COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 99 of 2022

B E T W E E N

GARET O. FINLAYSON
MARK FINLAYSON

Appellants

AND

CATERPILLAR FINANCIAL SERVICES CORPORATION

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Evans, JA
The Honourable Sir Brian Moree, JA

APPEARANCES: **Mr Kahlil D. Parker, KC, with Ms Roberta Quant, Counsel for the Appellant**

Mr Keith Major, Jr. with Ms Karen Brown, Counsel for the Respondent

DATES: **21 November 2022; 16 January 2023**
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Civil Appeal – Mortgage – Duty of care - Best market price – Reasonable care – Interference with trial judge's finding of fact – Delay in delivering judgment – Whether the respondent was in breach of its duty to the appellants to take reasonable care to sell the yacht for the best possible price reasonably obtainable – Whether sale at an undervalue - Judicial deference – Finding of fact - Section 18 of the Stamp Act

On 21 December 2001, Caterpillar Financial Services Corporation ("the respondent") granted a loan to Kurc Limited, a company beneficially owned by Garet O. Finlayson and Mark Finlayson ("the appellants"). The loan was in the amount of $9,680,000.00 and was secured by Maratani X, a 147-foot tri–deck motor yacht ("the vessel"). The appellants guaranteed the loan. The appellants defaulted on the loan. As a result, the respondent sold the vessel to realize the security although the vessel needed repairs. After the sale of the vessel, a balance remained on the loan. The respondent brought an action in the court below to recover the balance due. The Judge found in favour of the respondent. The appellants now appeal that decision on numerous grounds, inter alia, that the Judge erred in finding that the respondent took reasonable care to obtain a reasonable price for the vessel.

Held: Appeal dismissed. Costs to the respondent, to be taxed if not agreed.

An appellate court will only set aside findings of fact where it is plainly wrong and where there was no evidential basis for the making of the finding.

The burden was on the appellants to show that the sale was at an undervalue. The appellants, as mortgagors and guarantors, were required to lead evidence as to the costs of repairs to show that it would not have been unreasonable to undergo the costs of the repairs. The respondent was under no obligation to show why they did not spend the money to enable a sea trial. They had no obligation to do so.

The Judge found that the appellants did not prove that the respondent was in breach of that duty.

Aodhcon LLP v Bridgeco Ltd [2014] EWHC 535 (ch**)** considered
Close Brothers lt v AIS (Marine) 2 Ltd [2018] EWHC 4061 mentioned
Dean v Barclays Bank plc and another [2007] EWHC 1390 (Ch) considered
Minister Responsibel For Crown Lands v Findeisen SCCivApp No. 79 of 2022 mentioned
Parinv (Hatfield) Ltd v IRC [1998] STC 305 applied
Polymers International Limited v Philip Hepburn SCCivApp. No. 8 of 2021. mentioned
Sir Martin Broughton v Kop Football (Cayman) Ltd and others [2012] EWCA Civ 1743 applied
Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349 considered
Volpi and another v Volpi [2022] EWCA Civ 464 applied

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This is an appeal by guarantors of a mortgagor of a ship, against a decision of Weekes - Adderley J, ("the Judge") holding them liable to a mortgagee for the balance due under a mortgage after the mortgagee realized its security from the sale of the ship.

2. In her judgment, the Judge rejected the claim by the guarantors that the mortgagee acted in breach of its duty of care as a mortgagee and did not realize the market value of the ship, thus causing a shortfall. The guarantors claimed that had the mortgagee exercised the necessary due care, it would have realized more on the sale of the ship and there would have been no shortfall which was the subject of the mortgagee's claim.

Background

3. On 21 December, 2001 Caterpillar Financial Services Corporation ("the respondent") loaned to Kurc Limited ("Kurc") $9,680,000.00 on the security of a mortgage of a yacht known as Maratani X ("the vessel"). Garet Finlayson and Mark Finlayson (together "the appellants"), were the beneficial owners of Kurc, guaranteed the debt.

4. Further, monies were loaned to Kurc and were also duly guaranteed by the appellants.

5. Kurc defaulted on the loan. Whilst in Florida, the yacht was arrested at the instance of the respondent. After the arrest of the yacht, the respondent obtained the permission of a United States court to effect repairs to the vessel.

6. Thereafter, the respondent sought to realize on its security. The appellants also retained brokers to assist in selling the yacht.

7. The yacht was finally sold by the respondent in December 2016 for the sum of $2,430,000,00. At the time of the sale, the amount of principal owing on the debt was $4, 206,602.41. After applying the proceeds of sale to the debt, the balance due was $2,763,474.78. The respondent sued the appellants for that balance due.

8. The Statement of Claim was in the following terms:

> **"1. The Plaintiff is a company duly incorporated under the Laws of the State of Delaware, United States of America and is carrying on the business of financing Caterpillar®-brand equipment internationally.**
>
> **2. Kurc Limited is and was at all material times a customer of the Plaintiff and is indebted to the Plaintiff pursuant to a Loan more particularly described hereinbelow on Loan Agreement dated 21 December 2001 ("the Loan Agreement"), Promissory Note dated 20th January 2006 ("the Promissory Note"), First Amendment to Loan Agreement and Permanent Note, each dated 19th April 2006 ("the First Amendment"), Second Amendment to Loan Agreement dated 1st June 2011, ("the Second Amendment"), and Third Amendment to Loan Agreement dated 24th September 2014 ("the Third Amendment") (collectively, "the Loan Documents").**
>
> **3. On or about the 21st December 2001, the Plaintiff granted a construction loan to Kurc Limited in the principal amount of US$9,680,000.00 such principal to be repaid together with interest thereon at a rate equal to the One Month London Interbank Offered Rate ("LIBOR") plus 3% per annum (hereinafter referred to as "the Loan"). On the 21st December 2001, LIBOR was 1.876% per annum.**

4. The Loan was secured by, inter alia, a 145 foot Tri-deck Motor Yacht, Hull No. SY26 (“the Vessel").

5. By virtue of clause 2(2) of the First Amendment made between the Kurc Limited and the Plaintiff, Kurc Limited agreed to repay the Loan in 20 equal quarterly payments of principal in the amount of US$121,000.00 beginning on 1st May 2006 and continuing on the 1* day of each quarter month thereafter until 1st May 2011. Kurc Limited also agreed to make a final balloon payment of all outstanding principal, together with any other amounts then due on the 1st May 2011.

6. By virtue of the First Amendment, it was agreed that payments of all accrued interest shall be paid together with payments of principal as follows: during months 1 to 36, a fixed rate of interest equal to the three year U.S. Government H.15 SWAP rate plus 2.75%; and during months 37 to 1st May 2011, a variable rate of interest equal to the Three Month LIBOR plus 3% per annum.

7. By virtue of clause 2 of the Second Amendment made between Kurc Limited and the Plaintiff, Kurc Limited agreed, inter alia, that from the 1st May 2011, to the 1st May 2016, Kurc Limited would make 20 equal quarterly payments of principal in the amount of US$182,982.71. Kurc Limited also agreed to make a final balloon payment of all outstanding principal, together with any other amounts then due on the 1st May 2016.

8. By virtue of clause 2(1)(d) of the Second Amendment, Kurc Limited agreed, inter alia, from 1st May 2011 to 1st May 2016, interest would be at a variable rate equal to the Three Month LIBOR plus 4.50% per annum.

9. By virtue of clause 2(3) of the Third Amendment made between Kurc Limited and the Plaintiff, it was agreed that from the 1st August 2014 to 1st November 2014, the principal payments referred to at paragraph 6 hereof would be deferred until and payable on 1st May 2016; and that Kurc Limited would make a final balloon payment of all outstanding principal, together with any other amounts then due on the 1st May 2016.

10. The Plaintiff will rely on the Loan Documents for their full terms and effect.

11. By Guarantee and Indemnity dated 21st December 2001 ("the Garet O. Finlayson Guarantee") made between the First Defendant, Garet O. Finlayson and the Plaintiff, the First Defendant, guaranteed payment to the Plaintiff on demand of all monies and to discharge all obligations and liabilities incurred to the Plaintiff by Kurc Limited under the Loan and or the Loan Documents.

12. The First Defendant also agreed to pay interest from the date of demand until payment of al monies, obligations and liabilities guaranteed by the Garet O. Finlayson Guarantee at the rate provided in the Loan Documents.

