants' submissions

- [12] The gravamen of the appellants' case under this head is that the learned judge erred in determining the entirety of their application based on her determination of a preliminary point - delay. Counsel for the appellants, Mrs. Cara Shillingford-Marsh, argued that the issue of delay is but one of the factors that a court ought to consider in deciding whether to set aside a default judgment. She also contended that the learned judge erred in making reference to Order 2 of the RSC and that she ought to have relied on Order 13 Rule 8.
- [13] Counsel for the appellants submitted, on the authority of **Gregory Bowen et al v Dipcon Engineering Services Ltd**,⁵ that the Old Rules are not as restrictive as the CPR in terms of the criteria used for the exercise of judicial discretion in dealing with an application to set aside a default judgment. However, the learned judge fettered her discretion in failing to deal with the substantive application to set aside the default judgment. Accordingly, this Court ought to set aside her order and exercise the discretion de novo.
- [14] In her written and oral submissions, counsel relied on the case of **Muir v Jenks** as authority for the proposition that delay in making an application does not deprive a judgment debtor of his right to have a judgment for an excessive sum set aside. Furthermore, it is a judgment creditor's responsibility to have a judgment for an excessive sum corrected, and unless he does so, on the authority of **Hughes v Justin**, the judgment debtor is entitled to have that judgment set aside.

Respondent's submissions

- [15] Counsel for the respondent, Mrs. Heather Felix-Evans, contended that the burden on the appellants in challenging the exercise of the judge's discretion

⁵ Civil Appeal No. 12 of 2005 (delivered 22nd May 2006, unreported).

is a heavy one. An appellate court ought not to reverse the decision of a trial judge simply because it would have exercised the discretion in a different way. She also contended that the judge was correct to rely on Order 2 of the RSC as Order 13 rule 8 applies to judgments in default of appearance, not judgments in default of defence, which this matter concerns.

- [16] She rejected the submission by counsel for the appellants that the learned judge treated delay as a mandatory bar and that she did not consider any other factors. She submitted that the delay was significant and that the learned judge would have been wrong not to give it weighty consideration. Additionally, Order 2 rule 2 of the RSC obliged the learned judge to consider whether the application was made within a reasonable time. She further submitted that, contrary to counsel for the appellants' contentions, the learned judge did consider the reasons provided for the delay but did not accept them. Accordingly, the learned judge considered all relevant factors and there is no basis upon which her orders should be set aside.

Discussion

- [17] The starting point in determining whether the decision of the learned judge ought to be set aside is to restate the principles laid down in the seminal and oft-cited case of **Dufour and Others v Helenair Corporation Ltd and Others**,⁶ where Floissac CJ said:

“...an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

- [18] Bearing these principles in mind, I turn now to the consideration of the applicable rules. The learned judge, correctly in my view, identified the RSC as the rules governing the application to set aside the default judgment, as

⁶ (1996) 52 WIR 188.

the default judgment was entered in 1999, prior to the commencement of the CPR. A similar finding was made by Gordon JA in **Gregory Bowen**, where a default judgment was entered before the commencement date of the CPR and he held the RSC to be the applicable rules. Counsel for the appellants submits that Order 13 rule 8 is the applicable rule whereas counsel for the respondent submits that Order 2 rule 2(1) applies. It is convenient to set out both rules here:

“2(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

...

13(8) The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.”

[19] The learned judge accepted that Order 2 rule 2(1) applied to the set-aside application and went on to consider, at paragraphs 46 to 48 of her judgment, whether the application was made within a reasonable time. I find this to have been the proper approach. Counsel for the appellants has argued from the inception of these proceedings that the default judgment was irregular in that it was entered for an excessive sum. Liability has never been disputed nor have the appellants ever sought to mount a defence. Order 2 rule 2(1) makes specific provision for the setting aside of judgments or orders for irregularity.

