

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2016/0428

BETWEEN:

KAREN RODEN LAYNE

CLAIMANT

AND

GITTENS AGENCY LIMITED

FIRST DEFENDANT/ANCILLARY CLAIMANT

GRENADA COOPERATIVE BANK LIMITED

SECOND DEFENDANT/ANCILLARY DEFENDANT

Before:

The Hon. Mr. Justice Raulston L. A. Glasgow

High Court Judge

Appearances:

Shirlan Barnwell of counsel for the claimant

Deborah Mitchell for the 1st defendant and ancillary claimant

Deborah St. Bernard and Ian Sandy for the 2nd defendant and ancillary defendant

2024: 21st November

2025: 15th April

JUDGMENT

- [1] **GLASGOW, J.:** This claim throws up interesting questions about the relationship between the first defendant (“Gittens”), and the mortgagee, the second defendant (“GCBL”), once default is made on paying the sums due to the mortgagee on a mortgage. An even more curious concern is raised on the claim and that is, whether and what duties are owed by the mortgagee and/or mortgagor to a third party to that arrangement, the claimant (“Mrs. Roden Layne”). Mrs. Roden Layne claims that she was engaged to find a buyer for the mortgaged property, and brought the instant claim against Gittens and GCBL for alleged losses she suffered through their actions. A factual background is necessary to contextualise and resolve the dispute.

Some salient facts

- [2] Gittens and another related entity, Gittens Holdings Limited, entered into an agreement with GCBL to borrow sums of money from GCBL by way of an arrangement termed a ‘Transfer of Mortgage’ and ‘Deed of Further Charge’ dated 2nd day of March 2012. However, of these two entities, Gittens was the only entity against which Mrs. Roden Layne brought this claim. The sums lent by GCBL to Gittens under the agreement were secured by a mortgage over property owned by one Dorothy Gittens (“the property”). The property is located at Grand Anse, St. George’s in Grenada. Further advances of money under the loan agreement between Gittens and GCBL were secured by a Deed of Further Charge over the property dated 10th October 2012.

[3] The sums lent to Gittens by GCBL and the terms for repayment have not been laid before the court, but it appears that by December 2014, Gittens had defaulted on repaying the sums due under the mortgage agreement. It seems that both Gittens and GCBL discussed efforts by either of them to sell the property. At some point the discussions concluded in what is termed an 'Amicable Sale Agreement' dated 3rd December 2014 ("the sale agreement"). The essence of the sale agreement suggests that the parties decided terms on which they would pursue their individual right to sell the property. In particular, the terms of the sale agreement made it plain that GCBL at no point undertook to forego its rights both at statute and by way of the mortgage agreement, to sell the property further to Gittens' default on the mortgage.

[4] The relevant parts of the sale agreement reveal the following –

- (1) Gittens' total outstanding liability to GCBL as at 3rd December 2014 amounted to \$3,931,021.31. The agreed appraised value of the property was \$4,247,100.00. Gittens and GCBL agreed that in respect of Gittens' efforts to sell the property, it would list the property for sale with one of the real estate agents who held an agency agreement with GCBL at the reserve price of \$4,000,000.00. The agreed real estate agent was stated as Century 21;
- (2) Should either party sell the property on or before 15th March 2015, 75% of the interest accrued would be forgiven;

- (3) If the property was not sold by 15th March 2015, the reserve price would be reduced by 15% and the accrued interest as at 15th March 2015 would be reduced to 50% of the accrued balance;
- (4) GCBL agreed during the first six months of the sale agreement, that is, until 15th June 2015, that it would not list the property for sale “via the respective media available but give...” Gittens the opportunity to obtain a willing buyer. It is of importance though that notwithstanding this forbearance, GCBL reserved its right to sell the property but with the restriction that it would pursue its right to sell otherwise than through the channels of “the respective media”;
- (5) If the sale did not take place by 15th June 2015, the reserve price would be reduced by a further 15% and interest forgiveness would stand at 25% of the accrued balance. The parties also agreed that if the property was not sold by either party by 15th June 2015, GCBL would then proceed to advertise the property “via its website and other mediums (sic), in order to stimulate interest in the market and secure a sale”;
- (6) If no sale took place by 15th September 2015, GCBL would proceed to public auction at the last reserved price stated at paragraph (5) above and interest forgiveness would stand at 15% of the accrued balance of the debt owed to GCBL by Gittens;
- (7) If the property was not sold by public auction, GCBL would attach further reductions to the sale price as it saw fit;

- (8) The parties then agreed as to how “the net proceeds” of a sale would be distributed. Specifically it was agreed that 60% of the sale proceeds would attach to the loan debt to reduce it and 40% would be utilised to settle Gittens’ other outstanding liabilities to GCBL in a manner to be approved by GCBL;
- (9) The other term and condition of significance to the distillation of the issues before the court is the condition that the sale agreement would commence on 3rd December 2014 and terminate on 15th September 2015.
- [5] Mrs. Roden Layne claims that she entered into an agreement with Gittens to find a buyer for the property. She also claims that she entered into that arrangement with one Ben Gittens (“Mr. Gittens”) who represented to her that he was the managing director of Gittens and was so authorised to engage her services. The terms of the agreement seem not to have been in written form but for the reasons to follow nothing turns on this fact. According to Mrs. Roden Layne, she entered the agreement with Mr. Gittens in December 2015. I observe however that the letter from her lawyer to GCBL dated 2nd August 2016 instructs that she “*entered into contract with Mr. Ben Gittens*” in January 2016.
- [6] From the pleadings it appears that sometime in February 2016, Mrs. Roden Layne entered into a course of conversations with one Jonathan Steele of Steele’s Auto (“Mr. Steele”) about selling the property to him or his company. It would seem from the facts as well that Mrs. Roden Layne and Mr. Steele visited the property in February 2016 and that he

expressed an interest in buying same. He subsequently spoke to Mrs. Roden Layne on or around 24th February 2016 and made an offer of an amount at which he wished to purchase the property.

[7] Mrs. Roden Layne then contacted Mr. Gittens to inform him of Mr. Steele's offer. Mrs. Roden Layne's claim is that Mr. Gittens requested a higher price for the sale of the property than that offered by Mr. Steele. Mr. Gittens' counter offer was then conveyed to Mr. Steele through Mrs. Roden Layne. There is no evidence that Mr. Steele made a further offer to Mrs. Roden Layne with respect to the property.

[8] The facts reveal that sometime during March 2016, Mrs. Roden Layne again spoke with Mr. Gittens who then told her that Mr. Steele had approached GCBL and negotiated a price for the purchase of the property from GCBL. Mrs. Roden Layne claims that this was when she first became aware that the property was mortgaged to GCBL. In her witness statement she complains that "I asked Ben why he didn't tell me that the bank was also trying to sell the property. He said that he never focused on that because **he was the one who engaged me and any sale I got would be a matter between me and him.**"¹ (Bold emphasis and underline mine)

[9] On 20th April 2016, Mrs. Roden Layne met Mr. Gittens at a funeral in Woburn St. George. Mrs. Roden Layne asserts that Mr. Gittens then told her that GCBL had sold the property to Mr. Steele's father, Derek

¹ Mrs. Roden Layne's witness statement filed 30th October 2018 at paragraph 22

Steele. She then asked him about her commission. Her evidence states that Mr. Gittens indicated that it looked like Mr. Steele and GCBL were *“trying to deal me out.”*²

[10] On 21st April 2016, Mrs Roden Layne pleads that she contacted Mr. Steele and expressed her concerns about the entire affair. Her evidence is that Mr. Steele gave her an email address and asked her to put her concerns in writing, which she did via email dated 22nd April 2016.