13. By the Garet O. Finlayson Guarantee, the First Defendant, agreed that his obligations and liabilities for the prompt payment, performance and satisfaction of Kurc Limited's obligations shall be on a joint and several basis along with Kure Limited.

14. By Guaranty dated 1st June 2011 ("the Mark A. G. Finlayson Guaranty") made between the Second Defendant, Mark A.G. Finlayson and the Plaintiff, the Second Defendant, guaranteed prompt and punctual payment, performance and satisfaction of al obligations of Kurc Limited to the Plaintiff under the Loan and /or the Loan Documents.

15. By the Mark A. G. Finlayson Guaranty, the Second Defendant agreed that his obligations and liabilities for the prompt payment, performance and satisfaction of Kurc Limited's obligations shall be on a joint and several basis along with Kure Limited.

16. In breach of the terms of the Loan, Kurc Limited failed to make the agreed payments and has fallen into arrears thereunder whereupon this outstanding balance of principal and interest became payable.

17. By letter dated the 9th December 2015, the Plaintiff demanded payment of all sums due and owing to the Plaintiff by Kurc Limited under the Loan and the Loan Documents but the First and Second Defendants have wrongfully failed and/or refused to pay the said sum and remain in breach of the terms of the Garet O. Finlayson Guarantee and the Mark A. G. Finlayson Guaranty.

18. The Garet O. Finlayson Guarantee and the Mark A.G. Guaranty will hereinafter be collectively referred to as "the Guarantees".

19. The Plaintiff intends to rely on the Guarantees for their respective full terms and effect.

20. In breach of the terms of the Guarantees, the First and Second Defendants have failed to make prompt and punctual payment (or any payment), performance and satisfaction of the obligations of Kurc Limited to the Plaintiff under the Loan and /or the Loan Documents.

21. In consequence of the said breach the First and Second Defendant became indebted to the Plaintiff under the terms of the Guarantees.

22. The Plaintiff has incurred collection realization expenses in the amount of $762,093.40, as detailed in the Exhibit "A" attached hereto and incorporated. herein (Exhibit "A").

23. On or about August 2016, the Vessel was sold via judicial sale to the Plaintiff for a credit bid in the sum of $100.00.

24. On or about 28th December 2016, the Plaintiff sold the Vessel to a third party buyer for the sum of $2,430,000.00 (net of costs of sale). On the 29th December 2016, the principal balance on the Loan was $4,208,602.41.

25. The proceeds of the sale were disbursed as follows:

(i) Accrued and unpaid Interest of $202,138.69; and

(i) Principal of $2,227,861.31

leaving a principal shortfall of the sum of $1,980,741.10, due and payable by the Defendants to the Plaintiff, plus

further accrued interest and collection realization expenses.

26. In the premises, the Plaintiff has suffered loss and damage.

PARTICULARS PURSUANT TO ORDER 73 RULE 2 OF THE RULES OF THE SUPREME COURT

a. The Loan was made on or about the 21st December 2001 and amended on the 19th April 2006, 1st June 2011 and 24th September 2014.

b. The total amount of principal lent was the sum of US$9,680,000.00.

c. The interest charged on the Loan from month 1 to 36 was fixed at 7.57% per annum; from month 37 to 1st May 2011 was variable in accordance with Exhibit "B" attached hereto and incorporated herein (Exhibit "B"); from 1st May 2011 to 1st May 2016 was variable in accordance with Exhibit "B"; and from 1 May 2016 was variable in accordance with Exhibit "B".

d. The Promissory Notes were made on or about the 20th January 2006 and 19th April 2006, signed by Kurc Limited and copies of the same delivered to Kurc Limited on the said dates.

e. The Guarantees were made on the 21st December 2001 and 1st June 2011, respectively.

f. The amount of principal repaid on the Loan as at ~~31st January~~ 28th February 2017 is ~~$5,471,397.59~~ US$7,699,258.90 ~~7,234,860,20.~~

g. The amount of principal due but unpaid on the Loan as at ~~31st January~~ 28th February 2017 is ~~$4,208,602.41~~ US$1,980,741.103 ~~3,433,450.40.~~

h. The unpaid sum was demanded on the 9th December 2015.

i. The amount of interest due but unpaid on the principal sum as at ~~31st January~~ 28th February 2017 is $18,076.79 ~~222.817.27.~~

j. The Plaintiff has expended the sum of ~~$762,093.40~~ $764,656.89 in collection realization efforts as at the ~~31st January~~ 28t February 2017.

k. By reason of the foregoing, the First and Second Defendants are jointly and severally indebted to the Plaintiff as at the ~~31st January~~ 28th February 2017, in the sum of ~~US$5,193,613.08~~ US $2,763,474.78.

l. Interest continues to accrue on the said unpaid principal sum of US$ $1,980,741.10 at the per diem rate of US~~$598.09~~ 296.34 from the ~~31st January~~ 28th February 2017, to the date of payment.

AND THE PLAINTIFF claims against the First and Second Defendants:-

1. The said sum of ~~US$5,193,613.08~~ US$ $2,763,474.78;

2. Interest on the said sum of ~~US$5,193,613.08~~ US$1,980,741.10 at the variable rate in accordance with Exhibit B ~~of [%]~~ per annum from the ~~31st January~~ 28th February 2017 until the date of payment;

3. Alternatively, damages;

4. Costs; and

5. Further or other relief as the Court may deem just."

9. The appellants denied liability. I set out their defence:

"1. The First and Second Defendants admit Paragraphs 1, 2 and 3 of the Statement of Claim.

2. The First and Second Defendants make no admission or denials of Paragraph 4 of the Statement of Claim save as to adopt the description of a 145 foot Tri-deck Motor Yacht, Hull No. SY26 ("the Vessel") and put the Plaintiff to strict proof thereof.

3. **The First and Second Defendant admits Paragraphs 5, 6, 7, 8, and 9 of the Statement of Claim.**

4. **The First and Second Defendants make no admission or denial of Paragraph 10 of the said Statement of Claim.**

5. **The First and Second Defendants admit Paragraphs 11, 12, 13, 14, 15 and 16 of the Statement of Claim.**

6. **The First and Second Defendants deny Paragraph 17 of the Statement of Claim and state that the Plaintiff obtained leave from the United States District Court Southern District of Florida in Admiralty to make repairs to the Vessel with the expressed duty, obligation and agreement to make repairs to put the Vessel in a condition that would allow same to move under its own power thereby mitigating any potential loss by the Plantiff' preserving the vessels value to ensure it yielded its maximum sales price.**

7. **The First and Second Defendants state that the Plaintiff its servants or agents intentionally and or negligently failed to discharge that duty, obligation or agreement as stated in Paragraph 6 and instead used the said permitted funds to make cosmetic repairs to the Vessel.**

8. **The First and Second Defendants state that the failure of the Plaintiff to repair the engines which were manufactured, fit and installed by the Plaintiff, resulted in the Vessel being sold at ~~for~~ substantially less than its market value ~~thereby enabling the Plaintiff to be paid twice:~~**

   ~~**a Firstly by the Defendants as guarantors when the Vessel was sold at price far below book and market and, b, Secondly by the new owners who had to make the necessary repairs to the engines in order to enable the vessel to move under its own power.**~~

9. **The First and Second Defendants make no admission or denial in respect of Paragraphs 18 and 19 of the Statement of Claim and put the Plaintiff to strict proof thereof.**

10. The First and Second Defendants deny Paragraphs 20, 21 and 22 of the Statement of Claim and aver that they are not liable to pay or cause to be paid the claim as alleged or at all which obligations would have been satisfied but for the Plaintiff's breach of its duty, obligation or agreement.

11. The First and Second Defendants make no admission or denial of Paragraphs 23, 24 and 25 of the Statement of Claim and put the Plaintiff to strict proof thereof.

12. The First and Second Defendants deny Paragraph 26 of the Statement of Claim and states that the Plaintiff at all material times had an obligation to take reasonable steps to mitigate their loss and in contravention of that obligation or duty, the Plaintiffs intentionally and or negligently took the steps mentioned in Paragraphs 7 and 8 above which resulted in the vessel being sold for substantially less than its market value to achieve an unlawful and unjust gain.

