

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

GRENADA

CLAIM NO. GDAHCV2015/0345

BETWEEN:

THE DIRECTOR, NATIONAL INSURANCE FUND

Claimant

and

RICHARD DE ALLIE

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Keisha Lander for the Claimant

Ms. Karen Samuel with Ms Cara St Paul for the Defendant

2021: July 27;
2022: February 28

JUDGMENT

- [1] **ACTIE J.:** This claim concerns monies due and owing under the covenant to pay contained in an Indenture of Mortgage, and the alleged breach of duties of a mortgagee on the exercise of the power of sale.

Claimant's Case

- [2] On 19th November 2015, the claimant, on behalf of the National Insurance Fund (hereafter "the Fund"), filed an Amended Fixed Date Claim Form against the defendant for, among other things:

- (1) The sum of \$343,385.70 being the balance sum due under a mortgage loan held with the claimant as at 30th June 2015¹;
- (2) The sum of \$98,186.11 being accrued interest on the said mortgage at the rate 8% per annum on the principal sum of \$245,199.59 (\$234,144.00 being the sum loaned on the face of the Indenture of Mortgage) to date and continuing at a daily rate of \$53.78² until payment;
- (3) The sum of \$18,791.54 being legal fees, stamp duties for recording the mortgage and conveyance, bailiff fee for serving the defendant with demand letters, valuation reports, and for advertising of the property in the newspaper;
- (4) The sum of \$25.00 being court filing fees; and
- (5) The sum of \$2,000.00 being legal practitioners fixed costs on issue.

[3] Under an Indenture of Mortgage dated 24th April 2007, made between the defendant as Borrower of the One Part and the claimant as Lender of the Other Part, the defendant conveyed all that parcel of land situate at Springs, St. George's measuring Three Roods Ten Poles (3 Rds. 10 Pls.) (hereafter "the Indenture of Mortgage") to the claimant as security for the loan granted to the defendant. The sum loaned to the defendant on the mortgage deed was \$234,144.00³.

[4] The defendant made a total of 47 payments, with his last payment of \$500.00 (\$1,962.99 less than the monthly payment due) being made on 3rd May 2011, and has resultantly defaulted on the repayment of the monies due under the mortgage.

[5] Louis Williams gave evidence for the claimant. He states that demands for payment of arrears were issued to the defendant on 16th October 2008 and on 15th February 2011, and that in 2011 the claimant decided to initiate the Fund's power of sale to seek to recover the monies due under the mortgage. On 29th July 2011, a valuation

¹ This figure is an aggregate of the principal and interest as claimed in para 2 of the Amended Fixed Date Claim in the sum of \$98,186.11.

² 8% of \$245,199.59 is 19,615.97. 19,615.97 divided by 365, gives a daily rate of **\$53.74**, not \$53.78.

³ Figure differs from amount indicated as the principal. Another figure of \$245,218.21 is gleaned from a letter to the defendant from counsel Francis Paul dated 16th October 2008

report prepared by Corporate Real Estate Services at the request of an agent of the claimant valued the property at the time at \$360,000.00.

- [6] The claimant thereafter instructed local real estate agents to advertise and sell the property on the Fund's behalf. The claimant also advertised the sale of the property in local newspapers and on the Fund's website and social media pages.
- [7] The claimant states that the Fund is exercising its power of sale honestly and with regard to the defendant's interests. Despite the Fund's efforts however, to date the property has not been sold. The claimant therefore seeks to recover the monies due from the defendant under the personal covenant to pay.

Defendant's Case

- [8] The defendant admits owing the claimant and agrees that the claimant has the statutory power of sale under the Conveyancing and Law of Property Act.
- [9] Nevertheless, the defendant argues, inter alia, that the Fund acted in breach of its duty as mortgagee upon the exercise of the power of sale.
- [10] This, the defendant argues, the claimant has done by refusing or neglecting to take any or proper steps to expose the property to the market; by advertising crowded publications for bids in newspapers; and by refusing an offer for sale of the property at the price of \$245,000.00 in August 2013.
- [11] The defendant counterclaims for a declaration that the claimant acted in breach of its duties as mortgagee and damages for breach by way of set-off against any sums found due and owing to the claimant.

Issues to be determined

[12] The following issues arise for determination:

- (1) Whether the Fund breached its duty as mortgagee in its exercising of its power of sale;
- (2) Whether the sums mentioned in the Claim are justifiable;
- (3) Whether the defendant suffered loss and damages by reason of the Fund's breach of its duties as mortgagee; and
- (4) Whether the defendant's loss should be set off against all and any monies found to be due and owing to the claimant.