[11] On 25th April 2016, Mrs. Roden Layne wrote to GCBL (through an email sent to GCBL’s Mrs. Jacqueline Phillip). Mrs. Roden Layne ‘s evidence is that the purpose of her email *“was to put the Bank on notice that I was the person who had introduced Jonathan Steel (sic) to the MBH property and that I was therefore the person who was entitled to the commission if a sale of the property was closed with Jonathan Steele.”*³ GCBL’s Mrs. Jacqueline Phillip responded to Mrs. Roden Layne’s email by way of email of the same date.

[12] In July 2016, Mr. Gittens informed Mrs. Roden Layne that GCBL had completed the sale to Mr. Steele and had paid the commission to real estate agents, namely Terra Caribbean.

[13] Mrs. Roden Layne made several efforts to have GCBL pay the commission she claimed was owed to her but these efforts were refused by GCBL, which maintained the posture that it did not know Mrs. Roden Layne was engaged to sell the property and that it did not in fact have

² Mrs. Roden Layne’s witness statement filed 30th October 2018 at paragraph 22

³ Ibid at paragraph 25

any agreement or business relations with Mrs. Roden Layne to that effect.

[14] Now, it is a fact that the real estate agent Terra Caribbean was involved in this entire affair. As such, something must be said of that entity's role in this matter. Mr. Gittens says in his witness statement that he was unaware that Terra Caribbean was engaged. In fact, he claims that when he was contacted by Mr. Steele's father, Derek Steele, he was of the view that Derek Steele's discussions with him were further to the referral made by Mrs. Roden Layne. According to his evidence, the discussions with Mr. Derek Steele did not go very far, since the two of them could not reach consensus on a purchase price. Thus, when GCBL told him that the property was sold to the Steeles, he (Mr. Gittens) formed the view that it was Mrs. Roden Layne who brought the Steeles to GCBL. He says that he was quite surprised to find out that it was Terra Caribbean who were the real estate agents who "*brought in the sale and not the Claimant.*"⁴ This fact, Mr. Gittens claims, only became apparent to him when GCBL called him into the bank to discuss how the proceeds of the sale would be disbursed.

[15] Leila Maria La Touche of Terra Caribbean indicates in her evidence that Gittens and Terra Caribbean entered into a 'Non Exclusive Right to Sell Listing Agreement' dated 11th September 2015 whereby Terra Caribbean was engaged to sell the property on behalf of Gittens. Leila Maria La Touche indicates in her witness statement that the agreement

⁴ Mr. Gittens' witness statement filed 30th October 2018 at paragraph 18

was signed between herself and Andre Greenidge on behalf of Terra Caribbean and Mr. Gittens on behalf of Gittens.

[16] Terra Caribbean says that it listed the property on its website on the same day, 11th September 2015. Terra Caribbean's evidence is that it received a call from Jonathan Steele on 24th February 2016 indicating that he was interested *"in the property seen on Terra Caribbean's website and an offer of US\$ 1 million was made."*⁵

[17] Discussions then ensued between Terra Caribbean and GCBL which culminated in GCBL accepting Mr. Steele's offer of ECD 3.2 million. A sale agreement was finalised on 20th April 2016 with Mr. Derek Steele, father of Jonathan Steele and with Lucy Steele. The sale closed on or about 27th May 2016 and GCBL paid Terra Caribbean an agreed commission of five percent of the sale price.

[18] Mrs. Roden Layne then filed this claim against both Gittens and GCBL on 15th November 2016. Her claim outlines that Gittens breached an oral contract with her to the effect that if she found a purchaser for the property, she would be paid the commission from the sale. Against GCBL, she alleges that GCBL held part of the funds that it received from the sale on trust for her. Such sums, which amounted to the sum of the commission of five percent of the sale, formed part of the expenses of the sale and should have been paid to her by GCBL. By paying those

⁵ Leila Maria La Touche's witness statement filed on 30th October 2018

sums to Terra Caribbean, GCBL acted in breach of its obligations to her in law.

[19] Both Gittens and GCBL filed defences to the claim.

Gittens' defence

[20] The essential elements of Gittens' defence is that –

- (1) Mrs. Roden Layne and Gittens did not have an exclusive sale agreement;
- (2) Gittens was only aware of a sale by a realtor when it received a letter dated 23rd June 2016 from GCBL. Gittens had no knowledge of the identity of the realtor;
- (3) Gittens intended to pay the commission to Mrs. Roden Layne if the property was sold to a purchaser found by her, but Gittens was not in receipt of the sale proceeds. This state of affairs ensued because it was not Gittens that sold the property but GCBL, who did so by utilising its power of sale. GCBL, having sold the property, paid the commission to the realtor, Terra Caribbean, who concluded the sale with them. Gittens reiterated that it had no idea of Terra Caribbean's sale of the property.

GCBL's defence

[21] GCBL's defence is that –

- (1) It sold the property utilising its power of sale. The sale was arranged through reputable estate agents, including Terra Caribbean. GCBL had retained Terra Caribbean's services as one of its realtors from as far back 13th January 2012. Terra Caribbean and GCBL's agreement included a term that GCBL would pay Terra Caribbean a sale commission of five percent of the sale price where Terra Caribbean sold a property on GCBL's behalf;
- (2) GCBL points out that Mrs. Roden Layne herself admitted that she was retained by Gittens. GCBL reiterates that by the time they were served with Mrs Roden Layne's 25th April 2016 communication, Terra Caribbean had already notified GCBL by communication dated 25th February 2016 that it found a buyer for the property and they, GCBL, had already exercised their power of sale to sell the property. GCBL was thus obligated to pay the commission to Terra Caribbean and not to Mrs. Roden Layne;
- (3) GCBL was therefore not in a position of trust or contract with respect to Mrs Roden Layne and accordingly, GCBL did not breach any trust to her or breach any contract with her.

Gittens' ancillary claim and GCBL's response thereto

[22] Gittens then filed an ancillary claim against GCBL in which it seeks an order for indemnity against losses that it may suffer if the court finds that

Gittens ought to pay Mrs. Roden Layne the commission that she seeks. The counterclaim recites the history of the claim stated above but it does not recite a cause of action or the basis on which the court could find that GCBL is obliged to repay Gittens for any sums that the court may order it to pay to Mrs. Roden Layne. GBCL responded to the ancillary claim by insisting that, for the reasons cited above, it was not responsible for any losses that Gittens may have incurred or damages that Gittens may be ordered to pay to Mrs. Roden Layne.

Submissions on the law

[23] At trial, the parties were asked to file written submissions and authorities on the various issues highlighted on the claim. In particular the issues relate to –

- (1) Whether Mr. Gittens could have properly engaged Mrs. Roden Layne after the Amicable Settlement Agreement between Gittens and GCBL ended?
- (2) Did Gittens have the authority to engage Mrs. Roden Layne, given that the property was registered in the name of Dorothy Gittens and not Gittens?
- (3) Was Mrs. Roden Layne under a duty to investigate the status of the property which she was engaged to sell and is any loss that she suffered attributable to her failure to do so?

Mrs Roden Layne's submissions

[24] Mrs. Roden Layne addressed the second issue first. Her answer to this question is fairly straight forward. Her view is that at all times GCBL acted with respect to the property as if Gittens was the mortgagor, exercising all the rights and powers of the mortgagor. She argues that GCBL is therefore estopped from denying that Gittens had the right to sell through the mortgagor's equity of redemption. Mrs. Roden Layne points to paragraphs 11 to 15 of GCBL's defence where it outlines the course of GCBL's dealing with Gittens regarding the sale of the property.

[25] Mrs Roden Layne's view is that GCBL is bound by its pleadings and that it is further precluded by our Civil Procedure Rules 2023 at 10.6 from relying "*...on any allegation or factual statement which is not set out in the defence, but could have been set out there...*"⁶ Mrs. Roden Layne's argument is that GCBL has not amended its pleadings or been granted leave to do so. As such, GCBL cannot rely on the assertion that Gittens could not proceed to sell the property. Finally, on this issue, Mrs. Roden Layne asserts that "*as a matter of law there are no formalities required for the owner of real property or an interest therein to confer power on an agent to find a buyer for such property or interest therein. Such a contract is a simple contract and does not require any special formalities. Dorothy Gittens could by oral agreement confer the authority on the First Defendant to contract with third parties to find a buyer.*"⁷ **Bowstead and Reynolds on Agency**, 17th edition at paragraphs 2-035 to 2-037 is presented as authority for this submission.

⁶ See paragraph 7 of Mrs. Roden Layne's submissions filed on 17th January 2025

⁷ Supra, note 5 at paragraph 10

[26] With respect to the first issue, Mrs. Roden Layne relies on the terms of a mortgagor's equity of redemption. In this regard she presents the following commentary from Halsbury Laws of England –

“Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemption, and which continues notwithstanding that he fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate. Any provision inserted in the mortgage to prevent redemption on payment of the debt or performance of the obligation for which the security was given is termed a clog or fetter on the equity of redemption, and is void. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons. This is especially illustrated in the case of mortgages by building societies where, although redemption is not contemplated for periods usually varying between 15 and 25 years, nevertheless the mortgage may expressly allow redemption at any time. The right continues unless and until, by judgment for foreclosure or, in the case of a mortgage of land where the mortgagee is in possession, by the running of time, the mortgagor's title is extinguished or his interest is destroyed

by sale either under the process of the court or of a power in the mortgage incident to the security.”⁸

[27] Mrs Roden Layne also relies on **Horsham Properties Group v Clark**⁹ where it is stated that –

“No description of Miss Beech’s rights as mortgagor would be complete without mention of the mortgagor’s inherent right to redeem, that is, to recover full legal and beneficial ownership of the mortgaged property, and a discharge of the mortgage, on payment of all that is due to the mortgagee. ... I shall refer to it as the mortgagor’s equity of redemption. It constitutes an interest in the mortgaged property and, in terms of value, is the principal element of that which the mortgagor retains after the grant of the mortgage. Thus when a house owner describes herself as having an equity of £300,000 in a property worth £500,000 mortgaged to secure a debt of £200,000, it is strictly the equity of redemption to which the owner refers. While it is true that the mortgagor of registered land remains the registered proprietor during the subsistence of the mortgage, it is wrong in substance to describe the rights of such a mortgagor as tantamount to freehold ownership. For example, the equity of redemption is overridden once the mortgagee contracts to sell the mortgaged property in exercise of the statutory power of sale, or when a receiver, duly appointed under the mortgage, contracts to sell the

⁸ Supra, note 5 at paragraph 17

⁹ [2009] 1WLR 1255

mortgaged property, whether on behalf of the mortgagor or mortgagee, pursuant to powers given by the mortgage itself.”

[28] **Fisher v Lightwood’s Law of Mortgage**¹⁰, is referenced-

“The right of redemption may be lost by release of the right to the mortgagee by the mortgagor, by entry into a contract for the sale of the land by the mortgagee under his power of sale, upon foreclosure and by extinguishment by lapse of time under the Limitation Act 1980.”

[29] And further section 6 of the Conveyancing and Law of Property Act, Cap. 64 of the Laws of Grenada (“the Act”) which reads –

“(1) Where a mortgagor is entitled to redeem, he or she shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he or she would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

(2) This section does not apply in the case of a mortgagee being or having been in possession.

(3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.”

¹⁰ 11th Edition at paragraph 28.83

[30] **National & Provincial Building Society v Ahmed**¹¹, **Gibbs v Bank of Nova Scotia**¹² and **Joseph v RBTT**¹³ are also presented in support of Mrs. Roden Layne's case.

[31] Mrs Roden Layne relies on the foregoing authorities to make the following arguments –

(1) The mortgagor's equity of redemption is a proprietary interest with concomitant rights in the mortgaged property;

(2) It is an interest that exists from the creation of the mortgage up until *"it is redeemed or destroyed by entry into a contract or sale of land by the mortgagee under his power of sale, upon foreclosure and by extinguishment by lapse of time under the Limitation Act"*¹⁴;

(3) Where the mortgagor defaults, the equity of redemption is merely subordinated to the mortgagee's power of sale but it is not destroyed. In this regard, the mortgagor could sell the mortgaged property or enter into negotiations or agreements to do so subject to the mortgagee's ability to sell the mortgaged property further to the mortgagee's power of sale;

¹¹ [1995] 2 EGLR 127

¹² GDAHCV2008/0004

¹³ GDAHCV2017/0403

¹⁴ Supra note 5 at para 26

(4) The mortgagor can pre-empt or prevent a sale by the mortgagee by tendering all the money outstanding under the mortgage before a sale is completed by the mortgagee;

(5) Between the time of entering into a sale agreement and closing a sale agreement in the exercise of its power of sale, the equity of redemption is suspended. If the sale agreement falls through, the equity of redemption and its associated rights are restored.

[32] Having regard to all the foregoing, Mrs. Roden Layne concludes that, at the material time, it is clear that the mortgagor had the right to sell the mortgaged property and to engage a purchaser in that regard. If it is found that Mrs. Roden Layne is the person who did find the buyer, then the question is whether section 13(2) of the Act is engaged. I note Mrs. Roden Layne references section 13(2) of the Act. I fear that her intention is to refer to section 11 of the Act which deals with, among other things, how the proceeds of any sale are to be disbursed. I will treat her references to section 13 as references to section 11.

[33] With respect to section 13(2)¹⁵ of the Act, Mrs. Roden Layne's view is that while GCBL as mortgagee had wide powers of sale to sell the mortgaged property where Gittens had defaulted on the loan agreement, GCBL had post sale obligations which included obligations to Mrs. Roden Layne. Mrs. Roden Layne complains that GCBL breached those obligations. In this regard, once GCBL had sold the

¹⁵ I fear that reference is being made to section 11(3) here.

property, the moneys held in its hands included sums held on trust to be paid out of the proceeds of sale. Section 11 (3) of the Act reads –

“The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him or her in trust to be applied by him or her, first, in payment of all **costs, charges and expenses properly incurred by him or her as incident to the sale or any attempted sale**, or otherwise; and secondly, in discharge of the mortgage money, interest and costs and other money, if any, due under the mortgage; and the residue of the money shall be paid to the person entitled to the mortgaged property or authorised to give receipts for the proceeds of the sale thereof.” (bold emphasis mine)

[34] Mrs. Roden Layne claims that once GCBL was made aware on 25th April 2016 that she was the person who introduced the buyer to the property, GCBL held the sums due as commission on trust for her from the proceeds of the sale. She contends that GCBL’s failure to pay her those sums means that GCBL is in breach of section 13 (section 11) of the Act.