13. Alternately, the Plaintiff having commenced this action under the Laws of the State of Florida, are now intentionally and maliciously pursuing this action under the Laws of the Bahamas to avoid and obfuscate the duties and obligations imposed on them by the Florida courts.

14. **Save as expressly admitted herein, the First and Second Defendants deny each and every allegation contained in the Statement of Claim as if the same were set out and specifically traversed seriatim."**

10. It is to be noted that the Loan Agreement and Guarantees were admitted. As pointed out earlier, essentially, the appellants claim that the vessel was sold at an undervalue and that they ought not be liable to pay the balance claimed on the debt.

11. The trial of this matter began in February 2020. The respondent called one witness, Robert Hughes. His evidence in chief was his Witness Statement. He was cross-examined. The appellants also called only one witness. He was the appellant Mark Finlayson. His evidence in chief was his Witness Statement and he was cross-examined.

12. No other witnesses were called by either of the parties. No witness was called who was an expert on valuation of ships generally or the value of Marantani X in particular.

13. There were a number of documents admitted into evidence by agreement.

14. The trial judge made the following findings of fact:

> **"56.The evidence before the Court on behalf of the parties consisted of the respective Witness Statements, viva voce evidence from the stand and numerous documents which each party advances is relevant. The Trial Bundle consisted of the documents upon which the Plaintiff relied and which were not disputed by the Defendants. The following are the Court's findings of fact from the, Witness Statements, the said documentary evidence and viva voce evidence of the witnesses.**
>
> **57. I accept that the Third Party received the Vessel in 2006 and between 2006 and 2012 the Vessel was used extensively including that it was chartered commercially. That the Vessel sailed to Fort Lauderdale in 2012 for maintenance and was not used commercially or extensively or at all after that; and that in 2016 the Vessel was photographed by the Third Party as part of the efforts to sell it.**
>
> **58. I accept that on or about October 9, 2014 the Third Party by virtue of a brokerage agreement between itself and Bradford Marine Yacht Sales granted Bradford Marine Yacht Sales the exclusive right and authority to manage the sale of the vessel, that the gross asking price was $14,000,000.00 and that the sales executive acting on behalf was Tucker Fallon.**
>
> **59. I accept that a series of e-mail correspondence between the Defendants and Tucker Fallon show that prior to the purported surrender of the Vessel, Mr. Fallon advised the parties as to the state of the Vessel, possible remedies to the issues and the difficulties faced with selling the Vessel in the state it was in. In his e-mail dated January 8, 2016 he states that selling the Vessel "as is" would not be in their best interest as the offer price would be rock bottom. In another e-mail dated March 3, 2016 he advised that activity for clients to look at the**

Vessel was very slow as most of the brokers were aware that the boat had not run for years and that brokers were reluctant to show the boat as they were concerned to lose their clients.

60. I accept that the Plaintiff on or about April 19, 2016 filed a Motion for Entry of Order Authorizing Repairs to Vessel in Case No:16-cv-60705-WJZ in the United States District Court Southern District of Florida in Admiralty so that the repairs as outlined in the said Motion would be effected to preserve and maintain the Vessel to help yield the maximum sales price. I also accept that on or about May 16, 2016 the said Motion was granted and it was ordered inter alia that the substitute custodian be authorized to make or cause to make the necessary inspection and/or repairs to the Vessel including the a/c system, compressors, engines and related equipment and to keep a log of any equipment removed from the Vessel and ensure that the equipment is timely returned to the Vessel or maintained within his/her care, custody, or control following any assessment or repair to the equipment.

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

62. I accept that on or about May 20, 2016 a survey of the said Vessel was conducted by Davis & Company and that an inspection of the Vessel for the purposes of ascertaining the condition and value of the Vessel. I also accept the narrative as found on page 5 of the survey report that states:- "The vessel is currently inoperative and being prepared for sale after being recovered by a financial institution. The sale price of the vessel will be greatly affected by the amount of inoperative equipment that is returned to operating condition. There have been no reported losses in the last two years and no major hull damage reported however information is scarce. No engine service or warranty records available. Vessel was reported to have been modified for a draft reduction and no computations by a naval architect are available. Our

office recommends at least a simplified stability test and computation of wind heel by a qualified naval architect. As the Atlantic hurricane season is approaches our office advise expediting the process of returning the vessel to service and conducting a thorough sea trial to render the vessel capable of evacuating the area ahead of any approaching storm if necessary."

63. I accept that the survey estimated the value of the vessel at $16,000,000.00 as the estimated market value; the estimated replacement cost at $20,500,000.00; the orderly liquidation value at $7,500,000.00 and the forced liquidation value at $4,600,000.00. I also accept that the survey on page 7 noted that due to the condition of the vessel at the time of the inspection the surveyors' opinion was that the value of the value in its present condition was at the forced liquidation value of $4,600,000.00 and that the survey defines forced liquidation value as "the estimated gross amount expressed in terms of money that could be typically realized from a property advertised and conducted public auction, with the seller being compelled to sell with a sense of immediacy on an as-is, where-is basis, as of a specific date."

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

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

66. I accept that the further e-mail correspondence between the Plaintiff and Bradford Marine Yacht Sales shows that the parties considered a possible offer at $2.7 million, the subsequent deadline and that while he (Rob Coon) did not like the broker for Bradford Marine Yacht

Sales pushing for the sales price at almost $2 million he appreciated the negative image attached to the Vessel as a result of the Vessel not sailing for several years.

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

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

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

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

15. On these facts the Judge held that the sale was not an undervalue and gave judgement for the respondent.

16. The appellants appeal that judgment on the following grounds:

"Ground 1

Her Ladyship in the Court below, at paragraph 77 of her Judgment, erred in fact and law when she found that: " I am satisfied on the evidence that the Plaintiff took reasonable care to obtain the best price reasonably obtainable at the time. I am also satisfied that the evidence before the Court shows that in the circumstances the Plaintiff acted reasonably in the

exercise of its power of sale in securing a proper price for the Vessel especially in the condition that it was in."

Ground 2

The Respondent, aside from the unsupported, self-serving, and largely anecdotal evidence of Mr. Robert Hughes, led no relevant substantive evidence, expert or otherwise, demonstrating that it discharged its duty to take reasonable care to obtain the best price reasonably obtainable at the time or exercised its power of sale in a reasonable manner.

Ground 3

The relevant substantive evidence before the Court demonstrated that the Respondent's sale of the subject vessel for "$2,430.000.00" was unreasonable, reckless, negligent, and prejudicial to the Appellants' interests in all the circumstances.

Ground 4

Section 18 of the Stamp Act provides that: "No instrument which is required by any Act to be stamped shall be pleaded or given in evidence in any court unless the said instrument shall be duly stamped and the stamps thereon cancelled, except as hereinafter provided." The unstamped purported Loan Agreement, dated the 21st day of December A.D. 2001, the unstamped purported Promissory Note, dated the 20th day of January A.D. 2006, the unstamped purported First Amendment to the Loan Agreement and Promissory Note, each dated the 19th day of April A.D. 2006, the unstamped purported Second Amendment to the Loan Agreement, dated the 1st day of June A.D. 2011, the unstamped purported Guarantee and Indemnity, dated the 21st day of December 2001 ('the Garet O. Finlayson Guarantee'), and the unstamped purported Guarantee, dated the 1st day of June A.D. 2011 ('the Mark A.G. Finlayson Guarantee'), were neither properly pleaded nor admissible before the Court. In the circumstances, therefore, Her Ladyship's Judgment as against the Appellants is wholly unsustainable as there was no evidence properly before the Court substantiating the Respondent's claims as against the Appellants.

Ground 5

The Appellants were entitled to, and Her Ladyship wholly deprived the Appellants of a proper consideration of, and substantive reasoned decision with respect to, the arguments raised on their defence.

Ground 6

The Respondent by its Statement of Claim, indorsed upon the Amended Writ of Summons filed before the Court below on the 14th day of March A.D. 2017, did not properly plead or prove a claim for US$2,763,474.78 or any amount as against the Appellants.

Ground 7

Her Ladyship's Judgment was in any event against the facts and the preponderance of evidence before the Court, which facts and evidence established the Appellants' entitlement to the relief sought.

Ground 8

Her Ladyship in the Court below by her undue, unreasonable, and oppressive delay in delivering her Judgment has prejudiced the Appellants, depriving them of the timely and properly reasoned Judgment and conclusion of this matter to which they were reasonably and lawfully entitled.

Ground 9

Such further or other grounds as may be revealed upon receipt of the transcript of the hearing before the Court below."

Discussion and analysis

17. The issue raised in this case is a very narrow one. It is whether the respondent was in breach of its duty to the appellants to take reasonable care to sell the yacht for the best possible price reasonably obtainable. That duty is expressly stated in **Tse Kwong Lam v Wong Chit Sen** [1983] 1 WLR 1349. In that case, the Privy Council was considering a sale by a mortgagee to a company in which it had an interest. The Board said at page 1355:

> **"In the view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the**

> **transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss."**

18. It is also settled law that the burden of proof to demonstrate that a sale was at a price which was improperly low is on the mortgagor or the guarantor challenging the sale. In **Dean v Barclays Bank plc and another** [2007] EWHC 1390 (Ch), the court had to consider a claim against Barclays that it sold property at an undervalue. The court said at paragraph 133:

> **"The burden of proof is on the Claimant to prove a breach of duty. To succeed in his claim, he must satisfy me that the bank, acting by itself and its agents, did not take reasonable care to perform the duty I have just identified."**

19. More recently, in **Aodhcon LLP v Bridgeco Ltd** [2014] EWHC 535 (ch**),** the English High Court summarized the law as follows:

> **"[151] I derive the following relevant principles from the Fisher & Lightwood extract to which I was taken:**
>
> **(i) If a mortgagee decides to sell the mortgaged property he has a duty, in equity, to take reasonable care to sell for the best price reasonably obtainable, at the date of exchange of contracts (subject to (iv) below);**
>
> **(ii) How this duty is to be discharged requires the mortgagee to make an informed judgment and, because judgment is required, there are no steps which the mortgagee must definitely take;**
>
> **(iii) Generally, it is for the mortgagee to decide on the manner of sale, if appropriate after having sought expert advice. The property should be properly advertised; that is, advertised sufficiently frequently and sufficiently widespread to reach the appropriate pool of prospective purchasers;**
>
> **(iv) The mortgagee is entitled to decide the length of time the property should remain available for sale, subject to this: the property must be fairly and properly exposed to prospective purchasers;**

(v) <u>The mortgagee is not under a duty to improve the property for sale.</u> The mortgagee is not under a duty to pursue or obtain a planning permission and, it seems to me, by parity of reasoning, the mortgagee is not under a duty, in a case such as this one, to remove incumbrances like the Grant from the property. But a mortgagee is under a duty to bring to the attention of prospective purchasers potential advantages that might be achievable; so that, for example, prospective purchasers ought to be informed of the property's development potential;

(vi) Where the sale price is just above the sum required to discharge the mortgagor's outstanding debt, the court will scrutinise the sale with particular care;

(vii) There is a recognition that the fact of repossession can taint the property so resulting in it only being capable of sale at a reduced price;

(viii) The mortgagee will not have breached his duty unless he is 'plainly on the wrong side of the line';

(ix) The mere fact that a higher price might have been obtained does not inevitably mean that the duty has been breached;

(x) <u>The burden of proving a breach of duty by the mortgagee rests on the mortgagor</u>." [Emphasis added]

See also **Close Brothers lt v AIS (Marine) 2 Ltd** [2018] EWHC 4061 at paragraph 14.

20. As I said, no witness was called as an expert witness in valuation or in the method of selling a ship. In determining this issue the judge had to rely on the evidence of Mr. Hughes and Mr. Finlayson and the documentary evidence.

21. I now propose to deal with the grounds.

22. Grounds 1, 2 and 3 can be dealt with together. They are:

<u>Her Ladyship in the Court below, at paragraph 77 of her Judgment, erred in fact and law when she found that: " I am satisfied on the evidence that the Plaintiff took reasonable care to obtain the best price reasonably obtainable at the time. I am also satisfied that the evidence before the Court shows that in the circumstances the Plaintiff acted reasonably in the exercise of its power of sale in securing a proper price for the Vessel especially in the condition that it was in."</u>

The Respondent, aside from the unsupported, self-serving, and largely anecdotal evidence of Mr. Robert Hughes, led no relevant substantive evidence, expert or otherwise, demonstrating that it discharged its duty to take reasonable care to obtain the best price reasonably obtainable at the time or exercised its power of sale in a reasonable manner.

The relevant substantive evidence before the Court demonstrated that the Respondent's sale of the subject vessel for "$2,430.000.00" was unreasonable, reckless, negligent, and prejudicial to the Appellants' interests in all the circumstances.

23. The findings of fact are set out earlier in the judgment.

24. The appellants have challenged some of those findings of fact. In considering these grounds it must be recalled that an appellate court will only set aside findings of fact where it is plainly wrong and that there was no evidential basis for the making of the finding. This point has been made on many occasions. In **Minister Responsible For Crown Lands v Scott Findeisen et al.** SCCivApp No. 79 of 2022, this Court cited with approval the recent decision of the English Court of Appeal in **Volpi and another v Volpi** [2022] EWCA Civ 464**.** In **Volpi,** the court said:

> **"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:**
>
> **(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.**
>
> **(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.**
>
> **(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.**
>
> **(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the**

> **judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.**
>
> **(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.**
>
> **(vi) Reasons for judgment will always be capable of having been [sic] better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."**

25. The issue is whether on those findings of fact, the respondent was in breach of its duty to the appellants to obtain the best possible price at the time of the sale.

26. The primary contention of the appellants is that the respondent failed to make the vessel seaworthy in order for it to undergo a sea trial. The appellants' contention is that "**the overwhelming evidence before the court was that a sea trial was necessary to secure a reasonable return on the sale of the vessel**".

27. In my judgment, the flaw in the appellants' argument is that it is premised on a duty of the respondent as mortgagee in the discharge of its duty to improve the property, if necessary, to obtain the best possible price at the time of the sale. In my judgment, there is no such duty.

28. Whilst the respondent had the ability to invest in improving the property, its duty of care did not require it to do so. This point has been made in many authorities. In **Sir Martin Broughton v Kop Football (Cayman) Ltd and others** [2012] EWCA Civ 1743, the court said:

> **"77 The duties that equity imposes on a mortgagee in relation to a realisation of the secured property is a duty to take reasonable care to achieve the best price. That duty does not oblige him to improve the property or to wait for improvements in the market**."

29. The state of the Maratani X at the time that the respondent took possession is not in dispute. The evidence was that Kurc was attempting to sell the vessel and had retained the broker,

Bradford Marine, to find a buyer. The agent being used by Kurc and Bradford was Tucker Fallon. Fallon sent an email to Mark Finlayson on 3 March 2016 in the following terms:

> "**Tucker Fallon<tucker@bradford-marine.com>**
> **To: Mark Finlayson (mark.a.g.finlayson@gmail.com)**
> **mark.a.g.finlayson@gmail.com**
> **Cc: gfinlayson@gbcbahamas.com**
> **<gfinlayson@gbcbahamas.com>, Liz Bannister**
> **<Ibannister.gbc@gmail.com>**
> **(Ibannister.gbc@gmail.com)**
> **<|bannister.gbc@gmail.com>, Benson Nicholas**
> **(countryboy4211@hotmail.com)**
> **<countryboy4211@hotmail.com>**
>
> **Activity for clients to look at Maratani is very slow. Much of the reason for that is that all of the major brokers in South Florida know that the boat has not run in years. One broker asked me how |was going to sell a boat that could not go for a sea trial. All the Fort Lauderdale brokers know about the boat and are afraid to bring a client to see the boat. The brokers do not want a buyer to find out that so many systems do not work, that the boat has not run. The brokers will be reluctant to even show the boat because they would be concerned that they could lose the client.**
>
> **A way to overcome this is to have Caterpillar come on the boat and work on the starting system, get the generators running, tow the boat to the ocean and take it for a test run with Caterpillar mechanics on board. After that is done |can send a BROKER BROADCAST to 1300 yacht brokers worldwide to announce that Maratani has completed a Caterpillar sea trial and is ready to be sold.**
>
> **Buyers and brokers can deal with the facts that the boat needs paint, new headliners, the teak needs work, the hydraulics do not work, the elevator does not work and more, but They need to know that the engines and generators are operating correctly."**

30. On 29 March 2016 Kurc and the appellants gave up possession of the yacht to the respondent. The Consent to Surrender of Vessel signed by the appellants contained the following terms:

> **"CONSENT TO SURRENDER OF VESSEL**

THIS SURRENDER OF VESSEL AGREEMENT (the "Agreement'} is entered into on the 29th day of March 2016, by and among CATERPILLAR FINANCIAL SERVICES CORPORATION ("Lender"), the borrower identified at the signature blocks below ('Borrower"), and each guarantor identified at the signature blocks below (individually and collectively, the "Guarantors").