[20] Order 13 rule 8 cited by counsel for the appellants is a general rule that is replicated several times throughout the RSC and which allows the court to set aside or vary any judgment entered under the various Orders. However, I accept the submission of counsel for the respondent that this rule refers to judgements in default of appearance. Nonetheless, Order 19 rule 9 is in identical terms to Order 13 rule 8 but is specific to judgments entered in default of defence as is the case in this matter. Accordingly, this would be the applicable rule.

[21] That being said, there is nothing in the RSC which prevents both Order 2 rule 2(1) and Order 19 rule 9 from being read together. In fact, the latin maxim

generalia specialibus non derogant – the general does not derogate from the specific - would apply. Order 19 rule 9 bestows on a court the general power to set aside or vary a judgment on such terms as it thinks fit. However, this general power must be curtailed by any specific provisions in the rules and the court would be bound to consider whether the application to set aside the judgment has been made within a reasonable time, as Order 2 rule 2(1) requires it to do. Indeed, the language of Order 2 rule 2(1) is in mandatory terms. The court's power to set aside any judgment, order or step in any proceedings 'shall not be allowed unless made within a reasonable time'.

[22] Furthermore, rule 73.4 of the CPR permits a court exercising a discretion in proceedings commenced before the CPR came into force to take into account the principles set out in the CPR, particularly parts 1 and 25. Part 1 of the CPR deals with the overriding objective, which is to deal with cases justly, and the duty of parties to assist the court in furthering that overriding objective. Rule 1.1(2)(d) provides that dealing with a case justly includes 'ensuring that it is dealt with expeditiously'. The learned judge was accordingly entitled or rather obliged to consider the delay by the appellants in bringing the application.

[23] Counsel for the appellants relied heavily on the case of **Muir v Jenks**, where Buckley LJ found that:

"It is the duty of the creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so. The question therefore does not turn upon delay by the debtor."

He then went on to say that 'unless the party who holds the judgment elects to have it put right, then upon the authority of *Hughes v. Justin* it seems to me the defendant is entitled to say "This is a wrong judgment, set it aside."'

[24] While I accept the reasoning employed in this case, the principle is not absolute. It is trite that delay, in and of itself, does not deprive a judgment debtor of the right to have an irregular judgment set aside, nor does it relieve a judgment creditor of his duty to have an irregular or erroneous judgment corrected. However, on an application to have such a judgment set aside, a judge is entitled to consider the delay of the applicant in making the application

and whether, pursuant to Order 2 rule 2(1) that delay was unreasonable and the applicant had taken some fresh step in the proceedings after becoming aware of the irregularity. Where that delay has been unreasonable or excessive, it may be determinative of the application.

[25] As the Singapore Court of Appeal said in **Mercurine Pte Ltd v Canberra Development Pte Ltd**,⁷ a case cited by both parties,

“[i]n both types of setting-aside applications – ie, relating to regular and irregular default judgments respectively – the defendant’s delay in making the application is a relevant consideration and may be determinative where there has been undue delay... As a rule of thumb, the longer the delay, the more cogent the merits of the setting-aside application have to be.”

[26] The default judgment was entered on 9th July 1999 and the original application to set it aside was made on 22nd November 2010; a period of 11 years and 4 months later. To put this delay in context, I must look at what the courts have previously held to be inordinate delay. Popplewell J in **Avanesov v Shymkentpivo**⁸ found delays of 8 months and 6 weeks respectively to be lengthy, serious and highly culpable. The case held that:

“The need to ensure compliance with court orders and rules was not served by indulging a defendant like SP who had deliberately ignored the timetable and failed to engage in the proceedings until it perceived a risk of enforcement. There was nothing in the interests of justice in the particular circumstances of the case that pointed to a different conclusion. The prejudice that A would suffer if the judgments were set aside was significant. Moreover, the establishment by SP of a realistic defence was not sufficient to justify setting aside the judgments notwithstanding the large sums of money involved.”

[27] Additionally, Popplewell J said:

“A month or six weeks is a significant delay... and in the context of the public interest in finality of judgments which should normally require an application to set aside to be brought within days of being on notice, rather than weeks or months, save in exceptional circumstances.”

