

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

GRENADA

CLAIM NO. GDAHCV2019/0352

**IN THE MATTER OF AN INDENTURE OF MORTGAGE MADE THE 11TH MAY 2011
BETWEEN ERRON WILLIAMS OF ANNANDALE IN THE PARISH OF SAINT GEORGE
IN GRENADA OF THE ONE PART AND RBTT BANK GRENADA LIMITED A LIMITED
LIABILITY COMPANY INCORPORATED UNDER THE COMPANIES ORDINANCE
CHAPTER 47 OF THE 1934 EDITION OF THE REVISED LAWS OF GRENADA AND
CONTINUING UNDER THE COMPANIES ACT, 1994 AND CARRYING ON BANKING
BUSINESS IN GRENADA OF THE OTHER PART AND RECORDED IN THE DEEDS AND
LAND REGISTRY ON 9TH JUNE 2011 IN LIBER 16-2011 AT PAGE 274**

BETWEEN:

RBTT BANK GRENADA LIMITED

Claimant

and

ERRON WILLIAMS

Defendant

Before:

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

High Court Judge

Appearances:

Ms. Maurissa Johnson for the Claimant

Mr. Derick Sylvester with him Ms. Hazel Hopkin for the Defendant

2021: December 9;
2022: January 21 (Written submissions);
March 29.

JUDGMENT

[1] **GLASGOW, J.:** This is a claim for monies due and owing pursuant to a mortgage between the claimant, RBTT Bank Grenada Limited, formerly known as the

Grenada Bank of Commerce Limited (the bank) and the defendant, Mr. Erron Williams, (Mr. Williams).

The pleadings

Claimant's case

- [2] On 11th May, 2011 Mr. Williams executed a mortgage in favour of the bank in the sum of \$120,000.00 together with interest at the rate of 10.5% per annum. Mr. Williams' property is situated at Annandale in the parish of Saint George (the property). It was used as security for the mortgage.
- [3] Mr. Williams defaulted in his repayment obligations under the mortgage. Thereafter, the bank exercised its power of sale under the mortgage and sold the property on 12th May 2017 for the purchase price of \$49,000.00.
- [4] The bank contends that notwithstanding the sale of the property, the proceeds of sale were insufficient to satisfy the debt. The bank claims that Mr. Williams still owes the sum of \$87,210.31 to the bank.
- [5] By letter dated 23rd August 2017, the bank informed Mr. Williams that it was seeking payment of the balance of \$87,210.31 failing which it would commence legal proceedings against him to recover the sum. The bank pleads that, to date, Mr. Williams has failed, refused and/or neglected to make payment towards the outstanding debt. Therefore, the bank claims for relief against Mr. Williams in the sum of \$99,104.27 together with costs.

Defendant's case

- [6] On 11th October 2019 Mr. Williams filed a defence and counterclaim in response to the claim wherein he states that:-

- (1) On 28th July 2000, he agreed to buy the property for the purchase price of \$60,000.00. Thereafter, he secured a mortgage with the bank in the sum of \$40,000.00 to assist with the purchase of the property.
- (2) The property was valued by Kenrick Gabriel & Associates Ltd. on 13th April 2011 in the sum of \$152,460.00 with a forced sale value of \$137,214.00.
- (3) Subsequent to the Kenrick Gabriel & Associates Ltd valuation, he obtained a further mortgage from the bank in the sum of \$120,000.00 with interest at a rate of 10.5% per annum. The property was again used as security for the mortgage.
- (4) The bank exercised its power of sale by selling the property for the price of \$49,000.00 without regard to the 2011 valuation of \$152,460.00 conducted by Kenrick Gabriel & Associates Ltd.
- (5) He does not deny his inability to service the mortgage, but he pleads that the bank sold the property at an undervalued price.
- (6) He alleges that the bank's actions were negligent, inequitable and done in bad faith. Further, he complains that the bank accepted the lowest possible price and that it failed to properly advertise the sale of the property.
- (7) The bank failed to properly advertise and/or seek the market value for the property which would have appreciated since 2011 which was the date of the last valuation.
- (8) The bank failed to consider his interest throughout the proceeds of the sale of the property;
- (9) Having regard to the above, Mr. Williams counterclaims for special damages in the sum of \$105,260.00 (being the difference between the market value of the property at \$152,460.00 less the sale price of \$49,000.00); general damages for negligence/breach of statutory duty/breach of contract/ breach of trust and or breach of equitable duty; and declaratory orders, interest and costs.