Discussion

Whether the Fund breached its duty as mortgagee in its exercising of its power of sale

[13] The defendant having failed to honour the payment of the monthly instalments of \$2,462.99⁴ to the Fund, the claimant has the right to sue under the personal covenant to pay. The Indenture of Mortgage expressly provides for the application of lawful procedure under the **Conveyancing and Law of Property Act CAP 64** ("the Act") upon the failure of the defendant to satisfy demand for payment of arrears.

[14] **Section 9(1)(a)** of the Act states:

- "(1) 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,

⁴ Figure taken from para 8 of the Affidavit in Support of the Claim, however the Mortgage deed has a figure of \$1,851.57 and para 6 of the Affidavit in Support of Claim has a figure of \$1,967.52. The claimant states at para 3 of his Answer to request for Information filed 21st March 2016 that after termination of the defendant's employment, the interest rate increased from 5% to 8% thereby increasing the amount of the monthly instalments.

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...”

- [15] The power of sale is given to the mortgagee for his own benefit, to enable him to better realise his debt⁵, however, in exercising his power of sale, a mortgagee is under a specific duty to act in a prudent and business-like manner with a view to obtain as large a price as may fairly and reasonably with due diligence and attention, be, under the circumstances, available⁶. The best price reasonably available for the mortgaged property at the time will normally equate with the current market value⁷.
- [16] The Fund started exercising its power of sale in August 2011 upon the advertisement of the property for auction, and is still exercising same. Because the Fund has not yet determined its power of sale by selling the property, it is the claimant’s position that the question of breach raised by the defendant in his counter claim is premature. The court does not agree with the claimant. The case of **Bank of St. Vincent and the Grenadines Ltd v Austin Fraser**⁸ demonstrates that the court has jurisdiction to consider the exercise of a mortgagee’s power of sale before a property is sold.

Advertisements

- [17] The defendant contends that the Fund breached its duty as mortgagee by incorrectly describing the property in its advertisements. He also argues that the advertisements for bids in the newspaper were crowded and complains about the unsatisfactory frequency of the publication of advertisements.
- [18] According to the defendant, the Fund’s misdescription of the property resulted in one of the most attractive features of the property being absent from the advertisements,

⁵ Greville Healy, Sir Paul Morgan, Edward Peters, Oliver Radley-Gardner, Adam Rosenthal, Rhianon Davies, David Smailes: Fisher and Lightwood’s Law of Mortgage (13th edn., Lexis Nexis 2010) page 670

⁶ **Grenada Development Bank v Dexter Chance** Claim No. GDAHCV2010/0166

⁷ Supra n. 5 page 673

⁸ Claim No. SVGHCV2013/0147

specifically, reference to the view of the Atlantic Ocean from the property. Further, it is the defendant's position that the amalgamation of the aforementioned complaints on the manner in which the Fund advertised the property evidences its refusal or negligence to take proper steps to expose the property to the market.

- [19] The defendant argues that, consequently, he should not be responsible for the cost of the offending advertisements and consequential interest.
- [20] The claimant gave evidence that the mortgaged property is listed for sale with two real estate agencies⁹, and was advertised in local newspapers and on the Fund's website and social media pages. The date on which the property was posted on the websites of the realtors and the claimant was not provided to the court, however the defendant's property was posted on the claimant's social media accounts on 21st November 2019¹⁰.
- [21] The claimant states that the property was properly advertised in accordance with the law, and that the advertisements accurately described the property.
- [22] The claimant contends that the description used in the advertisements was taken from a valuation report of Joseph John & Associates dated 14th November 2006¹¹. This valuation indicates that the property is located "near the top of a steep hill the [sic] overlooks the South St. George Government School". In the advertisements drafted by the claimant, however, it is published that: "the property overlooks the South St. George Government School and the Springs recreational grounds".
- [23] The law is clear that during the exercise of a mortgagee's power of sale there should be proper advertisement, the extent of which is dependent on the circumstances of the case¹². If a mortgagee fails to take every proper precaution to secure the best

⁹ Nos. 51 and 52 on Supplemental List of the claimant

¹⁰ No. 54, 55 and 56 on Supplemental List of claimant

¹¹ No. 1 on the claimant's List of Documents

¹² Supra n. 5 page 679

price, his conduct is equivalent to wilful neglect and default¹³. In **Caribbean Banking Corporation v Alpheus Jacobs**¹⁴, Carrington JA (Ag.), expounding on the mortgagee's duty, stated:

“... 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...”

- [24] Furthermore, the learned contributors of **Fisher and Lightwood's Law of Mortgage** state that advertisements of auctions ought to be sufficiently in advance to permit prospective purchasers to attend.”¹⁵ Because each advertisement of an auction date can viewed as a separate event, advertisements for auctions may require a more sustained course over a longer period of time ahead of the sale¹⁶.
- [25] Bearing the above in mind, and analysing the case at bar, with respect to the newspaper publications during the period of 2011 to 2018, the property was advertised for public auction, sealed/private bids, and for sale in the New Today Newspaper and the Grenadian Voice. There were 56 advertisements in the New Today newspaper throughout the period, and 13 advertisements in the Grenadian Voice. All of the advertisements in the years 2011, 2012, 2013 and five of the advertisements in the year 2014 excluded reference to the attractive feature of the property overlooking the Atlantic Ocean, while 46 of the advertisements were grouped with other lots being sold by the Fund, the grouping of which, the defendant complains, crowded the ads.
- [26] The purpose of an advertisement is to provide information and arouse interest. Misdescriptions or omissions of attractive features which may promote a potential buyer's interest in the property ultimately undermine the ability of the property to intrigue its target audience and to fetch the best price attainable.

¹³ Supra n. 6

¹⁴ ANUHCVP2004/0010

¹⁵ Supra n. 5 page 679

¹⁶ Supra n. 6

[27] Considering the above, the court is of the view that the advertisements in the years 2011 to 2013 and five of the advertisements in the year 2014 misdescribed the property, the subject of this action. This is especially in light of a further valuation being done on the property by the said Joseph John and Associates dated 29th July 2011¹⁷, which valuation included reference to the feature of the land overlooking the Atlantic Ocean, and which stated that, at the time, there existed a healthy demand for properties within that location and immediate surrounding areas. The court noted all the various advertisements that were put into evidence, and is of the view that the 30 advertisements identified below did not meet the criteria:

(1) Auctions:

Date of Auction: 16th September 2011

- i. The New Today – 26th August 2011¹⁸
- ii. The New Today – 2nd September 2011
- iii. The New Today – 9th September 2011

Date of Auction: 20th January 2012

- iv. The New Today – 23rd December 2011
- v. The New Today – 30th December 2011
- vi. The New Today – 6th January 2012
- vii. The New Today – 13th January 2012

Date of Auction: 13th April 2012

- viii. The New Today – 9th March 2012
- ix. The New Today – 16th March 2012
- x. The New Today – 23rd March 2012
- xi. The New Today – 30th March 2012

¹⁷ No. 33 on the claimant's List of Documents

¹⁸ No. 36 on the claimant's List of Documents states that there is an advertisement of 19th August 2011, but this ad was not before the court

Date of Auction: 8th June 2012

- xii. The New Today – 11th May 2012
- xiii. The New Today – 18th May 2012
- xiv. The New Today – 25th May 2012
- xv. The New Today – 1st June 2012

(2) Sealed/Private Bids

Date of Bid: 15th October 2012

- xvi. The New Today – 21st September 2012
- xvii. The New Today – 28th September 2012
- xviii. The New Today – 5th October 2012
- xix. The New Today – 12th October 2012
- xx. The New Today – 5th April 2013
- xxi. The New Today – 12th April 2013
- xxii. The New Today – 19th April 2013
- xxiii. The New Today – 26th April 2013
- xxiv. The New Today – 26th July 2013
- xxv. The New Today – 2nd August 2013
- xxvi. The New Today – 10th January 2014
- xxvii. The New Today – 17th January 2014
- xxviii. The New Today – 15th August 2014
- xxix. The New Today – 22nd August 2014
- xxx. The New Today – 29th August 2014

[28] Had the property been properly described in the advertisements, which began to be published two months after the date of the valuation, it is likely that the property would have attracted greater interest, translating to a greater likelihood of being sold. The effect of the claimant issuing factually incorrect advertisements of the property therefore means that the description of the property in said advertisements was not adequate enough to incentivise the attendance and tender of prospective buyers, and

the claimant failed to take reasonable care to ensure that the property is sold at the market price.

[29] Nevertheless, the court notes that upon realising the error, the claimant corrected its newspaper publication to reflect a more accurate description of the property, and adopted that description in newspaper publications during the period 2014 to 2018. The claimant has also adopted the approach of displaying pictures of the property on the aforementioned websites and social media.

[30] The court, however, is not persuaded that the grouping of properties in the advertisements for sealed/private bids and sale resulted in the claimant's negligence to take proper steps in exposing the property. The publications prepared by the claimant utilised font features, such as bolding and underlining, which reasonably stand out to an interested reader. Moreover, an institution like the Fund has numerous properties it is enforcing its power of sale against. It is unreasonable to insist that the Fund expend monies to publish a single advertisement promoting the sale of solely the property concerning the defendant as the cost of the advertisement would further increase the defendant's indebtedness to the claimant.

[31] With respect to the defendant's complaint on the frequency of the advertisements, the court is guided by the decisions in **Bank of St. Vincent and the Grenadines Ltd v Austin Fraser**¹⁹ and **Grenville Radio Ltd v Nathaniel Paddy James & CIBC**²⁰. In **Fraser**, the court ordered, inter alia, that property be advertised by public auction or private treaty in six consecutive issues of at least two weekly newspapers, while in **Nathaniel Paddy James**, Mitchell J treated the advertisement of a property for sale by public auction once per week for at least seven weeks as "an acceptable period of time".

¹⁹ SVGHCV2013/0147

²⁰ ANUHCV1996/0133

[32] In this case, the claimant has implored the methods of auction, sealed/private bids and advertisements of sale. The maximum amount of time the claimant consistently advertised the property in the newspapers was for 4 weeks in the instance of auctions, and for 3 weeks in the instance of sealed/private bids and advertisements for sale. The minimum period of consistent publications was 2 weeks. The claimant also has the property listed on its realtors' websites and its own website and social media pages.

[33] The court is not of the opinion that the claimant acted in bad faith regarding the frequency of the advertisements. All but one i.e. (March 21st, 2014, ad in the New Today for sealed/private bids) of the time sensitive advertisements were circulated sufficiently in advance of the proposed date for their respective auctions or deadlines for bids, albeit some included misdescriptions.

Rejection of offer

[34] On 20th August 2013²¹, the defendant's Attorneys wrote the claimant informing him of interested purchasers who made an offer of \$245,000.00 for the property. The defendant's offer contained a condition to the effect that the claimant would accept the sum of \$245,000.00 in full satisfaction of the debt and the defendant would not be liable for the remaining balance of \$66,354.49. The claimant refused the offer.

[35] The defendant, moreover, argues that the claimant breached its duty by rejecting the offer presented of \$245,000.00 in the circumstances of the market. The defendant contends that a year prior to the offer, the claimant was willing to sell the property at the reserved price of \$278,000.00²².

[36] The defendant avers that the claimant was negligent or acted in bad faith in not accepting the offer. The defendant states that the acceptance of the offer would have enabled him to be in a more realistic position to seek financing elsewhere to pay off

²¹ Letter not before the court

²² No. 43 on the claimant's List of Documents – Newspaper advertisement dated 1st June 2012

the remaining balance on the loan or make arrangements with the claimant for a meaningful servicing of the remaining debt.

- [37] It is the duty of the mortgagee to obtain the best price reasonably obtainable in the exercise of the power of sale²³. Furthermore, “in deciding whether to accept an offer, a mortgagee is entitled to have regard to the fact that it would leave a substantial shortfall owing to the mortgagee, even though refusing the offer would increase the burden on the mortgagor”²⁴.
- [38] The court notes that the defendant accepts that the claimant was not obligated to accept the offer. The court is of the view that although the claimant advertised a reserved price of \$278,000.00, this sum represented the lowest acceptable price of the property for the claimant at the time and is \$33,000.00 more than the offer of the defendant.
- [39] If the claimant accepted the defendant’s interested purchaser’s offer of \$245,000.00, there would have been a balance of \$66,354.49 on the mortgage loan account which the claimant would then be mandated to recover from the defendant who has admittedly not been servicing the mortgage based on complaints of sporadic employment. The court notes that the defendant did not refer to any further communication or discussions with the claimant for the payment of the balance due after the refusal to accept the sale for the \$245,000.00. In these circumstances, the court agrees that since the mortgagee’s and the mortgagor’s interests conflict, the mortgagee is entitled to give preference to its own interest. The court therefore finds that the defendant has failed to prove a breach of duty by the claimant in this respect.

²³ Supra n. 5 page 670

²⁴ Supra n. 5 page 674

Whether the sums mentioned in the claim are justifiable

- [40] The claimant claims \$343,385.70 as the balance sum due under the mortgage loan as at 30th June 2015; \$98,186.11 as accrued interest on the said mortgage and continuing at a daily rate of \$53.78 until payment; \$18,791.54 being legal fees, stamp duties for recording the mortgage and conveyance, bailiff fee for serving the defendant with demand letters, valuation and for advertising of property in the newspaper; \$25.00 being court filing fees; and \$2,000.00 being legal practitioners fixed costs on issue.
- [41] The defendant disputes the sum of \$18,791.54, and states further that any loss suffered by him in the exercise of the mortgagee's power of sale should be set off against the amount owed under the mortgage.
- [42] The defendant by the Indenture of Mortgage covenanted to repay the sum of \$234,144.00, as well as all expenses properly incurred by the claimant in enforcing its security. The court is also guided by the contributors of **Fisher and Lightwood's Law of Mortgage**, who state that the mortgagee can only bring a claim on the covenant for the principal and interest and any other sums which the mortgagor has covenanted to pay, and not for expenses incurred by the mortgagee outside his covenanted obligations²⁵.
- [43] The court finds that the defendant is liable to pay the principal sum due under the mortgage and the accrued interest on the said mortgage. Regarding the principal sum due, there are varying figures presented by the claimant. The court accepts the claimant's evidence that the principal due stands at \$245,199.59.
- [44] With respect to the sums of \$18,791.54 and \$25.00, as claimed, the defendant has a legal obligation to pay costs and expenses properly incurred as a result of the

²⁵ Supra n. 5 page 679

claimant's exercising its power of sale²⁶, which includes advertisements and valuation reports.

[45] It is settled law that these special damages must be proven, yet, the claimant has failed to provide receipts for such expenditure. It is also settled law, however, that where there is evidence of actual loss but no evidence to prove quantum, the court can award nominal damages which may not be out of scale²⁷. The court is of the view that the claimant has demonstrated evidence of its loss by producing copies of newspaper publications and valuation reports, and, accordingly, awards a nominal sum for such expenditure. The court takes into account the claimant's misdescription of the property, and/or omission of reference to attractive features of the property in 30 of the advertisements and would reduce the amount claimed under this head.

Whether the defendant suffered loss and damages by reason of the claimant's breach of its duties as mortgagee

[46] The defendant contends that he suffered loss of:

- (1) the value of the proceeds of sale of \$245,000.00;
- (2) the interest accrued on the loan on the principal balance that would have remained due;
- (3) all and any late charges accrued to the loan; and
- (4) all and any expenses related to advertisement of the property from that date to present.

[47] The court is not of the view that the defendant has demonstrated any loss or damage resulting from the misdescription of the property in the newspaper advertisements²⁸. It would be inequitable, however, to order that the defendant pay for the inaccurate advertisements. Accordingly, the court awards a nominal sum to the claimant for 39

²⁶ Clause 15 in the Indenture of Mortgage

²⁷ *Greer v Alstons Engineering Sales & Services Ltd* (2003) 63 WIR 388

²⁸ *Bank of New Zealand and Karma Leah Nikora* [2013] NZHC 2228

advertisements @ \$200.00 each, and for 2 valuations @ \$500.00 each making a total of \$8,800.00.

[48] Furthermore, it is the evidence that the defendant never disclosed the name and identity of the interested purchaser to support the offer of \$245,000.00. It is also the evidence, borne out in cross examination at the trial, that the defendant was unsuccessful in his many attempts to sell the property privately and also through real estate agents.

[49] The court is of the view that the claimant was not under an obligation to accept the conditional offer made by the defendant. It is the defendant who is was under an obligation to satisfy the debt as covenanted in the mortgage deed. Given the ruling that the defendant failed to prove a breach of duty by the claimant with respect to the rejection of the offer of \$245,000.00, therefore, the court is not satisfied that the defendant suffered loss and damages. Accordingly, it is unnecessary to consider the setting off of the defendant's loss.

Conclusion

[50] Based on the foregoing, both the claimant and the defendant have, to an extent, proven their claim and defence.

[51] It is therefore ordered and declared as follows:

(1) The claimant acted in breach of its duties as mortgagee in exercising its power of sale by misdescribing the property and/or omitting reference to attractive features of the property, the subject of the mortgage, in 30 newspaper advertisements.

(2) The defendant is indebted to the claimant in the following amounts:

i.	Principal	\$245,199.59
ii.	Interest (up to 30 th June 2015)	98,186.11

- iii. Interest (from 1st July 2015 to date of judgment utilizing the daily rate of \$53.74) 130,856.90
- iv. Expenses (nominal sum for 39 advertisements @ \$200.00 each; 8,800.00 and 2 valuations @ \$500.00 each)
- Total: 483,042.60**

(3) Interest at the rate of 6% Per Annum from the date of judgment until payment in full.

(4) Each party shall bear their own costs.

Agnes Actie
High Court Judge

By the Court

Registrar