[28] The only criteria to be considered on an application to set aside a judgment for irregularity under Order 2 rule 2(1) of the RSC are that the application must

⁷ [2008] SGCA 38 [97].

⁸ [2015] EWHC 394 (Comm).

be made within a reasonable time and before the party has taken any fresh step after becoming aware of the irregularity. What constitutes a 'reasonable time' will naturally vary from case to case and will depend on all the circumstances including the reasons for the delay as well as the likelihood of success of the proposed defence. However, in situations where a party is aware of the entry of the judgment, and is represented by counsel, a delay of even one month may be considered inordinate.

- [29] The delay of 11 years and 4 months in this case is startling. The courts must emphasize the desirability of finality in litigation which is an integral part of the system of justice by which a claimant's rights are determined. There must come a time when a judgment creditor can be satisfied that his judgment will not be challenged or set aside or become subject to modifications and variations. There must be some permanence in judgments of the court such that a judgment creditor can seek to enforce that judgment with confidence.
- [30] The principle of finality in litigation dictates that a judgment debtor should not be easily allowed to set aside a default judgment, particularly after a significant or inordinate delay in applying for its setting aside, unless exceptionally compelling circumstances exist. In the rarest and most extraordinary cases, where the reasons for the delay are truly cogent, a court may be persuaded to consider setting aside the judgment even if the debtor has essentially slept on their rights.
- [31] For such a course of action to be justified, the defence presented by the judgment debtor would need to be remarkably robust, such that its success seems almost guaranteed. This requirement ensures that the debtor is not merely attempting to prolong the legal proceedings or evade the consequences of their actions through a belated application. The court would carefully assess the merits of the defence, scrutinizing its strength and potential impact on the original judgment.

[32] Moreover, in order to grant the setting aside of a default judgment, the court must determine that allowing the judgment to stand would result in a greater injustice than setting it aside. This consideration highlights the court's responsibility to weigh the interests of both parties and the overall fairness of the outcome. The court would assess the potential harm or prejudice caused to the judgment debtor if the judgment remains in place, balancing it against any detrimental consequences that may befall the judgment creditor if the judgment is set aside.

[33] No extraordinary circumstances exist in this case. The appellants have never filed a defence or draft defence or sought leave or an extension of time to file a defence. In fact, they have as much as admitted liability to the claim and admitted that they defaulted on the loan payments. The only challenge to the judgment is quantum of interest. Nonetheless, it was open to the appellants at any time to file a defence or to file an application for correction of the judgment. While it may have been the responsibility of the respondent to have the judgment corrected, if in fact any error exists, that error was never brought to the attention of the respondent until over a decade after the entry of the judgment.

[34] I turn briefly to the substantive issue raised in the application to set aside the default judgment. Counsel for the appellants asserted that the default judgment was entered for an excessive sum in that contractual interest had been added to the principal sum of the loan and that post-judgment interest was to run on the total sum. She asserted that this amounted to a compounding of interest and this was contrary to the laws of Dominica.

[35] An almost identical issue was raised in **The Bank of Nova Scotia v Joyce Erin Rabess et al**,⁹ where the learned master conducted a thorough examination of the law in Dominica on this point. She found that:

“[60] It is often the case that the court will provide a breakdown of the various heads under which debt or damages are awarded and separately identify any interest and costs. All these various parts of an

⁹ DOMHCV2002/0340 (delivered 29th June 2016, unreported).

award are all payable by the unsuccessful party by virtue of the order of the court and consequently, in my view, they all form the “judgment debt”. All these various sums made payable by the judgment, including any pre-judgment interest, become part of and merge into a total single sum awarded. Since any pre-judgment interest (in this case payable by virtue of a contract) as with the other component parts of the judgment merges into a single debt it cannot in my view be treated separately for the purposes of calculating statutory interest...