Issues

- [7] The parties have agreed that the court is to determine the following issues:
- (1) Whether the bank, in exercising its power of sale, did all that was reasonably sufficient to procure the best price reasonably obtainable and is entitled to recover the remaining sum owed to it.
 - (2) If the first issue is answered in the negative, then whether Mr. Williams is entitled to recover the sum of \$105,260.00, among other relief claimed in his counterclaim.

Discussion and Analysis

Submissions on the applicable law Claimant's submissions

- [8] Counsel for the bank, Ms. Maurissa Johnson, submits that the duty of a mortgagee in relation to the exercise of its power of sale is to take reasonable precaution to obtain the true market value of the mortgaged property. Ms. Johnson relies on the case of **Cuckmere Brick Co. Ltd. and Another v Mutual Finance Ltd**¹ to support her submission.
- [9] Additionally, Ms. Johnson submits that the sale under the exercise of a power of sale must be a genuine sale by the mortgagee to an independent purchaser at an honest price. The duty as Ms. Johnson puts it, is that the mortgagee must act in good faith and take reasonable precautions to obtain a proper price. The mortgagor has no redress even though more might have been obtained if the sale had been postponed as stated by Lord Cross in **Cuckmere**².
- [10] Further, Ms. Johnson explains that the test to be applied by the court is whether the bank did all that was reasonably sufficient to procure the best price reasonably obtainable. In considering whether the mortgagee has fallen short of that duty, the

¹ [1971] Ch. 949 CA at pages 968 H-969 A and pages 965 F to 966 A per Lord Salmon

² Ibid at pages 969 H and 970 C

facts must be looked at broadly and the mortgagee should not be adjudged to be in default unless he is plainly on the wrong side of the line.

Defendant's submissions

- [11] Counsel for Mr. Williams, Mr. Derick Sylvester, submits that the duty of a mortgagee in the exercise of its power of sale has long been settled by the court in **Cuckmere Brick Co. Ltd. and Another v Mutual Finance Ltd**³. Mr. Sylvester refers to page 966 of the judgment where Salmon LJ explained that a mortgagee under its power of sale is only a trustee of the proceeds of sale and not of the power of sale. Further, the mortgagee must not act contrary to his interest in the sale.
- [12] Moreover, the mortgagee must take care to ensure that he obtains the true market value of the mortgaged property at the time of the sale. Salmon LJ's exposition at pages 965-967 of **Cuckmere Brick Co. Ltd.**, is recited by counsel

At pages 965-966:

"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 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."

And at page 767:

"There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain

³ [1971] Ch. 949

whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, *Kennedy v. de Trafford* [1896] 1 Ch. 762; [1897] A.C. 180 with *Tomlin v. Luce* (1889) 43 Ch.D. 191, 194.

The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.”

- [13] Mr. Sylvester points out that while the mortgagee enjoys some degree of latitude in the sale of the property, the mortgagee is under a duty to act reasonably in obtaining the best price for the mortgaged property. This position he says was adopted in our jurisdiction in the recent decision of **Grenada Development Bank v Dexter Chance**⁴. Mr. Williams, accepts that, the law is clear that, even though the sale of the mortgaged property results in a disadvantageous outcome for the mortgagor in relation to the difference between the market value and the sale price, this is not proof of negligence on the part of the mortgagee. This position was recently restated by our Court of Appeal in **Caribbean Banking Corporation v Alpheus Jacobs**⁵. However, Mr. Sylvester submits that where the stated market value is so low it may lend itself to some evidence of fraud. In **Warner v Jacob**⁶, Kay J at page 224 of the judgment stated:

“...a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bonâ fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.”