[35] With respect to the third issue, Mrs. Roden Layne argues that as an agent for Gittens, she was not obligated in law to research the title of the mortgagor or Gittens before seeking to obtain a buyer. Her case is

one of a breach of Gittens' contractual obligation to her in the law of contract and not one of negligence in the law of torts.

Gittens' submissions

[36] Gittens agrees with Mrs. Roden Layne's submissions that Mr. Gittens had the authority to sell the property despite its default on the loan. This power, Gittens argues, as does Mrs. Roden Layne, arises from the exercise of the rights of the mortgagor which include the mortgagor's equity of redemption.

[37] Further Gittens indicates that based on GCBL's dealings with Mr. Gittens, Mr. Gittens had the authority to find a purchaser for the property "*at any time prior to the Second Defendant exercising its power of sale...*"¹⁶. Gittens insists that it could have sold the property even after the 'Amicable Settlement Agreement' expired on 15th September 2015. In earlier submissions, Gittens made the point that GCBL was in a position of trustee to Mrs. Roden Layne and was obligated to make enquiries "*to have enabled it to determine who to distribute the ...commission to.*"¹⁷

[38] Gittens also agrees with Mrs. Roden Layne that GCBL cannot, at this juncture, defend the claim on the basis that Mr. Gittens or Gittens were not authorised to sell the property. This is for the same reasons advanced by Mrs Roden Layne, being the fact that such an assertion was nowhere pleaded by GCBL as an answer to the claim brought by

¹⁶ Gitten's submissions filed on 17th January 2025 at paragraph 3

¹⁷ Gitten's submissions filed on 16th October 2020

Mrs. Roden Layne. Further, Gittens relies on the course of dealings between Mr. Gittens on behalf of Gittens and GCBL to contend that GCBL always recognised Mr. Gittens as the party who was dealing with the property and as such GCBL is now precluded from relying on any contrary position.

- [39] With respect to the last issue, Gittens relies on the conveyancing practice in Grenada to argue that it was not for Mrs. Roden Layne to satisfy herself of the title to the property but it is for the lawyer for the purchaser to conduct the necessary title searches to ensure that their client receives a good title.

GCBL's submissions

- [40] GCBL takes the position that firstly, Gittens, through Mr. Gittens, could not contract with Mrs. Roden Layne to find a buyer for the property since neither Mr. Gittens nor Gittens were the mortgagors of the property. In GCBL's view, Dorothy Gittens, the mortgagor, was the only person who could contract with respect to a sale of the property.

- [41] GCBL takes the further posture that even if Gittens and Mr. Gittens could sell the mortgaged property, any agreement to that effect could not bind GCBL. This was since GCBL *"already entered into a contract with Derek and Lucy Steele to sell the MBH property to them."*¹⁸ GCBL reminds the court that it entered into an agreement with the Steeles on 20th April 2016 and that it was only aware of Mrs. Roden Layne's

¹⁸ GCBL's submissions filed on 24th January 2025 at page 7

engagement by way of her communication dated 25th April 2016. “By that time the equity of redemption which in any event vested in Dorothy Gittens and not the First Defendant, had been extinguished by the contract for sale between the Second Defendant and the said Derek Steele and Lucy Steele.”¹⁹ GCBL is of the view that neither “Dorothy Gittens nor anyone authorized by her could contract with the Claimant to market the MBH property.” **Lord Waring v London and Manchester Assurance Society Ltd**²⁰ and **National & Provincial Building Society v Ahmed**²¹ are proposed as authority for this submission.

[42] With respect to the ‘Amicable Sale Agreement’, GCBL posits that this agreement permitted Gittens to advertise using the services of Century 21 and not Terra Caribbean. Further GCBL argues, the ‘Amicable Sale Agreement’ was terminated by the time of GCBL’s sale agreement with the Steeles on 20th April 2016.

[43] More significantly, GCBL argues that section 11 (3) of the Act is not applicable to Mrs. Roden Layne’s claim since “... *the Claimant had no contract with the Second Defendant to market the property on its behalf. The only entity which the commission could have been held on trust for would have been Terra Caribbean. The Second Defendant therefore correctly paid out the sales commission to Terra Caribbean...*”²². In any event, GCBL recalls Mrs. Roden Layne’s reply to its defence which specifically stated that she was not relying on a contractual engagement

¹⁹ Ibid

²⁰ [1935] Ch. 310

²¹ [1995] 2 EGLR

²² Supra, note 9 at page 9

with GCBL to assert her claim to the commission. Equity cannot assist her either, GCBL contends, since Mrs. Roden Layne “*had no connection in contract or otherwise with the Second Defendant and her only communication with the Second Defendant was to advise the Second Defendant by letter dated 25th April 2016 that she introduced Jonathan Steele to the MBH property. At the highest, the Claimant was a volunteer whom equity could not assist...*”²³

Analysis and discussion

[44] The distillation of the issues in this claim will be considered along the following areas –

(1) Based on these facts, what are the relevant rights and duties of the mortgagee (in this case, GCBL) once Gittens defaulted in payment of the sums loaned? More specifically does GCBL owe any duties to the third party, Mrs. Roden Layne?

(2) Based on these facts, what if any rights did Gittens have to deal with encumbered property and did Gittens owe any obligations to Mrs. Roden Layne regarding the exercise of those rights?

[45] Before offering my thoughts on these issues, I must address two preliminary matters.

[46] Firstly, I will address the contention that Mr. Gittens and/or Gittens could not contract to sell the property since the person named as the

²³ Supra, note 9 at page 9

mortgagor was Dorothy Gittens. I will state shortly that I agree with Mrs. Roden Layne and Gittens that nothing turns on this issue since it is clear that all times GCBL acted with respect to Gittens and Mr. Gittens as if they were authorised to act for Dorothy Gittens. On these proceedings, GCBL has also raised no objection to the effect that Gittens or Mr. Gittens were not authorised to deal with the property on behalf of Dorothy Gittens. Rather, GCBL has defended the claim on the basis that Gittens and/or Mr. Gittens were authorised to act. GCBL cannot be permitted, thereafter, to argue in submissions that Gittens and/or Mr. Gittens could not so act. As I have stated above, I agree with these submissions for the reasons cited by Mrs. Roden Layne and Gittens and as such the objection raised by GCBL in its submissions is refused.

[47] Secondly, in her written submissions, counsel for Mrs. Roden Layne makes the point that “*the Claimant is ignorant as to the case management power being utilised in asking the questions*”²⁴ posed by the court. I can do no more than remind learned counsel that the court’s power to manage the issues in a claim subsist throughout the pendency of the claim and even at trial. In this claim, it was clear to me that the issues raised by the parties could be distilled by addressing these issues by written submissions on the law and facts.

[48] I am also aware that if the court wishes to exercise any case management power on its own initiative²⁵, it must permit the parties time

²⁴ Supra, note 3 at para.3

²⁵ Part 26.2, Civil Procedure Rules 2023

to address the issues which was indeed granted to the parties and to which they responded with erudition and competence.

GCBL's rights and responsibilities consequent on Gittens' default on the mortgage payments

[49] As far as is relevant to the claim being pursued by Mrs. Roden Layne, the parties are all agreed that once Gittens fell into arrears on the loan that GCBL could sell the property to liquidate the sums due under the loan. This right ensues from the terms of the loan agreement itself²⁶ and from statute law which states at section 9 of the Act that –

“A mortgagee where the mortgage is made by deed shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely)—

(a) Sale.—A power, when the mortgage money has become due, to sell, or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he or she may think fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss occasioned thereby...”

²⁶ Clause 3(7) of the Transfer of Mortgage Debenture and Deed of Further Charge dated 2nd March 2012.

[50] Speaking of the scope and extent of this right, the learned authors **Fisher and Lightwood**²⁷ observe that –

“The power of sale is given to the mortgagee for his own benefit, to enable him the better to realise his debt. Accordingly, his own interests come before those of the mortgagor. The mortgagee is not a trustee of his own power of sale for the mortgagor and nor is he under a general duty of care to the mortgagor. He can, therefore, act in his own interests in deciding whether or not to exercise his power of sale. If the mortgagee does decide to exercise his power of sale, he can likewise act in his own interest in deciding when to exercise it, subject to his duty to obtain the best price reasonably obtainable. He is entitled to sell even though a sale (or the time, or the terms, of the sale) may be disadvantageous to the mortgagor.

However, while the mortgagee may look to his own interests, he must nevertheless pay some regard to the interests of the mortgagor. Thus, the mortgagee owes a general duty in equity to the mortgagor and to others with an interest in the equity of redemption (including subsequent incumbrancers) to act in good faith and to use his powers for proper purposes. No duty is owed to an unsecured creditor with no interest in the equity of redemption. A breach of the obligation to act in good faith ordinarily entails intentional conduct amounting to more than mere negligence, and encompassing an improper motive or an

²⁷ Fisher and Lightwood, *Law of Mortgage*, 15th edn, para.30.23

absence of good faith, but does not require evidence of dishonesty. A receiver is not obliged to prove good faith in respect of every act he has carried out in respect of the property; it is for a person alleging bad faith to prove it. In so far as consistent with the mortgagee's right to put his own interests first, the mortgagee must act fairly towards the mortgagor. Where their interests conflict, he is not entitled to act in a manner which unfairly prejudices or wilfully and recklessly sacrifices the interests of the mortgagor. Depending on the particular facts and circumstances of the case, he may also owe other duties in equity; the equitable obligations are flexible and will be adjusted to fit the requirements of the time.

Subject to those duties, the court will not inquire into his motives for exercising (or not exercising) the power of sale."

- [51] These general commentaries on the law have been expansively pronounced upon in the cases. See Salmon LJ's guidance in **Cuckmere Brick Co. Ltd and another v Mutual Finance Ltd; Mutual Finance Ltd v Cuckmere Brick Co. Ltd and others**²⁸ where his Lordship explained that

"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment

²⁸ [1971] 2 All ER 633 at 643

may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor."

[52] The mortgagee's right to sell is therefore quite extensive and it is the law that once the power of sale accrues to the mortgagee, that is to say, the mortgagor has fallen into default to pay, a sale may only be pre-empted, stopped or set aside on limited grounds. **Fisher and Lightwood** observe that a mortgagee may only be restrained from exercising his power of sale before entering into a contract of sale where the mortgagor tenders to the mortgagee or pays into court the sums claimed to be due under the mortgage. If the claim is excessive, the mortgagor is merely obliged to tender or pay into court the sums claimed less the excess²⁹.

[53] Where the mortgagee has entered into a contract for sale of the mortgaged property further to the right to sell, the principle is that the

²⁹ Supra, note 21 at para. 30.35

mortgagor is not permitted to stop or restrain the sale merely by tendering or paying into court the sums due. He may only stop the completion of the sale if he can show that the right to sell is not being properly exercised. Accordingly it has been said that where the mortgagee is acting properly in concluding the sale, the mortgagor will not be permitted to stop the sale even on grounds that the amount due is in dispute.³⁰

[54] Crossman J in **Lord Waring v London and Manchester Assurance Co. Ltd**³¹ offers the following elucidation on the matter –

“If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court in proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgment, perfectly clear ... that the mortgagee ... can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside.

In my judgment, s. 101 of that Act³², which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by

³⁰ Supra, note 21 at para. 30.36

³¹ [1935] Ch 310 at pages 318 -319

³² Section 101 of the UK Law of Property Act 1925 is similar to section 9 of the Grenada Act

private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor."

[55] It has now been accepted also that, in addition to the duty to act in good faith in concluding the sale mentioned above, the mortgagee also has a duty "*...to take reasonable steps to obtain the true market value of the mortgaged property at the date at which he decides to sell it.*"³³

[56] The position at law appears to be therefore that once a contract for sale has been entered into, (even pending completion of a proposed sale), the mortgagor's equity of redemption is extinguished and the mortgagor is precluded from exercising the right to redeem the property even on tendering payment to the mortgagee of the sums due or paying the same into court. He or she may only stop or restrain the sale where it is

³³ See Salmon LJ in **Cuckmere** at page 643.

shown that the mortgagee is not acting in good faith or otherwise acting reasonably to obtain the true market value for the property.³⁴

[57] Outside of the foregoing, the only obligations imposed by law on the mortgagee in terms of the sale of the mortgaged property further to the mortgagor's failure to pay, are the post-sale obligations once the mortgagee has realised its security by sale. Of singular importance to this claim is section 11(3) of the Act which is set out above.

[58] It is to this section 11(3) that Mrs. Roden Layne has resort in respect of her claim that GCBL owes her the commission after the sale of the property to the Steeles. More will be said later about this post sale obligation.

Gittens' rights notwithstanding breach of payments

[59] Mrs. Roden Layne submits that Gittens (for the reasons stated above Gittens is considered as standing in the shoe of the mortgagor for the purposes of the discussions in this claim) "*had the legal authority to treat with, including selling the...mortgaged property at any time prior to the Second Defendant exercising its power of sale.*"³⁵

[60] This is indeed a quite correct legal posture since it is the law that the mortgagor retains what is termed the equity of redemption over

³⁴ See National Provincial Bank v Ahmed, Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Limited [1967] 3 All ER 321; and Lord Waring v London & Manchester Assurance Co. Ltd [1973] 1 All ER 481. See also Duke v Robson

³⁵ Supra, note at para.13

mortgaged property which equity includes a right to redeem the property. The equity of redemption is not extinguished where the mortgagor fails to pay as agreed. Rather the right to redeem remains even in the face of default. **Fisher and Lightwood** explain that –

“Where a mortgage is effected by assignment or demise, then upon non-payment by the appointed time, the estate of the mortgagee at law becomes absolute and irredeemable. However, equity does not give to the mortgagor merely a right to redeem after the contractual date for redemption. From the outset of the mortgage, equity regards the mortgagor as the 'true' owner of the land, subject to the mortgage. This equity of redemption is itself an interest in property, which has been described as an estate, and as an interest or equitable right inherent in the land. Its existence (unlike the equitable right to redeem) pre-dates the contractual redemption date. The equity is assignable, chargeable and devisable – even at law – and subsists until extinguished by, for example, sale or foreclosure, notwithstanding that the mortgagee's interest may in the meantime have become absolute.”

[61] Lord Neuberger in **Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd** ³⁶ explains the development of the law –

“Until statute intervened in 1925, the common form of mortgage conveyed the land to the mortgagee subject only to a proviso for

³⁶ (No 2) [2013] 4 All ER 936 at para.71 et seq

redemption within a specified period (normally six months). That date, the legal redemption date, would almost always pass (and was normally intended by the parties to pass) without repayment, so that the land would then belong absolutely to the mortgagee as a matter of common law—see *Cheshire and Burn's Modern Law of Real Property* (18th ed, 2011), p 799 and *Megarry & Wade, The Law of Real Property* (8th ed, 2012), p 1117–1120. However, as those books go on to explain, despite the land having become the absolute property of the mortgagee in the eyes of common law, the Court of Chancery invariably recognised that the mortgagor's right to redeem survived notwithstanding the fact that, in common law, the land had absolutely passed to the mortgagee. As it is put in *Megarry & Wade*, p 1118, '[t]he mortgagor was thus given an equitable right to redeem at a time when the agreement between the parties provided that the mortgagee was to be the absolute owner of the land.'

[72] This right arose because the Court of Chancery, exercising its equity jurisdiction, recoiled from the notion that a borrower who had provided the lender with security, which traditionally was always in the form of land, should lose its land simply because it was late in repaying the loan secured on that land—see per Lord Haldane LC in *Kreglinger (G & C) v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 35, [1911–13] All ER Rep 970 at 973. Thus, the equitable right to redeem does not arise until the contractual redemption date has passed—see

Brown v Cole (1845) 14 Sim 427, (1845) 60 ER 424. So, under a normal form of mortgage, a mortgagor had two rights to redeem, a legal right only exercisable on the contractually stipulated date, and an equitable right exercisable at any time after the contractually stipulated date—see *Megarry & Wade*, p 1119.

[73] Save where it was inequitable to do so, the Court of Chancery recognised the borrower's right to redeem the land even after the legal effect of the agreement between the lender and the borrower was that the lender had become the absolute owner of the land—see *Salt v Marquess of Northampton* [1892] AC 1 at 18. This equitable right to redeem (the right to redeem) is part, normally the most important part, of the parcel of rights, known as the equity of redemption, which equity considered that a mortgagor should enjoy. The equity of redemption was treated by the Court of Chancery as an equitable interest in land—see *Casborne v Scarfe* (1737) 1 Atk 603 at 605, (1737) 26 ER 377 at 379.

[74] As Sir George Jessel MR put it in characteristic terms in *Campbell v Holyland* (1877) 7 Ch D 166 at 171,

'The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and ... the doctrine arose at a time when mortgages were made in the form of a conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract of the parties; yet

Courts of Equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and that the mortgage money should be a debt; and they gave relief in the shape of redemption on that principle.'

As Harman LJ explained in *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 All ER 143 at 146, [1964] 1 WLR 139 at 142, 'Chancery would treat as a mortgage that which was intended to be a conveyance by way of security ... Once a mortgage always a mortgage, and nothing but a mortgage'—and see eg per Lord Lindley in *Samuel v Jarrah Timber Wood and Paving Corpn Ltd* [1904] AC 323 at 329 to the same effect.

[75] The equity of redemption could classically only be lost by release from the mortgagor, **by sale of the land by the mortgagee under a statutory power**, or by lapse of time—see *Cheshire and Burn*, p 837–838. As Lawrence LJ put it in *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29 at 52, [1932] All ER Rep 277 at 285:

'no agreement between the parties that the mortgage should not be redeemable has any effect in equity, and any attempt to fetter the equity of redemption with any other condition than the payment of the money secured is null and void'." (Bold emphasis mine)

[62] It must be reiterated that, as stated above, while the mortgagor is entitled to sell further to the equity of redemption, as explained above, the right is subject to the mortgagee's power of sale where the

mortgagor has defaulted on the payments. See Crossman J's dictum in **Lord Waring** recited above. **Fisher and Lightwood's** expounding on the matter has also been referenced above. In this regard, as explained above in this judgment, it was elucidated in **National & Provincial Building Society v Ahmed** that the equity of redemption may, for instance, be extinguished when the mortgagee, in exercise of the power of sale, enters into a contract to sell the mortgaged property and not when the contract is later completed.

My thoughts

[63] The effect of the foregoing propositions of law is that –

- (1) Where the mortgagor falls into default of payment, the mortgagee is entitled to, among other things, sell outright any property which the mortgagee holds as security for the loaned sums due;
- (2) The mortgagee is not selling as agent of or on behalf of the mortgagor and can sell without regard to the interests of the mortgagor;
- (3) In selling he or she (the mortgagee) is to have to regard, however, to his or her obligation to act in good faith and to act reasonably to obtain the true market value of the property;

- (4) Notwithstanding these foregoing propositions, the mortgagor retains an equity of redemption which he or she can dispose of by, among other things, selling the same;
- (5) The mortgagor must be mindful though that the mortgagee can sell outright and that, provided that the mortgagee is selling in good faith and acting reasonably to obtain the true market value of the property, before a contract is entered into, the mortgagee can only be stopped in the sale effort if all the moneys due to the mortgagee under the mortgage are paid to the mortgagee or tendered into court;
- (6) If the mortgagee enters into a sale agreement, the mortgagor's equity of redemption is extinguished and the sale may only be set aside on grounds that the sale is not being conducted or has not been conducted in good faith or that the mortgagee is not acting or has not acted reasonably in obtaining the true market value of the property.

What are the implications of those principles for this claim thus far?

GCBL

- [64] Once Gittens had fallen into default of payments under the loan, there was nothing precluding GCBL from selling its security, the property, outright without any regard to any interests Gittens may have held in the same. In that exercise, GCBL would be acting in its own interest and not as the agent or on behalf of Gittens. So long as GCBL acted in good faith and reasonably to obtain the true market value of the property, it

could proceed with any sale to sell the property to recoup the sums owed to it by Gittens.

Gittens

[65] Equally, up until GCBL entered the sale agreement with the Steeles on 20th April 2016, Gittens could pursue selling the property in furtherance of the rights attendant to its equity of redemption. Gittens could also retain anyone to do so on its behalf. Before GCBL entered into the sale agreement with the Steeles on 20th April 2016, Gittens or its agent on Gittens' behalf could tender the full sums due to GCBL. GCBL would have then be obliged to stop or to order its agent, Terra Caribbean, to stop all its negotiations for the sale of the property.

[66] After GCBL entered a sale agreement with the Steeles on 20th April 2016, Gittens or Mrs. Roden Layne on Gittens' behalf could no longer proceed with any sale of the property. Gittens could not stop the completion of any sale by GCBL with the Steeles after 20th April 2016 except where it was argued that GCBL was not acting in good faith or was acting unreasonably in obtaining the true market value of the property from the Steeles. Once the sale was completed on 27th May 2016, the only interest residing in Gittens or its agent, Mrs. Roden Layne is with respect to the post sale obligations under the mortgage contract or in law, including the obligations as to the disbursement of the sale sums³⁷.

³⁷ I observe that in the 3rd December 2014 Sale Agreement, GCBL and Gittens agreed to some terms on which the sale proceeds would be disbursed.

The sale agreement and the agency of Terra Caribbean and Mrs. Roden Layne

[67] The further import of all this is that although GCBL and Gittens entered into the sale agreement, either of them could proceed to sell the property pursuant to their individual rights but subject to the conditions in the law recited above. The only implication of the sale agreement entered in between the parties in December 2014 was that the parties outlined terms on which they would both exercise their rights to sell the property. It did not preclude them from selling according to their various interests but merely circumscribed the manner in which they did so. That arrangement was agreed for a period of nine months. When the nine months ended without sale of the property, either party could continue to fully explore their right to sell the property. This is what precisely occurred.

[68] Mr. Gittens on behalf of Gittens (further to Gittens' effort to sell under its equity of redemption) engaged Mrs. Roden Layne in December 2015 to sell on its behalf. For those purposes, Mrs. Roden Layne can be strictly described as the mortgagor's agent in the mortgagor's exercise to realise its equity of redemption by sale of the property. Mrs. Roden Layne's discussions and engagements with Mr. Steele regarding her retainer with Mr. Gittens on behalf of Gittens were entirely in her capacity as acting for and on behalf of the mortgagor and not the mortgagee, GCBL. It is quite evident also that GCBL was at the same time pursuing its right to sell the property pursuant to its power of sale.

In furtherance of that effort, it withheld advertising the property until 15th September 2015, but thereafter it was quite free to sell the property by advertising it as it pleased including advertising the sale on Terra Caribbean's website through its agency agreement with Terra Caribbean.

[69] Additionally, it would seem to me that Terra Caribbean was not precluded in any of the material before me from acting as agent for Gittens either in the exercise of the rights attendant to Gittens' equity of redemption or as agent retained by GCBL in exercise of GCBL's power of sale. It turns out that Terra Caribbean contacted GCBL and concluded the sale with GCBL further to GCBL and Terra Caribbean's agreement. There is no evidence that Terra Caribbean ever contacted Mr. Gittens further to Terra Caribbean's agreement with Gittens. Thus for all intents and purposes, the sale was completed further to the exercise of GCBL's power to sell and not further to Gittens' exercise of its rights under the equity of redemption.

[70] In the meantime, Mrs. Roden Layne was not similarly circumstanced as Terra Caribbean. Mrs. Roden Layne was not retained by GCBL and as such had no connection to the mortgagee's exercise of its power of sale. She was, as I have stated above, the agent for the mortgagor's exercise of its rights under the equity of redemption. To be fair, Mrs. Roden Layne had no idea that GCBL held the power of sale over the property. But I see nothing wrong with this state of affairs.

[71] In fact, Mrs Roden Layne states in her evidence that when she queried about this lack of information from Mr. Gittens, he made it plain that **“he was the one who engaged me and any sale I got would be a matter between me and him.”** In my view Mr. Gittens was correct in this assertion since he was seeking to realise the rights attendant to the mortgagor’s equity of redemption and, subject to what I have said above about the limitations attached to such rights, Gittens’ exercise of this right had nothing to do with GCBL’s right to sell the property. But now that the property was sold by GCBL in furtherance of its power of sale, was Mrs. Roden Layne to be paid out of the funds realised and, if so, who should pay her? This raises questions of the disbursement of the sums raised by the sale of the property.

What then of the disbursement of the proceeds of the sale?

[72] As stated above, Mrs. Roden Layne argues that GCBL should pay her out of the proceeds of sale. Mrs. Roden Layne argues that the statutory basis for her claim arises from section 11(3) of the Act recited above. To repeat, section 11(3) reads –

“The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, **shall be held by him or her in trust to be applied by him or her, first, in payment of all costs, charges and expenses properly incurred by him or her as incident to the sale or any**

attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest and costs and other money, if any, due under the mortgage; and the residue of the money shall be paid to the person entitled to the mortgaged property or authorised to give receipts for the proceeds of the sale thereof.

[73] **Fisher and Lightwood** make the point that –

“A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee exercising the power of sale a trustee of the surplus proceeds of sale, if any, for the interested persons according to their priorities.”³⁸

And,

“A mortgagee's right to costs arises out of the particular relationship between him and the mortgagor. Therefore, even in the absence of a stipulation regulating the recovery of costs in the security document, a mortgagee is entitled to reimburse himself out of the mortgaged property for all costs, charges and expenses reasonably and properly incurred in enforcing or preserving the security...”³⁹

[74] The foregoing exposition of law makes perfect sense. If the mortgagee is put to the expense and costs of exercising his or her power of sale to recover the sums due to him or her, section 11(3) states clearly that it permits him or her to recoup those expenses and costs properly

³⁸ See para.55.1 of Fisher and Lightwood and Parker-Tweedale v Dunbar Bank plc (No 2) [1991] CH.26

³⁹ Ibid

“incurred by him or her”. It must be recalled that the sale to which section 11 refers is the sale permitted by section 9 of the Act, that is, the mortgagee’s power of sale. It makes no sense for the mortgagee to repay the expenses or costs of the mortgagor’s exercise of its rights to sell under the mortgagor’s equity of redemption. In terms of the facts under consideration in this case, I would say that in a case of this nature, the only obligation that the mortgagee held to the mortgagor was to pay out any surplus of the sale moneys to the mortgagor (or other person entitled to the equity of redemption). The mortgagor or other person entitled to the equity of redemption may then disburse those funds as they see fit including paying expenses incurred for the exercise of the mortgagor’s rights under the equity of redemption. For it must always be remembered that in the exercise of the mortgagee’s power to sell to get in the moneys due from the mortgagor, the mortgagee owes no obligation to the mortgagor or anyone acting on the mortgagor’s behalf other than to exercise the mortgagee’s power of sale in good faith and to act reasonably in getting the true market value of the property. The entire purpose of the exercise of the mortgagee’s power of sale is to get in the sums due and to do so for its own benefit and not that of the mortgagor.

- [75] The converse of this logic would suggest that where the mortgagee exercises the power of sale, the mortgagee has to pay any expense or costs that the mortgagor or the mortgagor’s agent’s may have incurred in any attempt to exercise the mortgagor’s rights to sell under the equity of redemption before the mortgagee retrieves the sums due for the debt that the mortgagor has defaulted on. This would have the extraordinary

result, for instance, that if the mortgagee sold the property for a sum less than the sums due to the mortgagee by the mortgagor, the mortgagee would be obliged to put the mortgagor's interests before its interests and ensure that the expenses of the mortgagor consequent on the mortgagor's attempt to exercise of its rights under the equity of redemption by means of selling are satisfied before the mortgagee can satisfy the debt due to itself. Mrs. Roden Layne has presented no authority for such a posture in law.

[76] I would say bluntly that, in a case of this nature, any expense or cost incurred by the mortgagor in the exercise of its rights under the equity of redemption are the mortgagor's expenses except where it can be shown that those expenses and costs were incurred as consequence of the mortgagee's failure to honour its obligation act in good faith and to act reasonably in obtaining the true market value of the property or some other breach of the obligations that the mortgagee may have to the mortgagor. The mortgagee is allowed in law to recover the expenses or costs that **he or she** properly incurs from the exercise of the power of sale, since it is through no fault of him or her that he or she has to go to market to sell the property to obtain the sums due from the mortgagor. The mortgagee cannot be asked to bear his or her own expense or costs properly incurred by him or her in those circumstances.

[77] Permit me to add that it would be a different scenario in those cases where, by way of example, a receiver is appointed at the instance of the mortgagee. See, for instance, section 14 of the Act which reads –

Appointment, powers, remuneration and duties of receiver

(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he or she has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his or her hand, appoint such person as he or she thinks fit to be receiver.

(2) The receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(6) The receiver shall be entitled to retain out of any money received by him or her for his or her remuneration, and in satisfaction of all costs, charges and expenses incurred by him or her as receiver, a commission at such rate, not exceeding five per cent on the gross amount of all money received, as is specified in his or her appointment, and if no rate is so specified, then at the rate of five per cent on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him or her for that purpose.

((8) The receiver shall apply all money received by him or her as follows, namely in—

(a) the discharge of all rents, taxes, rates and outgoings whatever affecting the mortgaged property;

(b) keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he or she is receiver;

(c) **payment of his or her commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;** and

(d) in payment of the interest accruing due in respect of any principal money due under the mortgage, and shall pay the residue of the money received by him or her to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property. (Bold emphasis mine)

[78] Section 14 recites the statutory power of the mortgagee to appoint a receiver. The mortgagee may also do so by the express terms of the deed of mortgage or by an order of the court. Section 14(2) stipulates that the receiver is deemed to be the mortgagor's agent except where the parties expressly agree otherwise by deed. Section 14(6) states that the receiver's costs, charges and expenses are paid out of the sums obtained from the sale of the mortgage property or other income derived from the exercise of the receiver's powers in accordance with the receiver's instruction.

[79] The similar principle applies where the receiver is appointed by express powers set out in the deed. **Fisher and Lightwood**⁴⁰ explain

⁴⁰ Supra, note 50 at para.28.8

“A receiver appointed under an express power is generally expressed to be, or expressly deemed to be, the agent of the mortgagor by the terms of the power⁵. The mortgagor will thus be liable for the receiver's acts and defaults⁶. However, if the receiver was appointed under an express power and is not expressed to be the agent of the mortgagor, he will be the agent of the mortgagee and the mortgagee will be responsible for his acts, defaults and remuneration⁷. The receiver will not be deemed to be the mortgagor's agent if the mortgagee represents otherwise, or directs or interferes with his actions.”

In the latter instance, the expenses and costs of the receiver properly incurred, would be expenses and costs that would be paid out of the sums obtained from the sale of the mortgage property or other income derived from the exercise of the receiver's powers in accordance with the receiver's instruction.

[80] Now, Mrs. Roden Layne may argue that the expenses of the sale were not properly incurred by GCBL because GCBL was made aware that she had introduced the property to the Steeles and should have paid her instead of Terra Caribbean. She is wrong, in my view, for two reasons –

(1) For the reasons that I have stated above, GCBL held no obligations to her in law and could have ignored her request even if it was made before the 20th April 2016 when GCBL entered into an agreement for sale with the Steeles through GCBL's agent, Terra Caribbean. This is since, to repeat, Mrs. Roden Layne was Mr. Gittens or

Gittens' agent and not GCBL's agent. She was not acting to get in GCBL's money further to its power of sale. She was acting as agent for Gittens further to the exercise of Gittens' rights under the equity of redemption. The mortgagee, GCBL, held no obligations in law to the mortgagor, Gittens, for the exercise of Gittens' rights under the equity of redemption, other than to act in good faith and to act reasonably when GCBL was exercising its own power to sell the property;

(2) Even if GCBL was obliged in law to pay the mortgagor's agent for the agent's expenses, there was no sale by the agent. By 25th April 2016 when Mrs. Roden Layne, as agent for Gittens, contacted GCBL⁴¹, a sale agreement was already settled by GCBL with GCBL's agent Terra Caribbean on behalf of the Steeles. Terra Caribbean was thereby entitled to receive the commission as part of GCBL's expenses of the sale in accordance with section 11(3) of the Act.

[81] This would mean that Mrs. Roden Layne has not proved her claim for the commission from GCBL. Before parting on this aspect of the claim though, I must comment on Mrs. Roden Layne's assertion that she bore no duty in law to research the Gittens' title before going to market the property for sale. I agree with Mrs. Roden Layne that the law does not impose such a duty on her. But certainly had she advised herself both

⁴¹ It must always be remembered that Mrs. Roden Layne was contacting GCBL in her capacity as Gittens' agent in Gittens' exercise of its rights under the equity of redemption. GCBL held no obligations in law to either Gittens or Mrs. Roden Layne other than the duty to sell the property in good faith and to act reasonably in recouping the true market value for the property.

of the capacity in which she was engaged and/or researched the title to the property before going to market, she would have been aware that the property was encumbered with the mortgage to GCBL and that GCBL was in the process of selling the property under its power of sale.

- [82] This information would have, additionally informed Mrs. Roden Layne of the capacity in which Mr. Gittens and Gittens were engaging her. In her witness statement at paragraph 21 she explains that during the month of March 2016, after she learnt of GCBL's involvement with the property, she contemplated whether she should register with GCBL "*as an agent*" and disclose "*my interest in the sale of the property. But I decided against that because I decided to honour the undertaking of confidentiality I had given to Jonathan Steele.*" I believe that if Mrs. Roden Layne had investigated the title of the property that she was tasked with selling before going to market with the same, she would have been able to better inform herself of whether she needed to engage with GCBL at a much sooner date. Perhaps such research would have advised her whether she needed to be engaged as agent for GCBL in the exercise of its power of sale at a date before GCBL agreed to sell the property to the Steeles.

Does Gittens have to pay Mrs. Roden Layne?

- [83] Mrs. Roden Layne has also claimed against Gittens for breach of contract. The short answer to this is that Gittens was trying to sell further to its rights under the equity of redemption. Such a sale was always at risk of being overridden by a sale concluded by GCBL pursuant to its

power of sale, which is what transpired. Mr. Gittens and Gittens did not breach the contract with Mrs. Roden Layne. That contract was made subject to GCBL's right to sell the property outright. If GCBL exercised its right to sell, as it so did in this case, Gittens could owe no obligation to Mrs. Roden Layne in such circumstances.

[84] In any event, Gittens' obligation to pay Mrs. Roden Layne could only arise if a sale was concluded by her. No such sale was concluded by Mrs. Roden Layne and there is no evidence presented by her to suggest that Mr. Gittens did anything to cause such an event not to occur. The claim against Gittens must also fail.

Gittens' ancillary claim against GCBL

[85] There is no need to venture any thoughts on Gittens' ancillary claim against GCBL since the success or otherwise of that claim was entirely contingent on Mrs. Roden Layne being successful in her claim against Gittens. Mrs. Roden Layne's claim against Gittens is unsuccessful and as such the ancillary claim is rendered moot.

Conclusion

IT IS HEREBY ORDERED:

[86] The claim brought by Mrs. Roden Layne against Gittens and GCBL is refused.

[87] The ancillary claim brought by Gittens against GCBL is also refused.

[88] Mrs. Roden Layne is to pay costs to GCBL in the sum of \$25,000.00 for defending the claim and ancillary claim and costs to Gittens for defending the claim in the sum of \$2,500.00.

Raulston L.A. Glasgow
High Court Judge

BY THE COURT

REGISTRAR