[62] It is the statute rather than the exercise of a discretionary power that makes interest at a rate of 5% payable on every “judgment debt”. It may very well be, as stated by Lindley L.J, that since the “judgment debt” includes an element of pre-judgment contractual interest - interest is in fact being calculated on interest. However, until such time as the legislature sees it fit to modify the law, the words in the statute must be given their ordinary and natural meaning.

[63] I therefore find no basis for setting aside the judgment in default on the basis that the judgment was been (sic) entered for an excessive amount because it orders that statutory interest be calculated on a sum which includes pre-judgment contractual interest.

[36] I fully adopt the findings and reasoning of the learned master in that case. The respondent was contractually entitled to any interest that accrued on the principal sum of the loan and was entitled to add said interest to the principal sum to calculate the total judgment debt. The regular statutory interest of 5% would then run on that judgment debt and I am satisfied that there is no statutory or other restriction barring the respondent from so recovering. Accordingly, the appellants have failed to demonstrate any knock-out point sufficient to justify the setting aside of the default judgment in the face of such egregious delay.

[37] The reasons submitted for the delay are also rather lacklustre in my opinion. They are totally lacking in cogency and do not even begin to amount to a good reason. The appellants asserted that they were awaiting the outcome of a related appeal to determine whether they ought to apply to set aside the default judgment. This reason simply does not reach the necessary threshold to justify the extraordinary delay in bringing the application. As was the case in **Avanesov**, the appellants showed a complete disregard for court timetables, made a deliberate decision not to apply to set aside the decision,

and failed to raise their concerns or make the necessary application within a reasonable time.

- [38] It is also not to be forgotten that the very reason a default judgment was entered against the appellants was because they defaulted in their obligation to file a defence in accordance with the rules of court. They filed a memorandum of appearance, signifying that they had been served with the proceedings and that they intended to participate in them, but they have since acquiesced in the proceedings and failed to defend themselves in any way.
- [39] In the instant case, the learned judge did not consider delay simpliciter as the appellants suggest, but she considered all the circumstances of the case including the extent of the delay, the reasons proffered for the delay and whether they were acceptable and reasonable. She was at pains to highlight that the delay was inordinate, oppressive and amounted to an abuse of process. She noted that the appellants were represented by competent counsel, that a defence was never filed and that they actively participated in the enforcement proceedings. It was then that she came to the conclusion that an injustice would result if the appellants were allowed to have a judgment that had gone unchallenged for 11 years and 4 months set aside.
- [40] I am satisfied, in all the circumstances of the case, that the learned judge considered all the relevant factors and was correct to find that there was an abuse of process by the appellants. For 11 plus years they, and/or their counsel, participated in enforcement proceedings and participated in the multiple auctions leading up to the eventual sale of the property, all without challenging the quantum of the judgment, whether formally or informally, or seeking to have it amended. They even went so far as to have a financier enter a bid at one of the auction sales of the property, albeit that person did not follow through with payment of the requisite deposit. To now call upon the court to have that judgment set aside would cause a great injustice to the respondent, who, throughout these proceedings, has been diligent in

prosecuting the claim and the enforcement of the judgment, all with the participation of the appellants.

- [41] I therefore do not conclude, and there is no sound basis for concluding, that the learned judge, in exercising her discretion, erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; such that her decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Accordingly, this limb of the appeal is dismissed.

Issue 2: Whether the learned judge erred in failing to deal with the substantive application to set aside the public auction sale of the mortgaged property

- [42] It appears from paragraph 54 of the judgment in the court below, that the learned judge was of the view that the application to set aside the public auction sale of the mortgaged property flowed from the application to set aside the default judgment, i.e. if the application to set aside the default judgment was dismissed, then the application to set aside the public auction sale would fall away. While she did make reference to the appellants' participation and acquiescence in the enforcement proceedings, she did not go on to consider the factors relevant to disposing of an application to set aside a public auction sale.
- [43] Sections 75 to 97 of the **Title by Registration Act**¹⁰ outline the process by which a mortgagee can seize and sell incumbered property, where a mortgagor has failed to perform the conditions of the mortgage or incumbrance. Accordingly, a mortgagee's power to sell a mortgagor's property does not necessarily flow from a judgment but is derived from statute. This means that the mortgagee's power to enforce its security is not contingent on the mortgagee obtaining a judgment against the mortgagor. In point of fact, in

¹⁰ Chap. 56:50 of the Laws of Dominica.

the instant matter, the respondent bank, having obtained the default judgment, proceeded to exercise its statutory power of sale by seizure and sale of the mortgaged property, rather than seeking to enforce the judgment by way of an order for sale.

[44] While it was within the discretion of the learned judge to dismiss the application to set aside the default judgment on the basis of delay, that was not sufficient to justify failing to deal with the application to set aside the public auction sale. The two applications, though contained in one document, were separate and distinct and required individual consideration. Furthermore, the property was not purchased by a third-party bona fide purchaser for value, but by the respondent bank itself. Accordingly, it was incumbent on her to consider whether there had been a breach of the mortgagee's duties and whether the bank acted in bad faith or exercised any undue influence in the sale.

[45] Consequently, the learned judge erred in dismissing the application to set aside the public auction sale. She failed to consider the relevant factors, or any of the factors in that application such that it can be said that her decision was blatantly wrong and outside the ambit within which reasonable disagreement is possible. While it is within this Court's power to remit this limb of the application to the High Court to be heard afresh, in considering the significant delay in this matter finally being heard, and in noting that the Court has all of the relevant materials before it and has heard fulsome submissions from both counsel, I find it prudent that the application be dealt with by this Court.

Whether the public auction sale of the mortgaged property to the respondent ought to be set aside

Appellants submissions

[46] The thrust of counsel for the appellants' submissions was that the public auction sale of the appellants' property ought to have been set aside as it was sold to the respondent at an undervalue and that the only valuation of the property was approximately 10 years old as at the date of the sale.

- [47] She relied on the decision of the Privy Council in **Tse Kwong Lam v Wong Chit Sen and others**¹¹ where the Board held that although there was no fixed rule that a mortgagee exercising his power of sale might not sell the mortgaged property to a company in which he was interested, in order to resist a borrower's application to set aside such a sale he had to show that he had made the sale in good faith and had taken reasonable precautions to obtain the best price reasonably obtainable at the time.

Respondents submissions

- [48] Counsel for the respondent contends that it is not open to the appellants to assert that the property was sold at an undervalue when they participated in the hearing for the fixing of the initial upset price as well as the subsequent hearings where the upset price was reduced. Additionally, the order by which the final upset price was set was made by consent.
- [49] She further contended that section 97 of the **Title by Registration Act** gives a mortgagor the right to approach the court to deal with any questions arising in the course of the sale. However, the appellants, despite being present and actively participating in the proceedings, never availed themselves of this provision but instead sought to set aside the sale some 5 years after the respondent's successful bid at the auction. She further argued that the appellants were estopped from having the sale set aside due to their inordinate delay in making the application.

Discussion

- [50] **Halsbury's Laws of England**¹² says this on the duty of a mortgagee on the exercise of its power of sale:

"A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent or until after the pursuit of an application for planning permission or the grant of a lease of the mortgaged property, though

¹¹ [1983] 3 All ER 54.

¹² Mortgage (Volume 77 (2021)), para 459.

the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase the likely sale value in favour of such a sale. He can decide if and when to sell on the basis of his own interests.

A mortgagee owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. The duty is not breached where the mortgagee has mixed motives for a sale, one of which is to secure repayment. Nor is the duty breached by a mortgagee's assessment of the market value of the mortgaged property which falls within an acceptable margin of error. The duty is owed to the mortgagor, subsequent mortgagees, and a surety but not to others such as beneficiaries under a trust of the mortgaged property. The duty cannot be replaced or supplemented by a liability in negligence. It can, however, be excluded by agreement...