RECITALS

A. Lender and Borrower are parties to that certain Loan Agreement dated on or around December 21, 2001 (together with all amendments thereto collectively the "Loan Agreement").

B. The Loan is secured by, among other things, a valid, first-priority Bahamian statutory mortgage in account current and deed of covenants collateral thereto (collectively "the Mortgage") on the pleasure yacht known as "MARATANI X", having Bahamian Official) Number 7000056, together with all Vessel collateral ("the Vessel").

C. Guarantors Garet O. Finlsyson and Mark A.G. Finlayson guaranteed the Loan pursuant to Guaranty agreements dated on or around December 21, 2001 and June 1, 2011 respectively, (each a "Guaranty" and collectively the "Guarantees").

D. As of March 10, 2016, the current amount of moneys due and owing under or in connection with the Loan Agreement (the "Indebtedness") is US$4,263,106.54, consisting of principal in the amount of US$4,208,602.4 and interest in the amount of US$51,861.08, and late charges in the amount of US$2,643.05, Per diem interest continues to accrue at the rate of US$598.04 daily.

E. Borrower and Guarantors have defaulted under the Loan Agreement and Guarantees and Borrower has agreed (i) to immediately turn over possession and control the Vessel to Lender (or its designated agent); (ii} that Lender may, at its option and at its expense, move the Vessel to a port of its choosing in the United States for storage on behalf of Borrower; and (iii) that Lender is hereby granted by Borrower with an irrevocable right and power to sell the Vessel either through private sale

in the name of Borrower or, if that is unsuccessful, that Lender may exercise other rights and remedies under the Loan Documents, including, without limitation, the right to take, in its sole discretion subject to the provisions hereof, the Vessel's ownership in order to apply its value to pay Indebtedness and subject thereto to pay over all surplus proceeds to the Borrower or as the Borrower may in writing direct and to sign and execute all documents required for any of the foregoing purposes, but keeping any and all rights to claim from Borrower and Guarantors any deficiency after sale of the Vessel pursuant to the Loan Documents. Subject to the Clause 3.2 the Vessel's value will be fixed by an authorized entity or person freely selected by Lender.

AGREEMENT

NOW, THEREFORE, based upon the recitals set forth above, which are incorporated herein, and the mutual promises contained herein, the parties agree as follows:

1. ACKNOWLEDGMENTS OF BORROWER AND GUARANTORS

1.1. Borrower and Guarantors acknowledge that Borrower is in default under the Loan Agreement and that Lender has demanded from Borrower payment of all moneys owing under or in connection with the Loan Agreement (the "'Indebtedness").

1.2. Borrower and Guarantors acknowledge that: (i} Lender has been granted & Mortgage over the Vessel; and (i) Lender is entitled (o immediately proceed to foreclose upon the ship mortgage and to exercise all of Lenders other rights and remedies set forth in the Loon Agreement and under applicable law.

1.3. Borrower and Guarantors acknowledge and agree that:

They shall immediately at the Lender's expense deliver the Vessel, together with all of its engines, boilers, machinery, masts, boats, anchors, cables, chains, rigging, tackle, apparel, furniture, capstans, outfit, tools, pumps, gears, furnishings, appliances, fittings and spare and replacement parts and all other appurtenances thereto

appertaining or belonging, and all other equipment, material, components or supplies installed or to be installed upon, or used or to be used in any capacity in connection with the construction, outfitting, repair or refurbishment of the Vesssl, whether on board or not on board, delivered, in the process of delivery or on order, and also any and all additions, improvements and replacements hereinafter made in or to said Vessel or any part thereof, including all items and appurtenances as aforesaid, and shall also deliver the original Commonwealth of the Bahamas Certificate of Registry, and all other ownership and registration documents, class and any other inspection certificates and all other information that may be of assistance to Lender in its management and liquidation of the Vessel to Lender safely afloat at Bradford Marine, 3051 W State Rd 84, Fort Lauderdale, Florida 33312, (its current location) or such other address as Lender shall indicate.

1.3.1, Upon delivery to Lender, the Vessel shall be in the condition required by the Mortgage and Loan Agreement and the other documents executed or delivered in connection with them; and

1.3.2. Provided that no other Events of Default occur and are continuing, Lender agrees that the Vessel shall be moved from its current location to & location acceptable to Lender in its sole discretion. A Custodian for the Vessel shall be selected by Lender and a custodial agreement shall be executed in connection herewith by and between the Custodian and Lender. As used herein "Custodian" means any custodian of the Vessel selected appointed and/or approved by Lender from time to time; and

1.3.3. In any event, Lender can terminate any agreements referred to in the preceding clause and move the Vessel to any location of Lender's choosing at any time and/or enter into further custodial agreements with other brokers/custodians upon ten (10) days written notice to Borrower and/or to the relevant broker/custodian.

1.3.4.The Lender shall pay the costs incurred in storing the Vessel with any custodian/broker whether at its current location or any other location acceptable to

Lender and all costs incurred in removing the Vessel from its current or then-existing location to any other location as contemplated above; and

2. GRANTING OF LIMITED POWER OF ATTORNEY

2.1. Borrower and Guarantors hereby grant Lender and its agents and employees an irrevocable limited power of attorney and authorize them to act as their attorney-in-fact for the limited purposes of moving, storing and selling the Vessel. This power, which is coupled with an interest in the Vessel, includes, but {s not limited to, the authority to take physical possession and control of the Vessel, to insure it against loss or damage, to communicate directly with the Bahamas Maritime Authority, the Borrower's registered agent (if so appointed), the Registry of Records, and/or any other governmental or other relevant third party and to make requests for documents of any of them, to sign and deliver all documents on behalf of the Borrower whatsoever related to the Vessel, or otherwise as necessary in order to effect the purposes of this Agreement and the grant of this limited power. By way of example only, and not as an exhaustive list of authorized acts, Lender and its agents and employees shall have the authority to sign any contracts for towage, dockage or other storage, brokerage and sale, including a memorandum of agreement, and/or purchase agreement, and a bill of sale from Borrower to any purchaser of the Vessel, and negotiate and settle all claims related to the Vessel including, but not limited to, those for salvage or insurance but the Lender shall be responsible for all costs incurred in respect of any of the foregoing matters.

3. LENDER'S POSSESSION OF VESSEL; APPLICATION OF SALE PROCEEDS AND OWNERSHIP.

3.1 Upon execution of this Agreement by Borrower, this Agreement shall be deemed sufficient to transfer possession (but not ownership or title) of the Vessel to Lender. Borrower and Guarantors represent and warrant that the Vessel is frec and clear of all liens (other

than Lender's lien), and clear of all claims, encumbrances and title defects. Borrower herby represents that it has full legal and beneficial title to the Vessel.

3.2 Lender, Borrower and Guarantors agree that due to uncertainties in the used vessel market, it is in their collective best interests not to agree upon a sum certain as the value of the Vessel that is to be applied against the Indebtedness. Rather, Lender, Borrower and Guarantors agree that Lender may dispose of the Vessel as it shall determine in its sole discretion, subject only to its agreement to act in good faith and subject to its taking due care to obtain the best price reasonably obtainable in the circumstances. The amount received upon such disposition, less all costs of such disposition including but not limited to reasonable legal fees and expenses, transportation, storage, refurbishment and commissions paid to any auctioneer, seller or other agent (the "Net Proceeds"), shall be applied to the Indebtedness as provided in Section 3.3 hereof and subject thereto any remaining surplus shall be paid to the Borrower or as the Borrower may in writing direct.

3.3 The Net Proceeds shall be applied to the Indebtedness owing under the Loan Agreement as follows: unpaid principal balance and all accrued interest then outstanding under the Loan (including additional interest accrued on past due payment)], together with Lender's attorney's fees, costs, expenses and other fees and charges, all as provided by the Loan Agreement and subject thereto any remaining surplus shall be paid to the Borrower or as the Borrower may in writing direct. Except as specifically amended by this Section 3.3 and with respect to Lender's acceptance of the Vessel as provided herein, the Loan Agreement and Guaranties shall remain in full force and effect and are hereby ratified and confirmed.

3.4, Borrower may redeem the Vessel at any time up until formation of a contract for purchase and sale of the Vessel upon payment of the total Indebtedness.

3.5. To the extent that the Lender postpones or defers the sale or other disposition of the Vessel but in the meantime

charters out or leases or makes other commercial use of the same, the Lender shall ensure that it is done on the best commercial terms that are reasonably obtainable and that the net proceeds of any such charter, lease or other commercial use shall be applied to the Indebtedness and that subject thereto any surplus proceeds shall be paid to the Borrower or as the Borrower may in writing direct.

4. MISCELLANEOUS

4.1. If, prior to a judicial foreclosure of the Vessel, Lender or its agent delivers a bona fide purchaser with a commercially reasonable offer then Borrower and Guarantors agree to sign any documentation necessary to complete the safe transaction.

4.2. The Borrower and the Guarantors hereby represent and warrant that they are duly authorized to execute and deliver this Agreement and any other documentation referred to herein. Each of the parties hereto represents and warrants to each other that (a) it has the requisite authority and power to enter into this Agreement and the transaction contemplated hereby, and (b) the execution and delivery of this Agreement have been duly authorized and constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms.

4.3. Except s herein provided to the contrary, the Borrower shall, at the Lender's cost and expense, execute and deliver such further instruments and documents that the Lender may reasonably request in order to give effect to the terms and provisions hereof.

4.4. This Agreement may be executed in one or more counterparts, all of which when taken together shall constitute one and the same instrument. Transmission by facsimile or e-mail (scanned document) of an executed counterpart of this Agreement shall be deemed to constitute due and sufficient delivery of such counterpart, and the parties hereto hereby agree to deliver to each other an original of such counterpart promptly after delivery of the facsimile or e-mail, as the case may be.

4.5. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shell, as to such provision and such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction.

4.6. This Agreement shall be governed and construed in accordance with the substantive laws of the Commonwealth of The Bahamas without regard to the conflict of laws provisions thereof. Any disputes arising under this Contract shall be submitted to either a competent court sitting at Nassau in the Island of New Providence one of the Islands of The Commonwealth of The Bahamas or any competent state or federal court sitting in Nashville, Davidson County, Tennessee but applying Bahamian law as the governing substantive law, and shall in either instance be decided by the court alone sitting without a jury.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives as of the day and year first above written."

31. It is to be noted that there is nothing in the Agreement which required the respondent to invest in improving the condition of the yacht, nor is there a covenant whereby the respondent agreed to do so.

32. Fallon wrote to the respondent on 28 April 2016 a letter in the following terms:

"April 28, 2016

Chris Johnson
Chris Oberholtzer
Caterpillar Finance

Re: Maratani valuation

As you know there are a few ways to determine the value of a yacht. One way is to take the price of a new yacht and work backwards. Another way is to look at recently sold similar yachts and compare, a third way is to look at

similar size yachts currently on the market and compare. None of these methods can be used with Maratani.

The yacht had problems from when it was launched. |do not know all of the details but have heard numerous stories from sources in the marine industry. I heard that the swim platform was under water when the boat was first launched and that flotation was increased at the stern. The platform is still low to the water now.

I was told that the draft was much deeper than anticipated and needed to be reduced for use in the Bahamas. I heard that the hull was reworked at the propellers to create propeller pockets and that part of the keel was cut off.

I heard that the exhaust system was too hot and additional raw water was pumped into the exhaust to cool it. This pump system was left on one time after the engines were shut off and salt water was able to get back into an engine requiring a rebuild.

Other brokers have asked me about stability issues and about how the boat will plane or not plane when underway. Design goal was to have a speed around 20 knots from my research; I have been told it never went over 15 knots.

Currently the boat is not operational. The ECMs and starting controls do not have power; the captain would start the engines by jumping the starters. The hydraulic systems may or may not work properly, before the boat does a test run the steering hydraulics and anchor hydraulic windless must be tested.

The boat has not been used for years and has not had a budget to maintain the systems or keep up the exterior or interior maintenance.

An investment has to be made to get the boat in running condition so that a survey and sea trial can take place and I understand that it will be done soon. The hydraulics must be tested and working and the elevator which is a main design feature of the yacht should be working or removed.

Current market value can be only estimated by subtracting the potential refit cost running anywhere from $1,000,000 to $2,000,000 from other yachts that have sold and then subtracting the risk factor for a boat that is an unknown entity.

Because there are no similar yachts to compare this to I would make the current estimates based on research with other brokers, conversations with brokers who have potential buyers, and with potential buyers that have spoken to directly.

With the boat in running condition, cleaned, waxed and interior cleaned.

- **Fair Market Value — current value in an arm's length sale based on industry conditions $5,500,000 to $6,000,000**
- **Orderly Liquidation — sale within 180 days $4,000,000 to $4,500,000**
- **Forced Liquidation — sale within 90 days $3,000,000**

The current asking price of the yacht is $6,500,000 and has been promoted as a "distress sale." I have had numerous inquiries at this price and have had three written offers, one at $3,500,000, one at $4,200,000 and one at $4,250,000. All are subject to survey and sea trial.

Tucker Fallon"

33. In paragraph 6 of their defence the appellants plead:

> **"6. The First and Second Defendants deny Paragraph 17 of the Statement of Claim and state that the Plaintiff obtained leave from the United States District Court Southern District of Florida in Admiralty to make repairs to the Vessel with the expressed duty, obligation and agreement to make repairs to put the Vessel in a condition that would allow same to move under its own power thereby mitigating any potential loss by the Plantiff' preserving the vessels value to ensure it yielded its maximum sales price."**

34. The appellants in their submissions assert:

> **"The Respondent at all material times accepted the reasonable necessity of the repairs required for the Vessel to undergo a sea trial and represented to the Appellants, Bradford Marine, and the United States District Court, Southern District of Florida in Admiralty, in Case No. 16-cc-60705-WJZ, that it would conduct the said repairs. In its Motion for Entry of Order Authorizing Repairs to Vessel, dated the 19th day of April A.D. 2016, against the Vessel and the Appellants, the Respondent stated inter alia that: "Thereafier, following some routine inspections of the Defendant Vessel, it was determined that repairs are necessary to preserve and maintain the Vessel, including to prevent further damage, to enable it to be moved under its own power in case of inclement weather and to preserve its value. 3. The repairs being requested include those to Defendant Vessel's a/c system so as to prevent damage to the four (4) compressors aboard Defendant Vessel, as well as repairs to the engines so as to enable Defendant Vessel to operate under its own power. 4. Without said repairs, Defendant Vessel may be further damaged such that its value and sales price may be reduced to the detriment of all parties involved in this action…7.The requested repairs will serve to preserve and maintain the vessel, as well as help yield its maximum sales price." 16 The Respondent led no evidence as to why these stated representations and objectives with respect to its custody and control of the Vessel were abandoned and why failure to carry out the said repairs would presumably no longer result in "*further damage to the Vessel"* or enure "*to the detriment of all parties involved in this action*". The Respondent was under a duty to prevent the Vessel suffering further damage as was clearly anticipated, which the said repairs were stated to be necessary in order to prevent.**"

35. For this the appellants rely on the Order of the United States court made on 16 May 2016 at the request of Caterpillar. That Order said:

> **"THIS MATTER is before the Court upon Plaintiff's Motion For Entry Of Order Authorizing Repairs to Vessel (DE 13). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.**

> **Accordingly, after due consideration, it is ORDERED AND ADJUDGED as follows:**
>
> **1. The Plaintiff's Motion For Entry Of Order Authorizing Repairs to Vessel (DE 13) be and the same is hereby GRANTED;**
>
> **2. The Substitute Custodian be and the same 1is hereby authorized to make, or cause to make, necessary inspection and/or repairs to Defendant Vessel, including to the a/c system, compressors, engines, and related equipment aboard Defendant Vessel; and**
>
> **3. The Substitute Custodian be and the same is hereby ordered to keep a custody log of any equipment removed from Defendant Vessel and to ensure that said equipment is timely returned to Defendant Vessel or maintained within the Substitute Custodian's care, custody, or control following any assessment or repair to said equipment.**
>
> **DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 16th day of May, 2016.**"

36. It is clear that the Order permits or authorizes the respondent to make repairs, but does not require the respondent to make repairs.

37. Neither that Order, nor the Agreement to Surrender the Vessel supports the appellants' claim that the respondent was under an obligation "**to make repairs to put the vessel in a condition that would allow same to move under its own power**" as pleaded or at all.

38. The Judge found as a fact:

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

39. In their submissions the appellants complain that this finding was unreasonable. They say:

> **"There was no expert evidence led addressing the costs of making the Vessel ready to undergo a sea trial. Her Ladyship appears to have fallen into error by basing her findings in that regard on a purported internal email, dated the 10" day of November A.D. 2016, to which Mr. Hughes was a stranger, between Landon Gracey, the Respondent's Customer Service Manager, to Rob Coon. also of the Respondent, wherein Mr. Gracey stated: "Our initial plan to sell the vessel had been to bring the boat to sea trial — It has not been sea trialed since 2006 and the market is aware of that. This would take approximately $500k in further repairs and roughly 4 -5 months in time to repair (sic) the boat for sea trial at a monthly holding cost of approximately $25,000.00." Her Ladyship's said finding, ostensibly based as it is on Mr. Gracey's email, a Customer Service Manager not called by the Respondent, as an expert or otherwise, was a finding that no reasonable judge could have reached'. The Respondent led no evidence demonstrating the basis for its departure from its stated "initial plan™ to bring the boat to sea trial, which deviation was never communicated to the Appellants."**

40. Two points should be made. First, the burden is on the appellants to show that the sale was at an undervalue. Second, it was the appellants as mortgagors and guarantors to lead expert evidence as to the costs of repairs to show that it would not have been unreasonable to undergo the costs of the repairs. The respondent was under no obligation to show why they did not spend the money to enable a sea trial. They had no obligation to do so.

41. In the absence of any expert evidence, in my judgment, the Judge was entitled to accept the contents of the letter from Landon Gracey, Customer Service Manager of the respondent to Rob Coon, the Managing Director of the respondent. That letter was in the following terms:

> **"Rob,**
>
> **"Per our conversation of this afternoon, here Is the recommendation and background on the Maratani. We'd like to give Whit Kirtland, our broker, the OK to accept $2.95M to try to close the sale he's working on now.**
>
> **CRF commendation:**

Recommend write-off of $1,417,463 to accept an as-is, where-Is offer on the Maratani X. Inventory amount is $4,190,463 vs, sale price of $2.95M and net sale proceeds of $2,773,000 after 6% sales commission. Customer originally offered $2.0M, was countered $3.9M and customer has come up to $2.5M. Our broker believes at best he can get the buyer up to $3.0M, therefore our request for a $2.95M sale price to give our broker the ability to close the deal. He is planning to counter the buyer's latest offer of $2.5M in the hopes of closing as close to $3.0M as possible. As described below there has been activity on the boat at the Ft Lauderdale Boat show but no real offers even after being viewed by over 12 qualified customers, including legitimate players in the field of buying project vessels like this one. We have also asked our broker to follow with one more lead who has promised to make an offer but has provided nothing as of yet.

Our initial plan to sell the vessel had been to bring the boat to sea trial - it has not been sea trialed since 2006 and the market is aware of that. This would take approximately $500K In further repairs and roughly 4-5 months in time to repare the boat for sea trial at 2 monthly holding cost of approximately $25,000.

According to our broker's input, which he is basing upon offers received to date and upon discussions with other brokers, he thinks the boat is worth at best as-is, where-is around $3.0M. If we take the boat to sea trial, and If It passes, then it Is estimated to be worth approximately $3.5M or more.

A major consideration Is if it doesn't pass sea trial, it might entail costly repairs. There may be design flaws based upon the input we've heard from Kirtland's research and other brokers that we have spoken to, that could render the vessel unseliable if It becomes known. Hence, our new approach is to sell it as is where is. See below for further background on the vessel's condition and our reasoning for this approach and acceptance of an as-is, where-is offer versus the additional Investment and risk of repairs for an orderly liquidation.

Viaratani X Background:

• The vessel was original begun by a shipyard in New Zealand in 2002; CFSC was providing both the construction and permanent loan.

• The borrower, Tiger Finlayson, had been a previous CFSC customer since 1996, with excellent relations and pay history.

• The vessel had several delays and at one point. construction ceased for approximately 12-18 months due to litigation between the shipyard and the owner over vessel draft issues. It was not meeting spec as draft was to be 6.5' vs actual of 7.5'. This was also causing the transom to sink and the vessel to plow through the water, as well as risk flooding the lazarette.

• The vessel was delivered in 2006, roughly 2 years late, and after sea trial in New Zealand It was cargoed to the Bahamas.

• The customer discovered that the boat still had draft issues when the boat was delivered to them and Finlayson was unable to use it at his home in the Bahamas. He took it to Ft Lauderdale/Miami at some point in 2007 and purchased a 88' Bertram to use instead.

• Our understanding is the Maratani X was tied-up in 2008 in Miami or Ft Lauderdale and put on the market, though we have no knowledge of original asking price. etc. Finlayson used the boat as a floating condo for himself and his son

• The extremely low hours on the engines below 50 would evidence this

• To our knowledge the yacht was never really utilized yet Finlayson continued to pay promptly.

• Listing data we do have while Finlayson controlled the yacht:

- **o 2013 vessel was listed with a broker named Luke Brown, list price $19,000,000**
- **o 2014 vessel moved to Bradford at some point, listed at $14,000,000**
- **o 2015 June, price dropped to $13,000,000**

o 2015 September, price dropped to $8,999,000

o 2016 January, price dropped to $7,500,000

o 2016 April, price dropped to $6,500,000

CFSC Background:

The customer began having serious payment problems in the fall of 2015 and was put on the PCL report in October.

• 12/26/15: Vessel was surveyed by CFSC using Willlamson Marine for the PCL. Surveyor valuation assumed the vessel would pass a sea trial with minimal repairs:

o FMV = $10,000,000

o OLV= $ 8,000,000

o FLV= $ 4,500.000

• 2/1/16: $4.2M balloon payment became due.

• 3/24/16: A Voluntary Surrender Agreement was sent to the customer.

• 4/4/16: Customer refused to sign the Voluntary Surrender Agreement.

• 4/11/16:

o Vessel seized by US Marshal at Bradford Marine, Ft Lauderdale and the process to take to auction was begun.

o Vessel inventoried by Remarketing at the net investment amount of $4.2M.

• 5/23/16: Survey received (ordered late April). Williamson Marine was unavailable so Davis Company was hired. Valuation was again based on the assumption that the vessel would pass a sea trial (engines wouldn't start), as is customary:

o FMV = $16,000,000

o OLV= $ 7,500,000

o FlV= $ 4,600,000

• Upon taking physical control of the vessel, the CFSC Captain began to uncover several items that aren't customarily identified in a survey, including taking apart sections normally covered by floor panels, ceiling tiles, false walls, etc. A full computer system check was run along with a test of the generators, main engines, fire controls systems, and all other vital components on the vessel revealing that a lot more work was required in order to get the vessel ready for sea trail.

• May2016: we had our local counsel file for approval to have major repairs done to the vessel prior to Marshal Sale.

• As the contractors continued to trouble-shoot, tear the boat apart, the depth of the repair issues worsened. Just a few examples:

o Wires were Jerry-rigged to circumvent alarm systems

o Hydraulic systems were disconnected or reconnected against normal practice

o Fuel tanks had water leaking Into them

o The main ship power control system was dangerously rewired

• We considered it appropriate to obtain an updated survey upon completion of the major repairs as this would provide a more accurate valuation.

• 9/23/16: US Marshal Auction held and CFSC bought the vessel through credit bid as there were no attendees or offers.

• The critical repairs continued through October and the boat was not listed. The intent was to wait until the repairs were done, the boat safe and show ready before allowing anyone on board.

• 10/21/16: Whit Kirtland at Bradford was hired as our broker based upon his previous performance on other vessels repossessed by CFSC.

> **• Major repairs (mostly safety and related) were completed late October, days before the Ft Lauderdale Show.**
>
> **• The boat was ALS listed by Bradford on 11/1/16 and first shown on 11/2/16. Up until then, nobody had seen the boat and we had no real data to support a market value of the vessel.**
>
> **• Approximately 12 people have toured the boat as of 11/9/16**
>
> **• We've received 4 offers in total, although only one in writing, ranging from $1.0M - $2.0M."**

42. It must be recalled that this letter was in evidence by agreement. That fact that Mr. Hughes was a "stranger" to the letter is irrelevant. There is no suggestion that the appellants, at the, trial objected to the admissibility of this letter or any of the other letters and documents. As the trial Judge said at paragrapgh 56:

> "**The evidence before the Court on behalf of the parties consisted of the respective Witness Statements, viva voce evidence from the stand and numerous documents which each party advances is relevant. The Trial Bundle consisted of the documents upon which the Plaintiff relied and which were not disputed by the Defendants."**

43. The respondent accepted a bid of $2,430,000.00. The appellants have not shown on the evidence that this price is, to use the language of **Close Brothers**, outside the ambit of a vessel of the type and condition of Maratani X at the time of the sale.

44. In my judgment, these grounds must fail.

Ground 4

Section 18 of the Stamp Act provides that: "No instrument which is required by any Act to be stamped shall be pleaded or given in evidence in any court unless the said instrument shall be duly stamped and the stamps thereon cancelled, except as hereinafier provided." The unstamped purported Loan Agreement, dated the 21st day of December A.D. 2001, the unstamped purported Promissory Note, dated the 20th day of January A.D. 2006, the unstamped purported First Amendment to the Loan Agreement and Promissory Note, each dated the 19th day of April A.D. 2006, the unstamped purported Second Amendment to the Loan Agreement, dated the 1% day of June A.D. 2011, the unstamped purported Guarantee and Indemnity, dated the 21st day of December 2001 ('the Garet O.Finlayson Guarantee'), and the unstamped purported Guarantee, dated the 1st day of June A.D. 2011 ('the Mark A.G. Finlayson Guarantee'), were neither properly pleaded nor admissible before the Court. In the circumstances, therefore, Her Ladyship's Judgment as against the Appellants is

wholly unsustainable as there was no evidence properly before the Court substantiating the Respondent's claims as against the Appellants.

45. A number of points should be made. Neither the Loan Agreements, the Guarantees, nor the Promissory Note and its amendments were made in The Bahamas, nor are any of them governed by Bahamian law.

46. The Loan Agreements and Guarantees were admitted by the appellants in their Defence.

47. The debt was created by the Loan Agreements and the Guarantees; the fact of the default and the amounts owed were acknowledged by the appellants on the Consent to Surrender the Vessel signed on 29 April 2016.

48. The documents, including the Loan Agreements and Guarantees, were all admitted into evidence by agreement.

49. No objection was taken by the appellants to the admissibility of the documents for want of stamping.

50. No opportunity was given to the trial Judge to adjudicate on the question of whether any of the documents were required to be stamped and, if so, the amount of the duty eligible on any challenged document.

51. In my judgment, this ground has no merit.

52. The appellants have studiously failed to identify which provision of the Stamp Act or any other Act in The Bahamas which requires stamp duty to be paid on a loan agreement, promissory note or guarantee made outside The Bahamas, and governed by a foreign law, and the amount of such duty, if any. Revenue statutes do not have extra-territorial affect.

53. Moreover, the respondent did not require the Loan Agreements or the Guarantees to be adduced in evidence to prove the debt as the debt was admitted in the Consent to Surrender the Vessel.

54. In **Parinv (Hatfield) Ltd v IRC** [1998] STC 305, Millet LJ, made it clear that the stamp duty point is immaterial if a fact can be proved otherwise than by relying on an unstamped document. He said at page 3102:

> **"Where the instrument is unstamped, secondary evidence of it (whether by way of photocopy or otherwise) may not begiven. But this does not preclude the court from resolving disputes of fact which can be**

resolved without reference to the inadmissible evidence or from acting where it is called upon to decide a question of law on the undisputed facts stated in a case stated." [Emphasis added]

55. This ground fails.

56. I now consider Grounds 5 and 8 together.

Grounds 5 and 8

The Appellants were entitled to, and Her Ladyship wholly deprived the Appellants of a proper consideration of, and substantive reasoned decision with respect to, the arguments raised on their defence.

Her Ladyship in the Court below by her undue, unreasonable, and oppressive delay in delivering her Judgment has prejudiced the Appellants, depriving them of the timely and properly reasoned Judgment and conclusion of this matter to which they were reasonably and lawfully entitled.

57. Notwithstanding the14 month delay between the completion of the evidence and the delivery of the judgment, the judgment of the trial Judge was clear, and carefully considered the issues and the evidence. In this case, there were only two witnesses. Their evidence in chief was contained in their Witness Statements. Their evidence on cross examination and re-examination was contained in transcripts duly recorded by a court stenographer. The evidence in the admitted written documentation showed clearly what transpired.

58. In my judgment, the delay, though inexcusable, did not affect the quality and reliability of the judgment and the judge's clear reasons. I do not propose to review the jurisprudence as we have done in **Polymers International Limited v Philip Hepburn** SCCivApp. No. 8 of 2021.

Grounds 6 and 7

The Respondent by its Statement of Claim, indorsed upon the Amended Writ of Summons filed before the Court below on the 14th day of March A.D. 2017, did not properly plead or prove a claim for US$2,763,474.78 or any amount as against the Appellants.

Her Ladyship's Judgment was in any event against the facts and the preponderance of evidence before the Court, which facts and evidence established the Appellants' entitlement to the relief sought.

59. These grounds are completely devoid of merit. I cite the Recitals contained in the Consent to Surrender the Vessel, duly signed by the Appellants:

"A. Lender and Borrower are parties to that certain Loan Agreement dated on or around December 21, 2001 (together with all amendments thereto collectively the "Loan Agreement").

B. The Loan is secured by, among other things, a valid, first-priority Bahamian statutory mortgage in account current and deed of covenants collateral thereto (collectively "the Mortgage") on the pleasure yacht known as "MARATANI X", having Bahamian Official Number 7000056, together with all Vessel collateral ("the Vessel").

C. Guarantors Garet O. Finlsyson and Mark A.G. Finlayson guaranteed the Loan pursuant to Guaranty agreements dated on or around December 21, 2001 and June 1, 2011 respectively, (each a "Guaranty" and collectively the "Guarantees").

D. As of March 10, 2016, the current amount of moneys due and owing under or in connection with the Loan Agreement (the "Indebtedness") is US$4,263,106.54, consisting of principal in the amount of US$4,208,602.41 and interest in the amount of US$51,861.08, and late charges in the amount of US$2,643.05, Per diem interest continues to accrue at the rate of US$598.04 daily.

E. Borrower and Guarantors have defaulted under the Loan Agreement and Guarantees and Borrower has agreed (i) to immediately turn over possession and control the Vessel to Lender (or its designated agent); (ii} that Lender may, at its option and at its expense, move the Vessel to a port of its choosing in the United States for storage on behalf of Borrower; and (iii) that Lender is hereby granted by Borrower with an irrevocable right and power to sell the Vessel either through private sale in the name of Borrower or, if that is unsuccessful, that Lender may exercise other rights and remedies under the Loan Documents, including, without limitation, the right to take, in its sole discretion subject to the provisions hereof, the Vessel's ownership in order to apply its value to pay Indebtedness and subject thereto to pay over all surplus proceeds to the Borrower or as the Borrower may in writing direct and to sign and execute all documents required for any of the foregoing purposes,

but keeping any and all rights to claim from Borrower and Guarantors any deficiency after sale of the Vessel pursuant to the Loan Documents. Subject to the Clause 3.2 the Vessel's value will be fixed by an authorized entity or person freely selected by Lender."

60. The debt was never in dispute. The appellants' obligation to pay the debt was never in dispute. The sole issue was whether the respondent was in breach of its duty as a mortgagee to the appellants in realizing its security. The burden was on the appellants to show that it was in breach of that duty. The judge found that the appellants did not prove that the respondent was in breach of that duty. We agree with the judge.

61. In the circumstances, this appeal is dismissed. Costs to the respondent, to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

62. I agree

The Honourable Mr. Justice Evans, JA

63. I also agree.

The Honourable Sir Brian Moree, JA