

**IN THE SUPREME COURT OF GUAM**

**BANK OF GUAM,**  
Plaintiff-Appellee,

**vs.**

**DANIEL R. DEL PRIORE,**  
Defendant-Appellant.

Supreme Court Case No.: CVA05-007  
Superior Court Case No.: CV1022-98

**OPINION**

**Filed: August 28, 2007**

**Cite as: 2007 Guam 7**

Appeal from the Superior Court of Guam  
Argued and submitted on July 24, 2006  
Hagåtña, Guam

Appearing for the Defendant-Appellant:  
Daniel R. Del Priore, *Pro Se*  
Ste. A12-115, GCIC Bldg.  
414 W Soledad Ave.  
Hagåtña, GU 96910

Appearing for the Plaintiff-Appellee:  
Daniel J. Berman, *Esq.*  
Berman O'Connor Mann & Shklov  
Ste. 503, Bank of Guam Bldg.  
111 Chalan Santo Papa  
Hagåtña, GU 96910

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD<sup>1</sup>, Associate Justice; and ROBERT J. TORRES, JR., Associate Justice.

**TORRES, J.:**

[1] Plaintiff-Appellee Bank of Guam (“BOG”) filed a Complaint to Foreclose Security Interest and for Damages against Defendant-Appellant Daniel R. Del Priore alleging that Del Priore had breached a mortgage agreement for the purchase of a vessel called the “Sunflower.” After a trial on the merits, the Superior Court awarded BOG a deficiency judgment. Del Priore appealed that decision, and in *Bank of Guam v. Del Priore*, 2001 Guam 10, we held that BOG’s failure to plead and prove the notice requirement of 13 GCA § 9504(3) barred recovery of a deficiency. The matter was remanded for proceedings consistent with our holding.

[2] Subsequently, BOG, with leave of the Superior Court, filed an Amended Complaint for Damages. BOG and Del Priore then each filed motions for summary judgment. The Superior Court denied Del Priore’s motion for summary judgment, but granted BOG’s motion with respect to its claim for damages. The court then entered judgment in favor of BOG for a deficiency, attorney’s fees, and interest. Del Priore appeals the judgment, asserting the Superior Court was without jurisdiction over the matter; misinterpreted this court’s remand following the previous appeal; misapplied the facts to the law to grant BOG’s motion for summary judgment; and improperly relied upon its previous findings of fact to enter summary judgment against Del Priore. We find the Superior Court had jurisdiction over BOG’s claim for damages; however, the grant of BOG’s motion for summary judgment was improper because BOG failed to fulfill the notice requirements in the Preferred Ship Mortgage agreed to by the parties. Accordingly,

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<sup>1</sup> Associate Justice Frances M. Tydingco-Gatewood heard oral argument in this case. Prior to the issuance of this Opinion, she was sworn in as Chief Judge of the District Court of Guam.

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we reverse and vacate the judgment entered by the trial court, including the award of attorney's fees and interest.

**I.**

[3] Daniel R. Del Priore and Maritza R. Yarbrough, fka Maritza R. Del Priore, purchased the "Sunflower" and to secure the payment of a promissory note, they granted a Preferred Ship Mortgage over the vessel to the Bank of the Orient, which later assigned the note and mortgage to BOG. Years later, Del Priore and Yarbrough failed to renew the insurance policy on the vessel that was required under the provisions of the promissory note and failed to make the installment payments that were due.

[4] BOG filed a Complaint to Foreclose Security Interest and for Damages in the Superior Court. The complaint contained two counts, alleging that Del Priore was liable for breach of contract and that BOG was entitled to immediate possession of the Sunflower. Del Priore and Yarbrough filed an answer and counterclaim asking that the complaint be dismissed and that they be awarded their costs and attorney's fees.

[5] While the foreclosure action was pending in the Superior Court, BOG repossessed the Sunflower and sold it at a public foreclosure sale for \$75,000.00,<sup>2</sup> which was not sufficient to satisfy the outstanding debts. BOG therefore sought a deficiency judgment of \$61,170.54, including insurance costs, security services, moving costs and appraisal costs.

[6] After a trial on the merits, the Superior Court issued judgment in favor of BOG for the amount of the deficiency and Del Priore appealed the decision to this court. In *Bank of Guam v. Del Priore*, 2001 Guam 10, we vacated the judgment and remanded, holding that BOG's failure to plead and prove the notice requirement of 13 GCA 9504(3) barred recovery of a deficiency.

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<sup>2</sup> This amount was double the appraised value of \$35,000.00 to \$38,000.00 for the sale of the vessel "as is."

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[7] On remand, the Superior Court allowed BOG to amend its complaint over the objection of Del Priore. Shortly thereafter, BOG and Del Priore each filed motions for summary judgment. The Superior Court granted BOG's motion for summary judgment and denied Del Priore's motion. A final judgment was entered and Del Priore filed a timely appeal.

## II.

[8] This court has jurisdiction over this appeal from a final judgment pursuant to 7 GCA §§ 3107(a) and 3108(a) (2005).

## III.

[9] Issues of subject matter jurisdiction are reviewed *de novo*. See *Taitano v. Lujan*, 2005 Guam 26 ¶ 15; see also *People v. Aguirre*, 2004 Guam 21 ¶ 26; *People v. Quichocho*, 1997 Guam 13 ¶ 3. A trial court's interpretation of a mandate from an appellate court decision involves a question of law and therefore is reviewed *de novo*. See *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6 ¶¶ 16-17; *Clemons v. Mech. Devices Co.*, 781 N.E.2d 1072, 1078 (Ill. 2002). "A trial court's decision granting a motion for summary judgment is reviewed *de novo*." *Arashi & Co., Inc. v. Nakashima Ent., Inc.*, 2005 Guam 21 ¶ 10 (quoting *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7).

## IV.

[10] On appeal, Del Priore asserts the Superior Court was without jurisdiction over the foreclosure and misinterpreted this court's remand following the previous appeal. He further argues that the Superior Court misapplied the facts to the law to grant BOG's motion for summary judgment and improperly relied upon its previous findings of fact to enter summary judgment against Del Priore. We address each issue in turn.

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**A. Subject Matter Jurisdiction**

[11] Del Priore first argues that because the Ship Mortgage Act, codified at 46 U.S.C.A. §§ 31301-31343, provides the federal court with exclusive jurisdiction over judicial foreclosure, the Superior Court lacked jurisdiction over this case. BOG contends that judicial foreclosure pursuant to the Ship Mortgage Act is not an exclusive remedy. BOG argues that it had the discretion to elect either judicial foreclosure under the Ship Mortgage Act or to pursue remedies available under Guam law, including repossession and sale.

[12] The Superior Court's jurisdiction over the issues raised in this case was not raised prior to this appeal. However, subject matter jurisdiction may be raised at any time, including for the first time on appeal. *See Taitano*, 2005 Guam 26 ¶ 15. The jurisdictional issues in the instant case involve questions of statutory interpretation of the Ship Mortgage Act that confers jurisdiction to federal courts.

[13] Title 46 U.S.C.A. § 31325(c) provides that “district courts have original jurisdiction of a civil action brought under subsection (b)(1) or (2) of this section. However, for a documented vessel, a vessel to be documented under chapter 121 of this title, a vessel titled in a State, or a foreign vessel, this *jurisdiction is exclusive of the courts of the States for a civil action brought under subsection (b)(1) of this section.*” 46 U.S.C.A. § 31325(c) (West, Westlaw through Pub. L. 110-48 approved July 18, 2007) (emphasis added). Specifically, subsection (b)(1) states that “[o]n default of any term of the preferred mortgage, the mortgagee may . . . enforce the preferred mortgage lien in a civil action in rem for a documented vessel, a vessel to be documented under chapter 121 of this title, a vessel titled in a State, or a foreign vessel.” 46 U.S.C.A. § 31325(b)(1). These provisions indicate that federal courts have exclusive jurisdiction over judicial foreclosure proceedings on preferred mortgage liens secured by a vessel. *Maryland*

*Nat'l Bank v. Darovec*, 820 F. Supp. 1083, 1087 (N.D. Ill. 1993); *Price v. Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1569 (W.D. Wash. 1983).

[14] Federal jurisdiction over an action to recover a deficiency, however, is not exclusive. As emphasized above, subsection 46 U.S.C.A. § 31325(c) states that the federal courts' jurisdiction is exclusive only for actions brought under subsection (b)(1). 46 U.S.C.A. § 31325(c). Jurisdiction of the federal courts over deficiency actions is addressed in subsection (b)(2).<sup>3</sup> A plain reading of this provision suggests that a deficiency action is not within the exclusive jurisdiction of federal courts.

[15] The Eleventh Circuit has held that the Ship Mortgage Act does not prohibit state self-help enforcement procedures when the underlying contract authorizes their use. *Dietrich v. Key Bank, N.A.*, 72 F.3d 1509, 1511 (11th Cir. 1996). The circuit court reasoned:

Because the language of the Act is permissive-i.e., the Act uses the permissive “may” rather than exclusive “must” with respect to its enforcement procedures--and because the Act is silent with respect to self-help repossession and resale, we are drawn to the conclusion that the federal law is not so pervasive that it thoroughly occupies the field. This reasoning accords with that of a majority of the cases and treatises which have squarely addressed the question.

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<sup>3</sup> 46 U.S.C.A. § 31325(b)(2) provides that:

On default of any term of the preferred mortgage, the mortgagee *may*-- . . .

(2) enforce a claim for the outstanding indebtedness secured by the mortgaged vessel in--

(A) a civil action in personam in admiralty against the mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness; and

(B) a civil action against the mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness . . . .

46 U.S.C.A. § 31325(b)(2) (emphasis added).

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*Id.* at 1515. After recognizing that some courts have held otherwise,<sup>4</sup> the Eleventh Circuit explained that their holding was supported by both the permissive language of the statute and the leading treatises on admiralty law. *Id.* at 1517 (citing 2 *Benedict on Admiralty* § 70f (7th ed. 1995)). Like the mortgage considered by the Eleventh Circuit in *Dietrich v. Key Bank, N.A.*, 72 F.3d 1509 (11th Cir. 1996), the mortgage in the present case contains a self-help provision. *Id.* at 1512; Appellant’s Excerpts of Record (“ER”), pp. 194-195 (Preferred Ship Mortgage). BOG was not seeking to augment the judicial foreclosure procedures through state law; rather, BOG exercised a self-help remedy. Furthermore, the mortgage here contains a “Remedies Cumulative” clause which states that the remedies provided for in the contract shall be given in addition to those existing by statute or at law and is explicit that the mortgage was not intended to foreclose other possible remedies. ER, pp. 197-198 (Preferred Ship Mortgage).

[16] The original complaint filed in the Superior Court contained two counts: one for breach of contract and one for “secured interest – foreclosure.” ER, pp. 1-4 (Complaint). Following the first appeal, the complaint was amended. The amended complaint also contained two counts: one based on breach of contract and the other on BOG’s lien, a “secured interest.” ER, pp. 67-71 (Amended Complaint for Damages). Included in the amended complaint is a request for BOG’s lien to be foreclosed. Clearly, the Superior Court would not have jurisdiction over any action to judicially foreclose the mortgage because the Ship Mortgage Act provides the exclusive judicial mechanism for foreclosure of a ship mortgage. 46 U.S.C.A. § 31325(c). The federal court’s jurisdiction over an action to recover a deficiency, however, is not exclusive. 46 U.S.C.A. § 31325(b)(2); *see Darovec*, 820 F. Supp. at 1087 (“[T]he Act is not exclusive and does not

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<sup>4</sup> The Eleventh Circuit acknowledged contrary holdings in *Bank of America Nat’l Trust and Savings Ass’n v. Fogle*, 637 F. Supp. 305 (N.D. Cal. 1985) and *Nate Leasing Co., Inc. v. Wiggins*, 789 P.2d 89 (Wash. 1990), both of which are cited by Del Priore in his opening brief. Compellingly, no other courts have followed those decisions.

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prevent non-judicial foreclosures. When, as in this case, the mortgagee has conducted a non-judicial private sale outside of the Act, we look to state law and the contracts between the parties to ascertain whether a deficiency judgment is warranted.”). The Superior Court does have jurisdiction over the breach of contract claims; therefore, the Superior Court had jurisdiction over the deficiency action brought by BOG. Del Priore’s argument that the Superior Court did not have subject matter jurisdiction is without merit.

### **B. Prior Opinion and Remand**

[17] Del Priore next asserts that the Superior Court misinterpreted this court’s opinion in *Bank of Guam v. Del Priore*, 2001 Guam 10, and specifically argues that the trial court “acted in derogation of the Supreme Court’s Opinion and Mandate when it allowed [BOG] to amend its Complaint.” Appellant’s Opening Brief, p. 10 (Jan. 23, 2006). He argues that the Superior Court erred when it failed to enter judgment for him when the case was remanded because our Opinion and Mandate constituted a final adjudication of the case. BOG maintains that this court’s Opinion did not mandate the trial court to enter judgment in favor of Del Priore. Instead, BOG contends that the remand was limited to the issue of pleading and proving notice of sale of the collateral.

[18] A trial court’s interpretation of a mandate from an appellate court decision involves a question of law and therefore is reviewed *de novo*. See *Town House*, 2003 Guam 6 ¶¶ 16-17; *Clemons*, 781 N.E.2d at 1078. “Where a remand limits the issues for determination, the court on remand is precluded from considering other issues, or new matters, affecting the cause.” *Nationsbanc Mortg. Corp. v. Hopkins*, 190 S.W.3d 299, 301-302 (Ark. Ct. App. 2004); see *Will v. Mill Condominium Owners’ Ass’n*, 898 A.2d 1264, 1268 (Vt. 2006). “When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such



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jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.” *Hampton v. Super. Ct.*, 242 P.2d 1, 3 (Cal. 1952). “However, when the remand instructions are general, the trial court must . . . exercise its discretion to determine what further proceedings are required.” *Purcell & Wardrope, Chartered v. Hertz Corp.*, 664 N.E.2d 166, 168 (Ill. App. Ct. 1996).

[19] In *Bank of Guam v. Del Priore*, 2001 Guam 10, this court determined that the failure to plead and prove the notice requirement of 13 GCA § 9504(3) prevented BOG from obtaining a deficiency judgment. *Id.* ¶¶ 8, 30. Del Priore raised this question for the first time on appeal, and we exercised our discretion to address the issue, which was purely one of law. *Id.* ¶ 27. Finding the Uniform Commercial Code of Guam to be silent on the effect of failure to plead and prove notice, this court discussed the lines of authority concerning the three divergent rules adopted by other jurisdictions. *Id.* ¶¶ 10-14. After a lengthy discussion, we adopted the absolute bar rule, finding it to be the best and most reasoned of the three. *Id.* ¶ 19. The absolute bar rule demands compliance with the notice requirement of section 9504(3) as a condition precedent to receiving a deficiency judgment. Following our announcement of the adoption of the absolute bar rule, we vacated the decision of the trial court and remanded for proceedings consistent with our Opinion. *Id.* ¶ 30. The mandate in that case also vacated the judgment by the trial court and remanded for proceedings consistent with the Opinion. ER, p. 21 (Mandate).

[20] Although the holding in *Del Priore*, 2001 Guam 10, was limited to the issue of pleading and proving notice of sale, neither the Mandate nor the Opinion contained any specific instructions regarding the proceedings the Superior Court should undertake on remand.

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Therefore, it was within the Superior Court’s discretion to hold proceedings consistent with our Opinion.

[21] We held in *Del Priore* that “compliance with the notice requirement of 13 GCA § 9504(3) is a condition precedent to receiving a deficiency judgment.” *Id.* ¶ 30. The notice provision of 13 GCA § 9504(3) requires the secured party to provide reasonable notification of the time and place of the sale to the debtor. Our holding was limited to the determination of what effect, if any, the failure to plead and prove the notice requirement contained in section 9504(3) would have on the ability of BOG to obtain a deficiency judgment. *Id.* ¶ 8.<sup>5</sup>

[22] On remand, the Superior Court granted BOG’s motion to amend the complaint to plead facts demonstrating that BOG gave proper notice to Del Priore regarding the public sale. In its decision and order granting summary judgment, the Superior Court found that the sole issue on remand was whether BOG satisfied the requirements of 13 GCA § 9504(3). ER, p. 170 (Decision & Order). Although the Superior Court recognized section 9501(3) “allows parties to enter agreements to determine the standards by which the fulfillment of the rights and duties given under the Code is to be measured if such standards are not manifestly unreasonable,” the Superior Court ultimately found that the “purpose of the notice requirement under the Mortgage was not frustrated by the manner in which Plaintiff gave Defendant notice.” ER, p. 175 (Decision & Order). The Superior Court held that BOG “substantially complied” with the terms

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<sup>5</sup> 13 GCA § 9504(3) provides, in part:

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but ever [sic] aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification* of the time and place of any public sale . . . shall be sent by the secured party to the debtor . . . .

13 GCA § 9504(3) (2005) (emphasis added).

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of the Mortgage “by publishing the Notice [of Sale]” and satisfied the reasonable notice requirement of section 9504(3) by sending Del Priore reasonable notification of the time and place of the public sale. ER, pp. 171, 175-176 (Decision & Order).

[23] In *Del Priore*, we held that satisfaction of the notice requirements of section 9504(3) was a condition precedent to BOG obtaining a deficiency judgment. *Del Priore*, 2005 Guam 10 ¶ 30. We did not, however, hold that such satisfaction was determinative with regard to the ultimate outcome of the case. Accordingly, to the extent the Superior Court reads *Del Priore* as so holding, the Superior Court misinterprets our decision. Satisfaction of the notice requirement of section 9504(3) is a condition precedent to BOG obtaining a deficiency judgment. It is not the only condition that must be fulfilled, particularly if the parties made an agreement establishing the time and manner for reasonable notification of the disposition of collateral.

**C. 13 GCA 9501(3)**

[24] The inquiry of whether BOG satisfied the notice requirements in order to recover a deficiency is not limited to a determination of whether there was reasonable notification of the time and place of sale as required by section 9504(3). A review of the notice provisions contained in the parties’ agreement is also required. Title 13 GCA § 9501 delineates the rights of both the debtor and the secured party following default. Section 9501(3) provides:

To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivisions referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subdivision (3) of Section 9504 and Section 9505) and with respect to redemption of collateral (Section 9506) but the *parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable*: . . .

(b) Subdivision (3) of section 9504 and subdivision (1) of Section 9505 which deal with disposition of collateral . . . .

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13 GCA § 9501(3)(b) (2005) (emphasis added). Section 9501 clearly contemplates and permits parties to establish by agreement the appropriate standards by which the commercial reasonableness and notification requirements of section 9504(3) shall be fulfilled as long as such standards are not manifestly unreasonable.

[25] The language of the Preferred Ship Mortgage must therefore be examined to determine whether it articulated the standards by which section 9504(3) was to be met, and if so, whether such standards were reasonable. The “Power of Sale” provision of the mortgage reads as follows:

With or without legal process, and with or without prior notice or demand, seize or take possession of the vessel; and with or without possession sell said property, at public auction free from any claim of Shipowner, first however, *giving notice of the time and place of said sale by publishing the same for five consecutive days, except Saturday, Sunday and any holiday, in a newspaper published at or in the vicinity of the home port of the vessel, and by mailing a copy thereof by registered mail to Shipowner at the address of Shipowner hereinbelow specified* and such sale may be held at such place and at such time as Mortgagee in such notice may have specified, or such sale may be adjourned by Mortgagee from time to time by announcement at the time and place appointed for such sale or for such adjourned sale and without further priority over this Mortgage.

ER, p. 195 (Preferred Ship Mortgage) (emphasis added). Although this provision does not explicitly mention section 9504(3), it clearly outlines the manner in which notice of a sale of the collateral should be given to Del Priore. In addition, neither party disputed the requirements set forth in the Power of Sale provision were reasonable.

[26] Section 9501(3)(b) expressly gives the parties the power to establish by agreement the appropriate standards that will fulfill notification and commercial reasonableness requirements as long as the standards are not manifestly unreasonable. 13 GCA § 9501(3)(b). In *Liberty Bank v. Honolulu Providoring, Inc.*, 650 P.2d 576 (Haw. 1982), the Supreme Court of Hawaii found that the parties had made “an agreement establishing the time for reasonable notification of the

disposition of the collateral.” *Id.* at 580. In finding that reasonable notice had not been given, the court reasoned that they “need not determine whether the notice given was reasonable under the general statutory provisions of the Uniform Commercial Code. By the very terms of the note and security agreement, Liberty Bank failed to provide sufficient notice of the auction within a reasonable time . . . .” *Id.*<sup>6</sup>; accord *Walker v. Modnar Corp.*, 343 S.E.2d 148, 150 (Ga. Ct. App. 1986) (“These contractual provisions [regarding notice] are not ‘manifestly unreasonable’ and consequently it is unnecessary to look beyond them to determine the rights and duties of the parties in this case.”). The Supreme Court of Montana, citing *Liberty Bank*, found the parties’ agreement with regard to notice to be “valid and binding on the parties so long as it is not manifestly unreasonable.” *Wippert v. Blackfeet Tribe*, 695 P.2d 461, 464 (Mont. 1985).

[27] Both *Wippert* and *Chapman v. Field*, 602 P.2d 481 (Ariz. 1979), recognize that the notice requirements agreed to by the parties are binding unless manifestly unreasonable. Both cases also contain language that states the notice given in each case satisfied neither the UCC requirements nor those specified in the agreement. *Wippert*, 695 P.2d at 465; *Chapman v. Field*, 602 P.2d 481, 485 (Ariz. 1979). Although one could stretch this language to suggest that the notice requirements of either the UCC or the agreement could be met, that reading would render the *Wippert* and *Chapman* decisions affirming the binding nature of notice requirements in a contract virtually meaningless. Moreover, this reading would further cause the express language of section 9501(3) to be, in certain situations, superfluous. 13 GCA § 9501(3); see *Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879) (“a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant” (quoting Bacon’s Abridgment, sect. 2)); *State ex rel. Div. of Forestry, Fire &*

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<sup>6</sup> Guam law contains the 1972 version of section 9-504(3) of the Uniform Commercial Code. In Hawaii, at the time *Liberty Bank* was decided, the same provision was the law in that state.

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*State Lands v. Tooele County*, 44 P.3d 680, 685 (Utah 2002); *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002).

[28] BOG does not contend that they satisfied the notice requirements contained in the mortgage and there is no evidence that these requirements have been satisfied. The Superior Court found the notice to be satisfactory under section 9504(3), but section 9501(3)(b) allows the parties to determine the manner in which the requirements of section 9504(3) are met. 13 GCA § 9501(3)(b). Therefore, in order to determine whether notice was reasonable under 9504(3) in this particular instance, the Superior Court should have looked to the language of the mortgage itself. The Superior Court decided that BOG satisfied the general notice requirements of section 9504(3) and that there was substantial compliance “with the terms of the Mortgage by publishing the Notice in two local newspapers of general circulation once a week for three weeks.” ER, p. 175 (Decision & Order). The very terms of the mortgage required BOG to publish the notice of sale “for five consecutive days, except Saturday, Sunday and any holiday, in a newspaper published at or in the vicinity of the home port of the vessel, and [mail] a copy thereof by registered mail to Shipowner at the address of Shipowner hereinbelow specified.” ER, p. 195 (Preferred Ship Mortgage).

[29] Rather than determining whether the notice sufficiently complied with the specific requirements contained in the mortgage, the Superior Court merely found substantial compliance with the mortgage requirements. The lower court committed error by not deciding, in accordance with 9501(3)(b), that the parties’ agreement determined the standards by which the fulfillment of their rights and duties under 9504(3) are to be measured. This agreement required BOG to publish the notice of sale for five consecutive days at or in the vicinity of the home port of the vessel, and mail a copy thereof by registered mail to Del Priore at the address specified.

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These standards are not unreasonable and the parties' agreement establishing the requirements for fulfillment of the standard should have been enforced.

[30] BOG also argues that the "Remedies Cumulative" clause in the mortgage allowed it to dispose of the Sunflower pursuant to section 9504(3) without the need to comply with the notification requirements in the Power of Sale provision of the mortgage. BOG asserts that it may exercise any right and invoke any remedy accruing to BOG by virtue of the Uniform Commercial Code of Guam or the mortgage agreement, and it did not elect a remedy under the mortgage provision. Del Priore does not dispute that BOG had various remedies available to it that were cumulative but maintains that BOG elected to proceed under the mortgage and thus was not limited to compliance with only 9504(3).

[31] "[T]he court should attempt to determine the intent of the parties at the time the contract was made as discovered by the language used to express their rights and duties." *Bicknell Minerals, Inc. v. Tilly*, 570 N.E.2d 1307, 1313 (Ind. Ct. App. 1991); *accord Old Kent Bank v. Sobczak*, 620 N.W.2d 663, 666-667 (Mich. Ct. App. 2000); *Bender-Miller Co. v. Thomwood Farms, Inc.*, 179 S.E.2d 636, 639 (Va. 1971). The Remedies Cumulative clause provides:

Each and every power and remedy herein specifically given to the Mortgagee shall be cumulative and shall be in addition to every other power and remedy herein specified, given or now or hereafter existing at law, in equity, admiralty or by statute and each and every power and remedy whether specifically given or otherwise existing may be exercised from time to time and as often and in such order as may be deemed expedient by Mortgagee and the exercise or the beginning of the exercise of any power or remedy shall not be construed to be a waiver of the right to exercise at the same time or thereafter any other power or remedy . . . .

ER, pp. 197-198 (Preferred Ship Mortgage). The language of this clause indicates that BOG was not limited to the remedies under the mortgage and thus could proceed under section 9504(3).

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[32] The trial court did not make a finding on whether BOG elected a remedy under the mortgage or section 9504(3). The trial court found that pursuant to section 9501(3)(b), the Power of Sale provision was relevant to determine BOG's compliance with section 9504(3). Our analysis demonstrates the soundness of this finding. *See Dir. of Dep't of Pub. Health & Soc. Servs. v. Cruz*, Civ. No. 85-0084A 1987 WL 109396 at \*2 (D. Guam App. Div. June 4, 1987) (unreported) ("Where two statutes specifically refer to one another the courts have interpreted this to mean that the legislature intended that they be read together." (citing Sutherland Stat. Const., 4th ed. 1984 § 51.03)); *Doe v. United States*, 74 Fed. Cl. 592, 598-599 (Fed. Cl. 2007); *Suez Co. v. Young*, 195 N.E.2d 117, 123 (Ohio Ct. App. 1963). The trial court then held that BOG substantially complied with the Power of Sale provision because the purpose of the notice requirement in this mortgage provision was achieved, and then determined that BOG strictly complied with section 9504(3). This holding was wrong. The trial court did not need to determine whether the notice given was reasonable under the general statutory provisions of the Uniform Commercial Code of Guam. Section 9501(3)(b) allows parties to establish by agreement the appropriate standards that will fulfill the requirements of commercial reasonableness and notification pursuant to 9504(3) as long as the standards are not manifestly unreasonable.

[33] Neither party has disputed the reasonableness of the mortgage notification requirements. Thus, under the section 9504(3) remedy BOG asserts it elected, it was still required to give notice pursuant to the terms to which it agreed in the mortgage because of section 9501(3)(b). *See Guam United Warehouse Corp. v. DeWitt Transp. Servs.*, 2003 Guam 20 ¶ 15 ("If a written instrument, *on its face*, expresses a contractual obligation, one of the parties should not be permitted to avoid it on the grounds that it was never intended as such unless the evidence to



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such effect is cogent and convincing.” (quoting *Berry v. Crouse*, 376 S.W.2d 107, 113 (Mo. 1964))). By the express terms of the mortgage, BOG failed to provide sufficient notice within a reasonable time. Moreover, to permit BOG to use the Remedies Cumulative clause as a means to avoid the express language of section 9501(3)(b) and its reference to 9504(3) would essentially mean that parties would not be allowed to determine by agreement the appropriate standards for disposition of collateral. Clearly, this was not intended by the drafters of the Uniform Commercial Code of Guam and we will not construe section 9501(3)(b) in this manner. See *Pangelinan v. Gutierrez*, 2004 Guam 16 ¶ 21 (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” (quoting *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 837 (1988))); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (*Duncan v. Walker*, 533 U.S. 167, 174 (2001))). BOG may still elect the remedies it wishes to pursue and the remedies are cumulative, but the Uniform Commercial Code of Guam allows the parties by agreement to determine the manner in which the elected remedy is to be exercised so long as the agreed terms are not manifestly unreasonable.

#### **D. Grant of Summary Judgment**

[34] Finally, Del Priore asserts that the Superior Court erred in granting BOG’s motion for summary judgment because it improperly applied the law to the facts. We agree. “A trial court’s decision granting a motion for summary judgment is reviewed *de novo*.” *Arashi & Co., Inc.*, 2005 Guam 21 ¶ 10 (quoting *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7). Summary judgment is appropriate when no material facts are in dispute and the movant is entitled to

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judgment as a matter of law. See *Iizuka Corp. v. Kawasho Int'l (Guam) Inc.*, 1997 Guam 10 ¶¶ 7-8. The Superior Court granted BOG's motion for summary judgment based on its conclusion that BOG strictly complied with the minimum notice requirements as set forth in section 9504(3) and substantially complied with the notice requirements, set forth in the mortgage. However, BOG had an obligation to fulfill the reasonable notice requirements agreed to by the parties and delineated in the Power of Sale provision of the mortgage. Apparently, BOG failed to do so. ER, pp. 39-40 (Decl. of Counsel); 173-174 (Decision & Order); 195 (Preferred Ship Mortgage). BOG's failure to comply with notification and reasonableness requirements absolutely bars BOG from obtaining any deficiency judgment. BOG is not entitled to judgment as a matter of law, and we reverse the Superior Court's grant of summary judgment. In addition, we vacate the award of both attorney's fees and interest because we reverse the award of the deficiency judgment.

[35] Del Priore asserts further that the Superior Court committed error when it relied on its prior findings of fact, particularly concerning the existence of a note, the mortgage and a default, if any, and the amount of any damages, when it entered judgment against him. We need not address this issue because we determine that BOG did not provide evidence that it satisfied the notice requirements of the mortgage.

## V.

[36] We hold that the Superior Court erred in granting summary judgment to BOG. The Superior Court misinterpreted our Opinion in *Bank of Guam v. Del Priore*, 2001 Guam 10, to the extent it held satisfaction of the general requirements of 13 GCA § 9504(3) to be dispositive of the issue of reasonable notice. Title 13 GCA § 9501(3)(b) allows a debtor and secured party to determine by agreement the standards by which fulfillment of the debtor's rights and secured

party's duties is to be measured if such standards are not manifestly unreasonable. The express notice requirements of the Power of Sale provision set forth in the mortgage were reasonable and were not satisfied by BOG. Accordingly, we hold that the grant of summary judgment was improper and **REVERSE**. In addition, we **VACATE** the award of the deficiency judgment, attorney's fees and interest.