If the mortgagor seeks relief promptly, a sale will be set aside if there is some element of impropriety or bad faith on the part of the mortgagee in the exercise of its power of sale, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale or if it would be inequitable as between the mortgagor and the purchaser for the sale to be set aside. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it or liable for damages. The prima facie measure of damage is the reduction in the value of the equity of redemption."

- [51] In **Cuckmere Brick Co Ltd v Mutual Finance Ltd**,¹³ the English Court of Appeal found that a mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale. However, in exercising the power of sale, the mortgagee was not merely under a duty to act in good faith, i.e., honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable

¹³ [1971] 2 All ER 633.

care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it.

[52] Similarly, in **Corbett and another v Halifax plc and others**,¹⁴ the English Court of Appeal held that equity would not intervene to set aside a conveyance of a legal estate made pursuant to the statutory power of sale unless there was some element of impropriety or bad faith on the part of the mortgagee in the exercise of that power. Moreover, a completed sale by a mortgagee was not liable to be set aside merely because it had taken place at an undervalue: impropriety was a prerequisite

[53] The authorities are clear as to the limits of a mortgagee's duty when exercising its power of sale. The mortgagee is duty-bound to act in utmost good faith, exercising a reasonable degree of care and skill when disposing of the mortgaged property. Paramount to this duty is the obligation to obtain the highest attainable price given the prevailing market conditions. However, this duty is to be balanced against the mortgagee's right to sell the property at its convenience and for its benefit. The mortgagee's mixed motives for a sale, including the objective of securing repayment, do not in themselves breach the duty as long as good faith is maintained. Likewise, as long as the mortgagee's assessment of the market value falls within an acceptable margin of error, the duty is not breached. Therefore, a pragmatic approach must be taken to strike a fair balance between the parties' competing interests.

[54] The circumstances which led to the sale of the appellants' property are rather straightforward. The appellants defaulted on a loan obtained from the respondent. The loan was for a substantial sum and from the outset, the appellants were not consistent with making payments. The respondent, in seeking repayment, initiated proceedings against the appellants which resulted in the filing of a claim. The appellants entered a memorandum of appearance but did not file a defence. The respondents then requested and obtained a judgment in default of defence. The respondent entered upon and

¹⁴ [2003] 2 All ER (Comm) 384.

seized the appellants' property, filed a summons to settle Articles of Sale, estimate an upset price, and fix the day of the sale.

[55] On 3rd May 2000, the court fixed the upset price at \$2,538,040.00 ostensibly upon considering the valuation by E.P. Munro dated 3rd October 1996 in which the property was valued at \$2,863,550.00.¹⁵ The property was put up for auction several times with no bidders until the upset price was eventually reduced, by the court and by consent, to \$2,170,024.50. At the final auction, the respondent purchased the property for approximately \$200.00 more than that price. The auctions, the applications to fix and reduce the upset price as well as the eventual sale of the property all took place under the control and supervision of the court and with the participation and concurrence, without objection, of the appellants.

[56] Counsel for the appellants contended that the respondent breached its duty of good faith by failing to inform the court of the bids of \$5,000,000.00 and \$5,100,000.00 made by the respondent and a third-party bidder respectively. She also complained that the only valuation of the property was done in 1996 and that it was outdated by the time the property was eventually sold in 2006. Accordingly, the judge was operating on an 'outdated' valuation which led to the property being sold at an undervalue.

[57] At this juncture, it is important to reiterate that the appellants participated in these enforcement proceedings every step of the way and the second named appellant was present at all of the hearings of the court. This was not a one-sided process whereby the respondent unilaterally arrived at a sale price and carried out the sale to itself without the knowledge of the appellants. It was open to the appellants to bring any concerns or considerations whether as to market value or upset price or otherwise to the attention of the judge or master.

¹⁵ Appeal Bundle 1, pg 108.

[58] Counsel for the appellants argued that the second-named appellant appeared in person at a number of the hearings in the enforcement proceedings and was accordingly not in a position to make representations on the appellants' behalf. However, I do not accept this position. The second-named appellant is a businessman and is a director of the first-named appellant, a reputable car dealership in the Commonwealth of Dominica. Prior to entering into business in the private sector, he was the Accountant General of the Commonwealth of Dominica.¹⁶ He is not the average litigant in person who may not be able to understand what is taking place in enforcement proceedings or hearings to fix or reduce an upset price. He was more than capable of informing the court of any pertinent happenings at previous auctions and of raising the issue of the need for an updated valuation. At the very least, he would have been prudent enough to seek legal advice in relation to any concerns he had. However, the appellants' position throughout these proceedings has been one of acquiescence, and they have only sought to raise these issues at this belated stage.

[59] In any event, I find that the bids made by the respondent and the third-party bidder on 22nd December 2005 and the respondent's alleged failure to disclose them are of no consequence. Bids were made and the highest bid was accepted. However, the successful bidder never made the statutorily required deposit and so it was deemed null and void and another date for auction had to be set. There was no evidence to suggest that he had been a serious bidder with any intentions of actually purchasing the property. There would have been no reason for the judge to inflate the upset price to match those bids when the property had been advertised for sale on a number of prior occasions at a much lower price and there were no bidders.

[60] As it relates to the supposed outdated valuation, the judge fixing the upset price had no difficulty relying on the valuation of E.P. Munro. It was open to him to request an updated one, but he did not do so. The appellants have never sought to challenge the order of the judge fixing any of the upset prices

¹⁶ See Appeal Bundle Volume 1, pg 25.

and there is little this Court can do to interfere with it at this stage. However, the Court has had the benefit of seeing the valuation prepared by Sorell Consulting Limited dated 26th October 2009, where the property was valued at \$2,804,926.00. This valuation came after substantial renovations had been made to the property by the respondent.¹⁷ I am comfortable that this valuation, allowing some margin for error, shows that the value of the property is not substantially more than the price the property was sold for.

[61] In light of all of these considerations, it would be remiss of me to not also consider the issue of the delay by the appellants in applying to set aside the sale. The issue of delay has been thoroughly ventilated above and the principles can also be applied to this limb of the application. An almost 5-year delay in seeking to set aside a court-connected sale is no doubt inordinate. Despite the fact that the purchaser was the mortgagee bank, there must be finality in the sale. The respondent, to its detriment, made significant improvements to the property and has been utilizing it for its own purposes. To set aside the sale after such a significant passage of time would cause great injustice to it and the appellants have not made out a case to justify such a setting aside.

[62] The respondent was under a duty to take reasonable care to obtain the best possible price for the property. It sought the assistance of the court to exercise its right of sale and relied on the upset prices fixed by the court to sell the property. It exercised its statutory right to purchase the property by public auction and it purchased the property for a sum over the upset price fixed by the court. All steps took place with the knowledge of and in the presence of the appellants. The appellants never sought to avail themselves of their right under section 97 of the **Title by Registration Act** to raise any questions arising during the course of the sale before the court. I do not find that the respondent acted in bad faith such that the sale ought to be set aside after all these years, nor do I find that the appellants have made out a case to be compensated in damages.

¹⁷ Appeal Bundle 3, pg 69.

Disposition

[63] Ultimately, the spectacular delay by the appellants in bringing these proceedings and the lack of cogent reasons for the said delay was fatal to the applications. Furthermore, no extraordinary circumstances or defences were presented to this Court which would warrant the setting aside of the default judgment or the sale in the face of significant and inexplicable delay.

[64] Accordingly, I would make the following orders:

- (1) The appeal is dismissed.
- (2) The sale of the mortgaged property to the respondent bank on 20th April 2006 stands.
- (3) Costs of the appeal to the respondent, such costs to be assessed by a Judge or Master of the High Court, unless agreed within 21 days.

I concur.

Mario Michel

Justice of Appeal [Ag.]

I concur.

Paul Webster

Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar