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

GRENADA

CLAIM NO. GDAHCV2010/0166

BETWEEN:

GRENADA DEVELOPMENT BANK

Claimant

and

DEXTER CHANCE

Defendant

Before:

The Hon. Mde Justice Agnes Actie

Appearances:

Ms. Michelle Emmanuel Steele, Amy Bullock-Jawahir and Cara St Paul for the Claimant
Ms. Winifred Duncan Phillip with Caryn Adams for the Defendant

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2020: March 17
October 5

JUDGMENT

[1] **ACTIE, J:** The facts in this case are not disputed. By way of the said Bill of Sale the defendant assigned a vessel named "Nestell 2" to the claimant to secure repayment of a loan facility in the sum of $147,000.00 with interest. The defendant defaulted in payment and the claimant took possession of vessel at the Gouyave Jetty and transferred it to the True-Blue Coast Guard Base at St. George's, Grenada for storage. The claimant sold the vessel for $60,000.00 leaving a

shortfall on the mortgage debt. This extant claim seeks to recover the shortfall in the sum of $77,789.69 inclusive of interest.

[2] The defendant admits that he fell into arrears under the said Bill of Sale but contends that the claimant sold the said Vessel at a gross undervalue. The defendant states the vessel was purchased brand new in March 2006 at a price of $147,000.00 and after purchase he spent an additional sum of $87,000.00 to substantially upgrade the vessel in Trinidad and Tobago. The defendant avers that the improvements comprised items such as gears, long line spools, boat well, solar system, navigational equipment and a "C33" combination sound and plotter. The vessel was valued at $255,279.84 by Llewellyn Ellis on 11th December 2007 after the improvements.

[3] It is the defendant's evidence that the boat was in excellent condition when it was seized by the claimant in February 2009, having been recently dry docked and painted with its steering shaft replaced. The defendant avers that the total value of the boat with all its equipment and contents when seized was $298,467.03 but was sold by the claimant at a grossly undervalued price of $60,000.00. The defendant contends that he is not liable for the shortfall claimed by the claimant.

[4] The defendant states that he suffered loss as a result of the claimant's breach and counterclaims for a sum of $ $238,467.03 being the value of the vessel with its contents less the sale price. The defendant described the claimant's breach of its duty of care as follows:

(i) Failure to obtain the true market value for the boat as the boat was not adequately advertised or adequately described.

(ii) Failure to allow the defendant to remove the large number of items and equipment from the vessel when the Claimant took possession and transferred the vessel to the True-Blue Coast Guard Base, St. George's.

(iii) Failure to properly maintain, preserve and secure the said Vessel at the Coast Guard base which resulted in the vessel being raided of most of its equipment and becoming filled with water which consequently led to engine seizure.

What is the duty of a mortgagee's when exercising the power of sale

[5] A mortgagee, when exercising its power of sale must "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 available'[1]

[6] In **Cuckmere Brick Co. Ltd v Mutual Finance Ltd**[2] Salmond LJ described the duty of the selling mortgagee as follows:

> "The mortgagee must have regard to the mortgagor's interests and must take reasonable precautions to obtain the true market value of the mortgage property at the date on which it decides to sell it".

The mortgagee therefore is under an obligation to exercise reasonable care to sell only at the proper market value.

[7] The claimant submits that it acted reasonably to discharge its duty of care to sell at the best price that could have been reasonably obtained and there is no evidence that it acted in bad faith. The claimant contends that it took reasonable care to preserve the vessel and had it serviced and repaired on two occasions along with insurance coverage while anchored at the Coast Guard Base.

Analysis

[8] Whether the mortgagee exercised due diligence in fulfilling its duty is a question of fact looking at all the circumstances. It is the effort rather than the result to which the court looks. The burden rests on the mortgagor to establish that the mortgagee failed to discharge its duty.

[1] McHugh v Union Bank of Canada [1943]AC 299 at 311
[2] [191] CH 949 at 968 H – 969A.

The Valuations

[9] The claimant presented the valuations of its two witnesses in support of the claim. Mr. Roland Baldeo, inspected the vessel on 24th February 2009 and gave it a fair market value of $100,000.00. The second valuator, Christopher Holder, inspected the vessel on 29th September 2009 and in his report dated 8th October 2009, gave the vessel a fair market value of $75,000.00. Both valuations state that the vessel's superstructure was in very good condition and the structural integrity had not in any way been compromised. Interestingly, the following items detailed in Baldeo's March 2009 report were not reflected in the Holder's October 2009 report made some 7 months after, namely:

i. Two 12 V batteries,
ii. Emergency Tiller,
iii. 1 VHF Marine Radio Bracket;
iv. 1 Shakespeare 6 DB VHF Antena;
v. 1 Global Positioning System GPS bracket
vi. 1 12 Volts electrical bilge pump
vii. 2 working lights

[10] In his written submissions, the defendant contends that the bank's valuations did not give an accurate description and appraisal of the vessel. The defendant states that the new vessel purchased in March 2006 was substantially upgraded and relies on a valuation of Llewellyn Ellis dated 11th December 2007 with the upgraded value of $255,279.84. The defendant states that he was about to go out fishing on the morning that the boat was seized but was not given an opportunity to clear the items which did not form part of the mortgage facility. The defendant contends that the valuations relied on by the bank failed to take into consideration the improvements made to the boat after purchase together with the items stored on the vessel when it was seized.

Was the vessel adequately advertised

[11] It is well established law that it is the duty of a mortgagee when realizing the mortgage property by sale to behave in conducting such realization as a reasonable man would have behaved in the realization of his own property, so that the mortgagor can receive credit for the fair value of the property sold. The Mortgagee's conduct is to be judged with reference to its conduct and efforts made in obtaining the true market value at the date it decides to exercise its power of sale. It is for the court to decide whether the mortgagee took reasonable care by looking at the efforts made in discharging that duty.

[12] With respect to effective advertising, the Court of Appeal in **Caribbean Banking Corporation V Alpheus Jacobs**[3] per Carrington JA (ag) said:

> "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.[4]

[13] The vessel was advertised for sale by private treaty with a reserved price of $100,000.00 in two newspaper publications on the 13th March 2009 and 20th March 2009, respectively, with closing bid date on 30th March 2009. The vessel was further advertised for sale by private treaty at a reserved price of $90,000.00 on the 29th May 2009 and 5th June 2009 respectively, with a closing bid date of 9th June,2009.

[14] Both advertisements gave short notice of the sale. The second advertisement gave an extremely short period of 4 days for bidding at a much-reduced price to what was stated in the March 2009 valuation.

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[3] **HCVAP 2004/010**

[4] see Fisher and Lightwood Law of Mortgage 10th ed. p. 390

[15] It is noted that the Christopher Holder's valuation made in October 2009, giving a value of $75,000.00 postdated the advertisements made in June 2009. It is the defendant's evidence that the Bank entered into an agreement to sell the boat on 27th August 2009. This was a full month before the second valuator inspected the boat on 29th September 2009. The boat was sold on 7th October 2009, before the date the second valuation report of 8th October 2009. The defendant states that the second valuation could not and did not inform the price accepted by the Bank.

[16] In **RBTT Bank v Elisha Baptiste**[5] Benjamin J said

> "It seems to me that each advertised sale must be viewed as a separate event. It would not be correct to treat all the advertisements as events exposing the property to the market as each prospective purchaser reading an advertisement would be guided by the date of the auction. If he did not attend, he would assume the property was sold and put it out of his mind; his interest would only be re-kindled by a advertisement for a fresh sale. This is hardly a satisfactory method of exposing the property to the local market. In my view, a more sustained course of advertisement over a longer period ahead of the sale in at least two newspapers would have been acceptable."
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> ……….
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> "The offer of the purchaser was the only one received after the advertisement inviting bids. In light of what I have found to be inadequate arrangements for the sale by public auction as well as by private treaty and the inadequacy of the description of the property in all advertisements, I am satisfied that on the evidence the Claimant did not take reasonable precautions to obtain the true market value of the property at the time of the sale."

[17] I am of the view that that the bank's duty to advertise adequately was unsatisfactory in several respects. The short intervals of the advertisements and

[5] **Claim No GDAHCV 2002/0373**

the course pursued in the sale of the leads to the ineluctable conclusion that the vessel was not sold under circumstances calculated to produce the best price that could have been reasonably obtained.

[18] A mortgagee who repossess the mortgaged property, with a view to a sale, puts itself in a position of responsibility, and if, in selling the property, fails to take every proper precaution to secure the best price, his conduct is deemed to be equivalent to willful neglect and default. The effect of the unsatisfactory advertisement in relation to the sale by private treaty means that the claimant failed to take reasonable care to ensure that the property was sold at the market value.

[19] What then should be a fair market value for the vessel. The two valuations for the bank gave the vessel a fair market price of $100,000.00 and $75,000.00 respectively. The defendant on the other hand presented the valuation of Mr. Llewellyn Ellis with a value of $255,279.84 after the improvements. The preferred valuation is a matter of fact to be determined by the court.

[20] In **Caribbean Banking Corporation v Alpheus Jacobs** Carrington JA (ag) citing "Cuckmere Brick Co[6] , in considering the duty of good faith owed in equity by a chargee exercising its power of sale, opined that:

> Valuation is not an exact science. Equally careful and competent valuers may differ within fairly wide limits about the value of any piece of land. But there are limits. When there is conflict, it is for the judge to decide which evidence is to be preferred".

[21] Having reviewed all the evidence, I accept the defendant's evidence that he made significant improvements to the vessel after purchase. The Llewellyn's valuation in my view is the most credible of the three valuations. The Baldeo and Hutchinson valuations appear to have been juxtaposed against the value of a new vessel and failed to take into consideration the improvements made by the defendant. Both

[6] at 959 D

valuators in cross examination could not confirm or deny that the boat had been upgraded after purchase.

[22] My preference for the Llewellyn's report is further bolstered by the fact that the bank insured the hull and engine at a value of $220,000.00 while it was being stored at Coast Guard Base. However, I take into consideration that the Llewellyn valuation was done in December 2007 and the issue of depreciation should be considered. Mrs. Veron Marshall, Credit Officer for the claimant, admitted that had the boat been sold for the insured sum of $220,000.00, it would have been sufficient to pay off the defendant's indebtedness to the bank.

[23] The claimant failed to give any satisfactory explanation why the boat was sold at $60 000.00, when both of its valuation gave estimates in excess of the sale price. It appears that the bank merely made an arrangement to sell the vessel at a gross undervalue without making an effort to obtain the fair market value.

[24] A mortgagee's sale of an asset undervalue causes grave prejudice on the mortgagor, since it erodes the effective value of the mortgagor's equity of redemption. A sale price which is inadequate leaves no surplus for the mortgagor and also leaves a deficit on the mortgage loan for which the mortgagor will still be duty-bound to repay under the mortgage contract. I find that the defendant has discharged his burden in establishing that the bank failed to exercise the due diligence expected of a mortgagee. The vessel in my view was not properly valued or advertised.

[25] In the circumstance, I am minded adopting the bank's insured value of $220,000.00 as a fair market price of the vessel. The bank failed to make efforts to sell the vessel at a price near the insured value. The bank was not simply entitled to adopt any arrangement or accept any price merely because its debt would be satisfied or partially satisfied.

Special Damages

[26] In his counterclaim, the defendant pleaded and particularized a list of additional items totaling the sum of $43,187.19 which were on the vessel when it was seized. I accept the defendant's assertion that the boat contained items that did not for part of the mortgage facility and the valuation.

[27] Mrs. Marshall for the claimant, admitted that she did not take an inventory when the boat was seized in February 2009, and that an inventory was never done during the period that the vessel was at the Coast Guard Base. In cross-examination, she said 'thinking now I should have made one'.

[28] Mr. Peter Modeste, a Police Officer, retained by the Bank to seize the vessel also admitted that he did not do an inventory of the items left on the boat although one was requested by the Bank.

[29] The claimant states that the defendant was given an opportunity to take the items from the boat which the defendant vehemently denies. The defendant asserts that he made several complaints to the bank when he noticed that boat was being raided and items were being removed. Mrs. Marshall admits that the defendant made several complaints about the vessel not being secured and items being removed from the boat. The defendant's complaints were further evidenced in a letter dated May 24,2009 addressed to the Managing Director reiterating the verbal complaints that the vessel was being raided while docked at the Coast Guard Base.

[30] The items pleaded and particularized totaling the sum of $43,187.19 in the counter claim were not all substantiated with receipts. It is trite law that special damages are to be pleaded and proved[7]. It is also settled law that where there is evidence of actual loss but there is no evidence to prove the quantum, the court can award nominal damages which may not be out scale. This principle was enunciated by

[7] Grant v Motilal Ltd & Anr; Ilkiw v Samuels [1963] 2 All ER 879

the Privy Council in **Greer v Alstons Engineering Sales & Services Ltd**[8] where it states:

> "When such evidence is not provided, however, it is open to the trial judge to give consideration to an award of nominal damages. In McGregor on Damages (13th Edn) at para 295 it is stated: 'Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss'. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss."

[31] I accept the defendant's evidence that the boat was equipped for fishing with all the ancillary items needed to ply his trade when it was seized. I note the particulars of the items pleaded and accepts the fact that receipts would not be readily available to prove the total sum claimed. In the circumstances, I make a nominal award of $20,000.00 which in my view is not out of scale.

[32] In summary and for the reasons outlined, the claimant's claim stands dismissed. Judgment is entered in favor of the defendant on the counter claim in the sum of $180,000.00 that is $220,000.00 (insured price) - $60,000.00 (sale price) + $20.000.00 (nominal special damages). The total sum of $180,000.00 awarded shall be discounted by deducting the sum due and owing on the mortgage debt at the date of the sale of the vessel.

ORDER

[33] It is ordered and directed as follows: -

(i) The claimant's claim stands dismissed with Prescribed Costs to the defendant in accordance with CPR 65.5.

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[8] (2003) 63 WIR 388

(ii) Judgment is entered in favor of the defendant on the counterclaim in the sum of $180,000.00. This sum is to be reduced by the sum due and owing on the loan facility at the date of the sale of the vessel.

(iii) Interest at the rate of 6% on the balance from the date of judgment until payment in full.

(iv) Prescribed Costs on the remaining balance in accordance with CPR 65.5.

Agnes Actie
High Court Judge

By the Court

Registrar