- [14] Additionally, Mr. Sylvester argues whether or not a mortgagee has discharged its duty to secure the best price for the mortgaged property is a matter of fact to be determined upon consideration of all the circumstances of the case. In considering a potential breach of this duty, Mr. Sylvester urges that the reasonableness of the steps that have been taken by the mortgagee to obtain the best price for the property must be considered in the round⁷. Mr. Sylvester also commended the court to the

⁴ GDAHCV2010/0166

⁵ ANUHCVP2004/010

⁶ (1882) 20 Ch D 220

⁷ *Apple Fields & Others Ltd v Damesh Holdings Ltd* [2004] 3 LRC 221 applied in *Alpheus Jacobs*

Privy Council decision of Templeman J in **Tse Kwong Lam v Wong Chit Sen and others**⁸.

- [15] Mr. Sylvester presents the case of **The Bank of Nova Scotia v Lind Lou-Liburd et al**⁹ as an instance where the issue of whether the mortgagee took reasonable care to obtain the true market of the mortgaged property upon sale was considered. In that case, the property in dispute case was valued on four occasions between October 2011 and October 2014 with each successive valuation decreasing the market value of the property by 15 percent. Mr. Sylvester commends the court to paragraph 4 of the decision of Ventose J in **Lind-Lou-Lubird**, where the court found that the valuations did not indicate or “explain the reduction in value during the three-year period”. In the premises, it is Mr. Williams’ contention that the bank has breached its duty owed to him as mortgagor to obtain the true market value of the property.

The valuation reports

The Kenrick Gabriel & Associates Ltd valuation

- [16] On 13th April 2011, a valuation report for the property was prepared by Kenrick Gabriel & Associates Ltd for Mr. Williams. In summary the report states that:
- (1) It is signed by one Kenrick Gabriel, who is the principal engineer for the company.
 - (2) A site visit of the property was conducted on 12th April, 2011.
 - (3) The property contains 21,780 square feet.
 - (4) The property is best used for residential purposes.
 - (5) The topography of the property is gently sloping.
 - (6) The property has access to services and amenities, including electricity, water and telephone.

⁸ [1983] 3 All ER 55 at page 63

⁹ SKBHCV2016/0108

- (7) The value per square foot of the property is \$7.00.
- (8) The total value of the property is EC \$152,460.00.
- (9) The forced sale value of the property is estimated at EC \$137,214.00

The Terra Caribbean valuation

[17] On 28th June 2016, Terra Caribbean sent a report to the bank in respect of the property. The report reveals that the property was inspected on 17th June, 2016 which is the date of the valuation. The valuation report states:

- (1) The property is vacant and measures 21, 780 square feet.
- (2) The topography is gently sloping.
- (3) The property has access to cable television, water and telephone services.
- (4) There are overhead electric mains.
- (5) The property offers a view of the surrounding hilltops and is occupied by trees, shrubs and some agricultural crops.
- (6) The property is bound by vacant lots to the north and south. However, there are dwelling houses to the west and east of the property.
- (7) The access road is partially paved and all utilities are available, including water, electricity and telephone.
- (8) It should be noted that the plot plan was not available at the date of the valuation. One boundary marker was identified at the date of the valuation. The land area noted is per the deed of conveyance dated 28th July, 2000.
- (9) The neighbourhood where the property is located lies within a subdivision of the Annandale Estate. The subdivision is predominately characterised by vacant and cultivated lots. There are some concrete and modest residential dwellings in the area. The neighbourhood features a waterfall (a tourist attraction) and a water plant. There are amenities such as school, church and small retail shops located in the neighbourhood.
- (10) In relation to the market value, the report reveals that the property has a market value of \$2.25 per square foot.
- (11) The total value of the property is indicated at \$49,000.00

(12) Three comparable properties were used to estimate the market value of the property. Two lots within the Annandale neighbourhood and one in Vendomme, Saint George. The acreage of Annandale properties were 43,832.25 square feet and 48,188.25 square feet respectively. Both Annandale lots were sold on 21st April 2016 for EC \$65,000.00 and \$70,000.00 and were valued at \$1.48 per square foot and \$1.45 per square foot respectively. The Vendomme lot was sold on 2nd April 2014 for EC \$78,000.00 and measured 20,515 square feet.

Submissions on the Terra Caribbean valuation

Claimant's submissions

- [18] Counsel for the bank, Ms. Johnson explains that the bank relies on the Terra Caribbean (Terra) valuation. Ms. Johnson points out that Terra considered several properties which were sold in the immediate and surrounding areas within three years of the date of the appraisal.
- [19] Further, Ms. Johnson observes that the first two comparative properties listed on page 4 of the report were both located in Annandale and were sold on 21st April 2016, which was a mere two months prior to the date of the report. The Vendomme property was sold in 2014, two years prior to the date of the report.
- [20] Additionally, Ms. Johnson notes that the Annandale comparatives were sold for EC \$1.48 and EC \$1.45 per square foot respectively and did not have readily available utilities as was the case with the property. Ms. Johnson also notes from the report that the Vendomme property had better access and views than the property and sold for EC \$3.80 per square foot. Ms. Johnson submits that the above variable required Terra to make adjustments in order to ascertain the value of the property at EC \$2.25 per square foot.

Defendant's submissions

- [21] Mr. Sylvester states that the Terra Caribbean valuation was conducted some ten months and twenty-six days prior to the sale of the property. Therefore, Mr. Sylvester contends that this begs the question whether the valuation was done contemporaneously with the actual sale of the property. Notwithstanding the above, Mr. Sylvester notes the comments made by Terra Caribbean that *"it should be noted that the plot plan was not available at the date of the valuation¹⁰".* With respect to those comments, Mr. Sylvester is of the view that it is wholly unsatisfactory that a valuation would be conducted on the property without the appraiser having a plan in hand. Mr. Sylvester submits that it is doubtful that the appraiser was in a position to identify what was valued.
- [22] Mr. Sylvester highlights the fact that in the Terra Caribbean report, it summaries the features of the neighbourhood, including the partially paved road access, the modest condition of the dwelling houses in the area, views, attractions, amenities, and close proximity to the capital city of St. George's. Mr. Sylvester opines that the neighbourhood where the property is located is certainly one of value. Therefore, Mr. Sylvester queries the basis on which it appears from the bank's valuation that the property has decreased in value over the years. Counsel invites the court to draw a negative inference that the bank was negligent.
- [23] Mr. Sylvester then emphasised the fact that the Kenrick Gabriel valuation conducted in 2011 shows that the property was valued at \$152,460.00 which is more than double the original purchase price for the property at \$60,000.00. However, 5 years later in June 2016 Terra Caribbean valued the property for \$49,000.00 which, Mr. Sylvester concludes, amounts to a value that is about 32 % less than the property's previous value. Mr. Sylvester does not dispute that the authorities suggest that a valuation is not an exact science or the fact that valuations can differ in value. However, he argues that that there is no justification for the marked depreciation in

¹⁰ Page 3 of the Terra Caribbean valuation report found at page 76 of the Trial Bundle

the value of the property. Mr. Sylvester relies on the analysis of Ventose J in **The Bank of Nova Scotia v Lind Lou-Liburd et al** to support his rationale that the onus lies on the bank to ensure that there was justification or rationale for the depreciation in the value of the property.

- [24] Mr. Sylvester concludes that, having regard to all of the circumstances, including the absence of the survey plan, identifiable boundary marks and the lack of justification for the marked decrease in value, the bank has failed in its duty to obtain the true market value of the property.

Defendant's submissions on advertisement

- [25] With respect to the advertisement of the property, Mr. Sylvester submits that the bank as mortgagee owes a duty to the mortgagor to adequately advertise the property. Mr. Sylvester relies on **Caribbean Banking Corporation v Alpheus Jacobs**¹¹, where our Court of Appeal explained that the bank is under a duty to advertise the property for sale, properly describe it in the advertisements and ensure that the advertisements are sufficient in number. In respect of the duty to properly advertise the property, Mr. Sylvester commends the court to the findings made by the court in **RBTT Grenada Bank Ltd v Elisha Baptiste**¹², where the court found that the advertisements were inadequate since the periods between the advertisements and the proposed sale were brief.
- [26] Mr. Sylvester points out that the bank has not presented evidence of the advertisements carried out by it or its agent Terra Caribbean in respect of the sale of the property. The affiant, Nikisha Alexander, who gave evidence about the advertisement, has not identified her relationship to the bank or whether she is an employee of the bank. Further, apart from her assertion on oath that the information is within her personal knowledge, there is no evidence as to what capacity the information on the advertisement came into her knowledge or whether the evidence

¹¹ ANUHCVP2004/010 (Delivered on 6th October 2008) at para. 25

¹² GDAHCV2004/0373

of the advertisement is within her own knowledge. In any event, the statements made by Nikisha Alexander are not supported by evidence. There is no photograph of the advertisement which the bank alleged was placed on Terra Caribbean's website or evidence of the actual period the property was advertised for sale.

- [27] Mr. Sylvester points out that there is no evidence as to whether the property was sold as a consequence of the advertisements which were carried out by the bank. The bank has failed to produce evidence to substantiate its assertions that the property was properly advertised for sale. Therefore, Mr. Williams urges the court to find that the bank has failed in its duty to ensure that it took reasonable steps to obtain the true market value of the property.

Discussion and Analysis

- [28] The common law duties of a mortgagee in exercising its power of sale are well-established. Salmon LJ in **Cuckmere Brick Co. Ltd and Another v Mutual Finance Ltd**¹³ stated at page 966 that:

"There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, Kennedy v. de Trafford [1896] 1 Ch. 762; [1897] A.C. 180 with Tomlin v. Luce (1889) 43 Ch.D. 191, 194. The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law." (My emphasis)

- [29] This principle was adopted by our Court of Appeal in **Caribbean Banking Corporation v Alpheus Jacobs**¹⁴, where Carrington JA stated at paragraph 9 of the judgment that *"there is judicial dicta that the obligation to take reasonable care to obtain the proper market value is also part of the duty to act in good faith."*

¹³ [1971] Ch. 949

¹⁴ ANUHCVP2004/010

[30] The Privy Council in **Tse Kwong Lam v Wong Chit Sen and others**¹⁵ held that:

“...the mortgagee and the company had to show that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the method of sale, the steps which ought reasonably to be taken to make the sale a success and the amount of the reserve. The mortgagee was not bound to postpone the sale in the hope of obtaining a better price...” (My emphasis)

[31] The question then arises whether the bank discharged its duty to obtain a true market value of the property. The bank has put forward the following in discharge of its duty¹⁶:

- (1) Enlisted the independent services of Terra Caribbean Grenada (Terra), who are qualified valuers and appraisers, to value the property;
- (2) Enlisted the services of Terra to list the property for sale;
- (3) The property was listed and advertised for sale by Terra on its website which meant that the property was exposed to potential buyers both locally and internationally;
- (4) Terra also used display flyers to advertise the property locally;
- (5) The property was advertised from 6th October 2016 to on or about May 2017 when the sale was closed. During that period, Terra visited the property with four potential purchasers in order to ascertain the best price for the sale of the property.
- (6) The property was sold in May 2017 for the exact value placed on it by Terra and was not done in bad faith¹⁷.

Findings on the Terra Caribbean Valuation report

[32] The property was originally purchased by the defendant, Mr. Williams for \$60,000.00 on 28th July, 2000. Generally, land tends to appreciate in value and in

¹⁵ [1983] 3 All ER 54

¹⁶ Affidavit of Nikisha Alexander filed 18th November 2019 at para. 9(c)(i)-(vi)

¹⁷ Affidavit of Nikisha Alexander at paras. 5(h) and 7

my view, barring negative circumstances, it is presumed that the property would have increased in value since its sale to the defendant in July 2000. It is noteworthy that the property was valued by Kenrick Gabriel & Associates Ltd in April 2011 for the sum of \$152,460.00.

- [33] Neither the bank nor Terra Caribbean Grenada have led any evidence to justify or explain the depreciation or reduction in value of the property when it was valued for \$49,000.00. While the court appreciates that a valuation is “not an exact science¹⁸” and that valuations will differ in value, no sufficient justification has been provided for the depreciation in the property’s value. The valuation in this case proposes a comparative analysis of other properties in the area. But this, in my opinion, should have formed the beginning and not the totality of the assessment of the value of the property in question. Clearly, the mere fact that other properties in the area sold for between \$1.80 and \$2.00 should not be the end of matters. The bank’s valuers should have considered the assessment of the previous value to explain the vast differentiation in the value that was being proposed a mere 5 years later.

Duty to obtain true market value

- [34] The duty to exercise reasonable care to obtain the true market value also imposes a duty to properly advertise the property for sale. This principle has been restated by our Court of Appeal in **Caribbean Banking Corporation v Alpheus Jacobs**¹⁹, where Carrington JA [Ag.] stated at paragraph 25 of the judgment that:

“There can be little dispute that proper compliance with the bank’s statutory duties required it to advertise the sale, to describe the properties properly in the advertisements and ensure that the advertisements were sufficient in number and content to reach the appropriate market. The advertisements should also have been sufficiently in advance of the sale to permit prospective purchasers to attend the auction and the auction should have been held under reasonable conditions.” (My emphasis)

¹⁸ As adopted by Carrington JA in *Caribbean Banking Corporation v Alpheus Jacobs* ANUHCVP2004/010 at para. 13

¹⁹ ANUHCVP2004/010

- [35] With respect to the bank's duty to properly and adequately advertise the property, I am of the view that the bank has failed to lead evidence that the property was properly advertised. Apart from the assertions that the property was placed on Terra Caribbean's website, the bank has failed to produce in evidence the contents of the actual advertisement or flyer displaying the property on Terra Caribbean's website. Equally, aside from the statement that the property was advertised by Terra Caribbean for approximately seven months, the bank has failed to plead the length of time that the actual advertisement was placed on Terra Caribbean's website. Further, the bank has failed to indicate where the flyers were displayed and to whom the target audience were.
- [36] Furthermore, in the affidavit of Nikisha Alexander²⁰ (Ms. Alexander) filed in support of the bank's case, I note that there is no evidence of the capacity in which Ms. Alexander tendered her evidence, whether on behalf of the bank as an employee or on the behalf of Terra Caribbean. CPR 30.3(1) prescribes that "*...an affidavit may contain only such facts as the deponent is able to **prove from his or her own knowledge**.*" Apart from Ms. Alexander's statement that "*the facts and matters herein deposed are true and correct and within my personal knowledge*", Ms. Alexander has failed to show that the information on the advertisements contained in her affidavit came from her own personal knowledge and information. Therefore, I am of the view that very little weight can be attached to Ms. Alexander's evidence in relation to the discharge of the bank's duty to properly advertise the property.
- [37] The foregoing analysis leads me to conclude and I so find that on a balance of probabilities that the bank did not take reasonable care in obtaining the true market value of the property when it sold the property in May 2017.

²⁰ Filed on 18th November 2019 and found at pages 63-70 of the Trial Bundle

Relief

- [38] With regard to the remedy available for the defendant, Mr. Williams, the Privy Council in **Tse Kwong Lam v Wong Chit Sen and others**²¹ stated at page 63 of the judgment that:

“Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for the sale to be set aside.” (Underlining supplied)

- [39] In view of the fact a sale has been made to a purchaser for value without knowledge of the bank’s missteps, it will not be proper to set aside the sale. Mr. Williams’ relief will lie in damages which are measured in the difference between the market value at 2011 at \$152,460.00 less the sale price of the property in 2017 at \$49,000.00. This method is calculated based on the amount he would have received if a proper sale had been conducted. Accordingly, Mr. Williams is entitled to the sum of \$105,260.00 in special damages.

My thoughts on the B M Horsford & Co. Ltd valuation

- [40] On 4th October 2021, the company of B M Horsford & Co. Ltd prepared a valuation report for the property on behalf of Mr. Williams. The report states that the property was inspected on 14th August 2021 and its interest was valued as at October 2021. The report discloses that the company did not have sight of the survey plan for the property and therefore could not comment on the shape, depth and road frontage.
- [41] Further, the report states that there is an incomplete concrete structure on the property which is still in the initial stage of construction. In analysing sales data with

²¹ [1983] 3 All ER 54

the area of the property, Mr. Horsford states that he has conducted at least four appraisals all within the 400-yards radius of the property and the average value per square foot is \$6.00. Mr. Horsford is of the opinion that a fair market value of the property is in the region of \$263,403.00 with a forced sale value ranging between \$171,212.00 and \$184,382.10.

Submissions on the B M Horsford & Co. Ltd valuation

Claimant's submissions

[42] Counsel for the bank, Ms. Johnson notes the following from the Horsford's valuation report:

- (1) The property was inspected some four plus years after it was sold by the bank;
- (2) Mr. Horsford was not provided with the "legal property data", that is the title deed or conveyance proving ownership of the property;
- (3) The "property information" in the report failed to identify any boundaries for the property;
- (4) The lot size is incorrectly stated; and
- (5) The property comprises of an incomplete structure which is in its initial stage of construction.

[43] In the premises, Ms. Johnson objects to the court's use of the valuation on the grounds that that there is no proof that what was inspected by B.M Horsford & Co. Ltd. was in fact the property which was sold. Ms. Johnson also posits that even if the property inspected could possibly be considered as the property sold, there is evidence of obvious improvements which could have affected the assessed value.

Defendant's submissions

- [44] It is the defendant's case that, having regard to increased value of the property as appraised by Mr. Horsford in his valuation report, he remains steadfast in his contention that the bank is not able to justify the depreciation in the value of the property since the Kenrick Gabriel valuation of \$152,460.00. Counsel for Mr. Williams, Mr. Sylvester commends the B M Horsford report as exhibiting the constant appreciation of the value of the property over time. Therefore, Mr. Sylvester concludes that the bank ought to have investigated the Terra Caribbean report or at the very least consult with Terra about this disparity or request another valuation report.

Analysis

- [45] I note that Mr. Horsford acknowledges that he was not provided with a copy of the survey plan for the property. This, in my view, suggests that Mr. Horsford was not able to fully identify and appreciate the features of land, including its boundaries, road frontage, size and depth. Indeed, this would have affected the value he estimated for the property.
- [46] Moreover, it is noteworthy that the property has an incomplete concrete structure affixed to it. Further, the report does not contain a separate value for the land and the incomplete concrete structure thereon. It is reasonable to conclude that the value of the incomplete concrete structure would have been considered by Mr. Horsford in his report in assessing the market value of the property. Indeed, I agree with counsel for the bank that the improvements to the property have certainly increased its value.
- [47] Equally, the court notes that the property was valued on 14th August, 2021, some four years and three months after the property was sold on 12th May, 2017. The report was not done contemporaneously with the sale of the property. It therefore does not assist the court in determining whether the bank obtained a fair market

value for the property at the time of the sale. Further, given the length of time since the sale, it is reasonable to form the view that the property would have appreciated in value since then. Therefore, having regard to the totality of the evidence, I am of the view that very little to no weight can be placed on value ascribed to the property by Mr. Horsford.

Agency

- [48] Counsel for the defendant, Mr. Sylvester, in his submissions discussed the principle of agency and whether Terra Caribbean was an agent of the bank. While comprehensive, the discourse does not take the disposition of this matter much further. For one thing, it is not disputed that the bank enlisted the services of Terra Caribbean to value the property. It is the bank's case that it utilised Terra Caribbean's services in order to advertise and expose the property for sale to potential purchasers. Further, it is the bank's evidence that Terra Caribbean advertised the property for seven months and showed the property to four potential purchasers²². Accordingly, in light of the above, there can be no dispute that Terra Caribbean Grenada was the bank's agent in the conduct of the sale of the property.

General Damages and Declaratory orders

- [49] Mr. Williams in his defence and counterclaim seeks both general damages and declaratory orders. General damages seek to compensate a party for non-pecuniary losses they suffered as a result of a breach in duty. In the case at bar, the defendant, Mr. Williams has not pleaded the non-pecuniary losses he suffered as a consequence of the bank's negligence during the conduct of the sale of the property. I am of the view that special damages will provide an adequate remedy to Mr. Williams for the bank's negligence. Indeed the Privy Council stated in **Tse Kwong Lam v Wong Chit Sen and others**²³ that "*...the borrower will be left to his remedy*

²² Paras. 5(c) to 5(g) of Claimant's defence to the Defendant's counterclaim page 67 of the Trial Bundle.

²³ [1983] 3 All ER 54 at page 63

in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for the sale to be set aside". Accordingly, the prayers for declaratory orders and general damages for negligence, breach of statutory duty and or contract or trust or equitable duty are refused.

Conclusion

[50] For all these reasons, judgment is entered for the defendant. Accordingly, the defendant is awarded:

- (1) Special damages in the sum of \$105,260.00.
- (2) Interest at a rate of 3% per annum from the date of service of the claim to the date of trial.
- (3) Interest at a rate of 6% per annum from the date of judgment to the date of payment.
- (4) Prescribed costs in accordance with CPR 65.5 to be paid within 21 days of today's date.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar