

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
GRENADA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO.: GDAHCV2017/0403

BETWEEN:

TERRENCE R. JOSEPH

Applicant

AND

RBTT (GRENADA) LTD

Respondent

Appearances:

Gennilyn Ettienne for the applicant

Shereen Wilkinson and Dillon Charles for the respondent

Sheriba Lewis and Kim George for the interested party Rueben John

2017: November 23

2018: February 8

JUDGMENT

- [1] **GLASGOW, J:** There is a simple but contentious issue to be determined on this application. The question is whether the applicant is entitled on the facts of this case to the grant of an interlocutory injunction to restrain the respondent from completing the contracted sale of a mortgaged property owned by the applicant? While there is near consensus on much of the material facts, the parties are at great variance about the applicable law and I am asked to 'sift the wheat from the tares.'

The Agreed Facts

- [2] The applicant and his then wife were the joint owners of a lot of land situated in the picturesque district of Calivigny, Grenada. In September 2008, the land was used to secure a mortgage given by the respondent ("RBTT") to the couple to build their matrimonial home. The mortgage stipulated, among other things, that the Josephs were jointly and severally liable to repay the mortgage sums and that, in the event of default, the mortgagee could exercise the statutory power of sale.
- [3] The applicant and his wife defaulted on the loan. The respondent demanded payment from them by way of letter dated 29th December 2014. There was continued default. The respondent notified the applicant and his wife in July 2017 that the property was being sold. The respondent then entered into an agreement for sale with a purchaser and a deposit was paid.
- [4] On 9 November 2017, Mr. Joseph filed a notice of application supported by affidavit seeking an injunction restraining RBTT from entering into any contract for sale, selling or disposing of the mortgaged property. The court was also asked to stop the respondent from advertising the property on Terra Caribbean's website at the stated price of US \$259,973.00. A fixed date claim form and statement of claim had been previously filed by the applicant wherein he sought an injunction against the respondent's sale or advertising of the property below a price which represents its true market value, damages for breach of duty to act in good faith, damages for misrepresentation, further or other relief and costs.
- [5] In its answer to the injunction, RBTT says that it engaged Terra Caribbean to conduct a valuation of the property in 2015. Terra Caribbean estimated the size of the house on the property to be 1903 square feet. The property was then listed on Terra Caribbean's website for sale. At October 2015, the advertised price was EC \$1,090, 000.00. However, RBTT's evidence is that there were no offers to purchase at this price. In 2017, the property was then re-advertised for sale at a price of EC\$706,320.00. RBTT received an offer of EC\$635,000.00 from one

Rueben John ("Mr. John") which it accepted. An agreement for sale dated 28th August 2017 has been signed and a deposit has been paid.

- [6] Mr. Joseph also testified that he commissioned valuations of the property. His evidence is that the first valuation was done in 2015 since he was interested in selling the property at that time. The value of the property is stated therein as EC\$1,050,000.00. I observe that the size of the building is omitted even though the valuation outlines a detailed description of the building. Mr. Joseph says that he commissioned a second valuation in September 2017 which revealed a forced sale price of EC\$1,040,000.00. The total size of the building is listed in that valuation as 5,196 square feet.

Arguments for the Injunction

- [7] At the risk of over simplifying the complaints made by Mr. Joseph, it appears that he is concerned about the differences in the measurement of the size of the building and the price at which RBTT advertised the same for sale. RBTT testifies that its valuation suggests that the building is 1903 square feet in size while Mr. Joseph's evidence describes a building that is 5,196 square feet in size. RBTT's valuation of 1903 square feet has led, he argues, to the property being advertised for sale at a price far below its value. In his affidavit filed on 9 November 2017 he states at paragraph 30 that he wishes to restrain RBTT's improper exercise of its power of sale due to the bank's failure to properly assess the value of his property. At paragraph 47 of his affidavit, he prays that the court stops the imminent sale of the property on the grounds that the sale is '*premised on dishonest conduct, misrepresentation and absence of good faith.*' He further asks the court to order that the true market value of the property is obtained.
- [8] In written submissions filed on 6th December 2017, Mr. Joseph agrees that '*the essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property as an assurance of repayment of a loan, with a provision for*

*redemption.*¹ He argues that the mortgagor's equity of redemption is not clogged by a contract for sale and any contractual efforts to do so is void. It is further submitted that section 10 of the United Kingdom's Law of Property Act contained such a constraining provision which is not expressed in Grenada's Conveyancing and Law of Property Act ("the Act"). As such, '*at any time prior to the completion of sale by the mortgagee in the absence of good faith, the equity of redemption is fully available to the Applicant.*'² The court is therefore empowered to restrain any 'oppressive conduct' by a mortgagee on ordinary principles of law including the principles adumbrated in **American Cyanamid v Ethicon**³. Mr. Joseph says that RBTT may be precluded from concluding the conveyance for the following reasons

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- (1) The written agreement for sale does not enhance RBTT's position since Rueben John, the intended purchaser, has not obtained an alien's landholding licence. Accordingly Mr. John has acquired no legal or equitable interest in the property. The contract for sale of the land in this case therefore fails to clog the equity of redemption;
- (2) Mr. John is not in the position of a purchaser without notice of the alleged irregularities of the sale. The indenture of mortgage is a registered document and as such the world including Mr. John is put on notice of its contents. Unlike in the United Kingdom, he is offered no statutory protection in Grenada unless there is a concluded sale. He is, therefore, at risk of losing out to the mortgagor on realisation of the equity of redemption at any time up until the time of completion of the sale. Any remedies that he must pursue in that regard must be against the mortgagee. Mr. Joseph explains that, in Grenada⁴,

¹ Mr. Joseph's submissions filed on 6th December 2017 at page 136 of the court's file

² Ibid

³ [1975] 1 ALL ER 504

⁴ Supra, note 1 at page 132

Before the contract of sale, the applicant as mortgagor expects from his mortgagee fairness, good faith and absence of collusion or fraud, placing all cards upward on the table and treatment of the security without compromising the interest of the mortgagor therein even if he is granted the right to exercise his power of sale.

After a contract of sale has been signed ... only when the contract is completed, does the alien acquire any interest in the property which cannot be impugned by the applicant, but such a contract may be set aside if entered into in bad faith.

[9] Mr. Joseph then applied the foregoing propositions he has made on local law to the allegations he has raised against RBTT. In this regard he observes that there is implied in the indenture of mortgage a duty to act in good faith. He contends that the equity of redemption is his contractual right. The 'misdescription' of the size of the house brings his case within the category of cases where the intended sale must be 'attacked' as it is based on grounds of bad faith. He disputes RBTT's rejoinder that his case is one based on the common law action of misrepresentation. Rather, it is RBTT's 'gross conduct' which is outlined as either *'factual misdescription, misrepresentation to the prospect or even fraud where the evidence exists of a failure to describe the property in its advertisement and to find the price – as distinct from selling at a reasonable price... constitute still a cause of action known in law and well settled in law.'*⁵

[10] Mr. Joseph further complains that it is evident that RBTT is conducting the sale so badly that it would reduce the proceeds since the property is not accurately described and the resulting price asked is less than the true value of the property. Injunctive relief is accordingly available to the mortgagor to avoid irremediable damages. Mr. Joseph contends that his motive is to have the court set matters

⁵ Supra, note 1 at page 131

right by stopping RBTT from *'wilfully and recklessly dealing with the property before trial...'*⁶He claims that the court can order RBTT to get the correct description of the property and to obtain the correct market value. Mr. Joseph relies on the cases of **Prasad v Zarshbina Company Limited and Fifa Holdings Limited**⁷, **Australian Barter Currency Exchange Pty Ltd v Uniting Church (NSW) Trust Association Limited**⁸, **JetPak Services Ltd v BWIA International Airways Ltd**⁹ to propose that the court does have the jurisdiction to grant injunctive relief as prayed.

[11] Mr. Joseph closed his arguments by asking the court to find that this is not a case where he should be asked to pay the mortgage debt into court before obtaining relief. He asserts that the court ought to be flexible in enforcing this prerequisite for the grant of the injunctive relief due to the alleged bad faith demonstrated by RBTT. He also claims that an award of damages would be inadequate when one considers the financial loss that he would suffer because of RBTT's purported bad faith. The court is asked to find that Mr. Joseph has demonstrated that –

- (1) Possible financial loss that he may suffer is a real and not an imagined or contrived threat;
- (2) By failing to conduct a proper valuation, RBTT has failed *'miserably in protecting the equity entrusted to it as fiduciary'*¹⁰;
- (3) His valuations of the property are more accurate and the property is more likely to be valued between 1.45 or 1.5 million dollars; and
- (4) In all the circumstances, the property is being sold at an 'undervalue'.

⁶ Supra, note 1 at page 129

⁷ Civil Action No. HBC 16 of 2013 (Fiji)

⁸ [2009] NSWSC 607

⁹ (1998) 55 WIR 362

¹⁰ Supra, note 1 at page 126

[12] The court is asked to find that if the grant of the injunction is likely to put RBTT in greater difficulty, then the best outcome would be to order RBTT to obtain a *'correct statement of valuation of the mortgaged property.'*¹¹

RBTT's Response

[13] In its submissions filed on 1st December 2017, RBTT relies on sections 9 and 11 of the Act to submit that a mortgagee has the power to sell a mortgaged property by private contract or auction and thereafter to convey the property to the purchaser.

[14] RBTT argues that once the right to sell the mortgaged property has accrued, the mortgagee is entitled to exercise the right at such time as it chooses. It matters not that the exercise occurs at a time that is inconvenient to the mortgagor or that a higher price could be obtained if the mortgagee delays the exercise. The case of **Cuckmere Brick Co. Ltd and another v Mutual Finance Ltd**¹² is cited in aid of this proposition. RBTT accepts that the mortgagor has the right to prevent the exercise of the power of sale before a contract for sale has been agreed but the mortgagor may only do so where the sum owed under the mortgage is paid up into court. The case of **Duke v Robson**¹³ is supplied to the court as authority for this view.

[15] RBTT then distinguishes the situation where a contract for sale is agreed between the mortgagee and an intended purchaser. In those instances, RBTT argues that *'the sale will not be restrained by the Court unless it is improper, which will be based on various factors.'*¹⁴ RBTT relies on Crossman J's judgment in **Lord**

¹¹ Ibid at page 125

¹² [1971] 2 ALL ER 633

¹³ [1973] 1 WLR 267

¹⁴ RBTT's submissions filed on 1st December 2017 at para. 5

Waring v London and Manchester Assurance Co. Ltd¹⁵ where he offered the following guidance –

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 Act, 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 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.

- [16] RBTT asks the court to conclude that, on the facts of this case, Mr. Joseph's application does not establish an arguable case that it has failed to properly exercise its powers of sale. Indeed it is argued that misrepresentation does not avail Mr. Joseph on this application since a claim of that sort arises in a case of an agreement between parties. The essential features of a claim for

¹⁵ [1935] Ch 310 at pages 318 -319; RBTT also relies on **Property & Bloodstock Ltd v Emerton** [1968] Ch. 94

misrepresentation, RBTT says, *'is an untrue statement which induces a party (the Representee) to enter into a contract with another party (the Representor).'*¹⁶ RBTT submits that Mr. Joseph has 'misconstrued' the situation since there is no allegation of misrepresentation between RBTT and Mr. John.

[17] Accordingly, RBTT has asked the court to decide 2 questions –

- (1) Where a valuation is obtained by RBTT at least 24 months before the valuation obtained by Mr. Joseph, and where the valuation obtained by RBTT is different from that obtained by Mr. Joseph and a contract for sale is obtained by RBTT, was there an improper exercise of RBTT's power of sale?; and
- (2) Can Mr. Joseph, on an application for an interlocutory injunction, restrain RBTT from exercising its statutory power of sale where there is no serious issue to be tried? (It must be noted that I have tried to recite the questions asked by RBTT in the peculiar manner in which they have been submitted to the court.)

[18] In respect of question 1, RBTT's answer is that there is no improper exercise of its statutory power of sale. RBTT relies on the following –

- (1) RBTT informed Mr. Joseph by way of letter dated 29th December 2014 that he was in arrears of the sums due under the mortgage. The letter further advised that if the arrears of the debt were not paid, then RBTT would pursue the remedies available under the mortgage;
- (2) Mr. Joseph did not clear the arrears as demanded. Instead RBTT received a letter from Mr. Joseph in January 2015 wherein he admitted his indebtedness to RBTT;

¹⁶ Supra, note 12 at para 9. RBTT's submits **East Pine Management Limited v Tawney Assets Limited and Others** BVIHCAP [2012]/0035 as authority for this view

- (3) Mr. Joseph did nothing to clear the arrears of the debt. He has only offered in his affidavit supporting the application for the injunction that his wife was obligated to pay the mortgage whilst he was obligated to pay household bills during the period of their marriage;
- (4) RBTT obtained a valuation of the property in October 2015. The valuation was conducted in good faith and no improper motives can be ascribed to RBTT or the person who conducted the valuation exercise. In fact there is no evidence before the court to support Mr. Joseph's contentions that RBTT acted improperly in obtaining the valuation. RBTT observes that a valuation involving the size of the building was only procured by Mr. Joseph after the valuation obtained by RBTT. RBTT complains that Mr. Joseph never gave this valuation to RBTT; and
- (5) RBTT informed Mr. Joseph in July 2017 that it received an offer to purchase the property and that the offer was accepted. Mr. Joseph made no efforts to pay any sums thereafter to RBTT. He then sought injunctive relief from the court 4 months after being informed of the contract for sale.

[19] RBTT further submits that in considering whether to grant an injunction, the court ought to have regard to the conduct of the parties. See **Great Western Railway Company v Oxford, Worcester and Wolverhampton Railway Company**.¹⁷ RBTT highlights the following as facts which would preclude a grant of the injunction requested by Mr. Joseph –

- (1) Mr. Joseph and his wife are jointly and severally liable for the mortgage debt. Both parties have defaulted on payments and the mortgage has fallen into arrears;

¹⁷ 43 ER 133

- (2) Mr. Joseph did not communicate with RBTT;
- (3) Mr. Joseph has not, to date, revealed any evidence of his attempts to sell the property;
- (4) Mr. Joseph has stymied RBTT's efforts to gain entry to the property;
- (5) Mr. Joseph allegedly obtained a valuation of the property in October 2015 which valuation did not set out the square footage of the property. RBTT was not provided with a copy of the valuation; and
- (6) In July 2017, Mr. Joseph had actual notice that RBTT had accepted an offer for the property. Notwithstanding this notice, Mr. Joseph did not provide a copy of the 2015 valuation or make an effort to communicate with RBTT except on 4th September 2017 when he requested the balance of the loan.

[20] In concluding its arguments on question 1, RBTT seeks to distinguish the **Chandresh Prasad** case from the facts before me. In that regard, RBTT points out that the court in that case found a serious issue to be tried in respect of misrepresentation going to the root of the mortgage deed, fraud and duress. The court also found that the applicant in that case paid into court the sum of \$30,000 and that there was sufficient security available from the applicant's sale of other properties. RBTT distinguishes those facts from this case on the grounds that Mr. Joseph is not seeking to impugn the mortgage deed which underpins RBTT's power of sale. Additionally, RBTT continues, there is no issue of fraud, misrepresentation or duress going to the root of the mortgage deed. In fact, RBTT reiterates, there is no issue of misrepresentation since such a claim can only be raised between RBTT and Mr. John, the proposed purchaser. Finally, RBTT notes that Mr. Joseph has not paid any moneys into court.

[21] In respect of question 2, RBTT relies on the case of **National Commercial Bank Jamaica Limited v Olint Corporation Limited**¹⁸, **American Cyanamid v Ethicon**¹⁹ and **Re Lord Cable Garrett v Waters**²⁰, to submit that the court must be satisfied that there is a serious issue to be tried and if so, damages would not be an adequate remedy before an injunction is granted. RBTT concludes that based on all the facts of this case, injunctive relief would not be appropriate at this time.

Intended Purchaser's Views

[22] Mr. John proffered his views as an interested party to these proceedings. Mr. John relies on section 9 (1) of the Act and paragraph 5(v) of the mortgage deed to submit that RBTT has the right to sell the mortgaged property following Mr. Joseph's default in paying the mortgage debt. He, however, contends that Mr. Joseph's assertion of bad faith and misrepresentation cannot aid him in his request to restrain RBTT's efforts to sell the mortgage property. In respect of bad faith, Mr. John accepts that good faith is one of several duties that a mortgagee may owe to a mortgagor when the mortgagee decides to sell the mortgage property.²¹ Among the duties Mr. John cites are the duties to act in good faith and to take reasonable care to obtain the true market value of the property. He posits that a breach of the duty to obtain the true market value cannot be alleged in this case and indeed has not been so alleged because an allegation of that type of breach can only be properly made subsequent to a sale of the property. On the issue of misrepresentation, Mr. John submits that there can be no case on the claim for misrepresentation as the claim of a mortgagor can only arise in equity. The claim for misrepresentation gives rise to a cause of action in contract law. The mortgagor who seeks to restrain the mortgagee's power of sale must look to equity

¹⁸ [2009] UKPC 16

¹⁹ [1975] 1 ALL ER 504

²⁰ [1976] 3ALL ER 417

²¹ **Medforth v Blake** [2000] CH 86 is submitted as authority for this submission

for his relief and not to the general principles of law. Mr. John refers to **Downsview Nominees Ltd v First City Corpn Ltd**²² in support of this argument. He rejects the view that the **Prasad** case is applicable to Mr. Joseph's case for the reasons set out by RBTT.

[23] Mr. John also reiterates RBTT's stance that the mortgagor may only restrain a sale of the property before a contract where he pays the mortgage sums owed to the mortgagee into court. He goes on to make the point that where the mortgagee enters into a contract for sale, the equity of redemption is suspended and the mortgagor may only restrain the sale thereafter on grounds that the mortgagee is not acting in good faith. In determining where the balance of convenience lies in this case, Mr. John asks the court to find that a purchaser's title is virtually unimpeachable so long as he is a bona fide purchaser for value. He contends that there is no evidence to the contrary in this case.

[24] With regards to the factors that the court ought to consider before granting the injunction, Mr. John contends that Mr. Joseph will have to make out an arguable case that the power of sale was not properly exercised because –

(1) The conditions for sale have not satisfied; and

(2) The sale is being conducted at a price below the true market value.

[25] Mr. John claims that the only issue in this case relates to the second condition, that is, whether the property is being sold at a price below the market value. In that regard, he submits that the following matters demonstrate that Mr. Joseph has failed to make out such a case –

(1) There is no evidence of dishonest or unscrupulous behaviour on the part of RBTT, Terra Caribbean or the intended purchaser;

²² [1993] AC 295

- (2) The valuation relied on by Mr. Joseph is not produced by a qualified person;
- (3) No evidence has been furnished to the court at this time to support the statement that Terra Caribbean is not qualified to produce a valuation of the property. On the other hand, Mr. Joseph, who is a customs broker, appears to be giving evidence of the matters related to preparing a correct valuation. Property valuation is a science on which the court ought to receive evidence from qualified persons;
- (4) Even if there is 'mis-description' of the property, Mr. Joseph has not shown that there is a material effect on the price. The court is asked to find that a 500 square feet property in an affluent or well-placed location may fetch a better price than the 1000 square feet property in a less affluent or less well – placed location. Mr. Joseph must therefore offer evidence that the sale price is at an 'undervalue.' To rule otherwise *'it would be open to every mortgagor to come to the Court with a higher valuation and without more, be entitled to injunct the sale,'*²³
- (5) Mr. Joseph recognises RBTT's right to sell the property. RBTT has commenced the exercise by entering into an agreement for sale and has accepted a deposit further to the same. If the injunction is granted, the intended purchaser may bring a claim against RBTT for relief including specific performance; and
- (6) Mr. Joseph has demonstrated his inability to pay the loan due to financial constraints. He has admitted that his position may not improve. If an injunction is granted and RBTTT is successful at the trial of the substantive claim, Mr. Joseph may not in a position to honour an

²³ Mr. John's submissions filed on December 4, 2017 at para. 40

undertaking in damages. RBTT will then be unable to recover the fruits of a judgment against him.

Findings and Ruling

[26] My first observation is that Mr. Joseph seeks to distinguish the statement of law espoused in **Lord Waring v London and Manchester Assurance Co. Ltd** from his case by submitting that the court in that case deliberated on section 10 of the Law of Property Act 1925 (UK). My reading of the **Lord Waring** case indicates that the court considered sections 101(1) and 104(1) and (2) of the Law of Property Act 1925 (UK). These two provisions have been replicated almost entirely in the Grenadian Conveyancing and Law of Property Act in sections 9 and 11. I find therefore that the elucidation of the law in that case is not distinguishable from or inapplicable to this discourse in the manner argued by Mr. Joseph.

[27] The foregoing leads me to my next observation. Section 9 of the Act indicates clearly that a mortgagee has the right to sell the mortgaged property once the mortgage debt has become due. This power to sell has been described as one that may be exercised entirely at the discretion of the mortgagee. In **Cuckmere**, Salmon LJ explained that²⁴

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

²⁴ **Cuckmere Brick Co Ltd and another v Mutual Finance Ltd; Mutual Finance Ltd v Cuckmere Brick Co Ltd and others** [1971] 2 ALL ER 633 at 643

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.

- [28] Notwithstanding this almost unfettered right to realise the security for the sums due to him, the mortgagee is enjoined to conduct a proper sale if it chooses to exercise the right to sell. In this regard the law places certain obligations on the mortgagee. More prominent is the view that *'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.'*²⁵ Salmon LJ further elucidated the nature of these obligations²⁶ –

Counsel for the defendants contends that the mortgagee's sole obligation to the mortgagor in relation to a sale is to act in good faith; there is no duty of care, and accordingly no question of negligence by the mortgagee in the conduct of the sale can arise. If this contention is correct it follows that, even on the facts found by the learned judge, the defendants should have succeeded. It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. 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 with

²⁵ Fisher and Lightwood's **Law of Mortgage**, para. 30.23

²⁶ [**Cuckmere Brick Co Ltd and another v Mutual Finance Ltd; Mutual Finance Ltd v Cuckmere Brick Co Ltd and others** [1971] 2 ALL ER 633 at 643

Tomlin v Luce ((1889) 43 ChD 191 at 194). The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the 'proper price', others to the 'best price'. Vaisey J in *Reliance Permanent Building Society v Harwood-Stamper* ([1944] 2 All ER 75 at 76, 77, [1944] Ch 362 at 364, 365), seems to have attached great importance to the difference between these two descriptions of 'price'. My difficulty is that I cannot see any real difference between them. 'Proper price' is perhaps a little nebulous, and 'the best price' may suggest an exceptionally high price. That is why I prefer to call it 'the true market value'.

I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

[29] It has been suggested that the mortgagee may owe other duties in equity and that these obligations '*are flexible and will be adjusted to fit the requirements of the time.*'²⁷. For the purposes of this discussion, it may be appropriate to ask whether Mr. Joseph has satisfied this court that his case is one of an alleged breach of any of the duties owed to him by RBTT and if so, whether an injunction ought to be issued to restrain the sale in light of the alleged breaches?

Stopping or Retraining the Sale

[30] In respect of stopping or restraining a sale of the mortgaged property, the authors of the legal treatise, Fisher and Lightwood's **Law of Mortgages** explain that a mortgagor may only be restrained from exercising his power of sale before entering into a contract of sale where the mortgagee 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 excess.²⁸

[31] Where the mortgagee has entered into a contract for sale of the mortgaged property further to the right to sell, the legal posture is that the mortgagee 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.²⁹ The question of whether or when the mortgagor may restrain the sale of the mortgaged property was addressed in the case of **Lord Waring v London and Manchester Assurance Co. Ltd.** Crossman J's elucidation has been set out above. The suggestion is that pending completion of a proposed sale, the

²⁷ Supra note 25 and **Medforth v Blake** [2000] Ch. 8

²⁸ Supra note 24 at para 30.35

²⁹ Ibid at para 30.36, **Lord Waring v London and Manchester Assurance Co. Ltd** [1935] Ch 310; **Property and Bloodstock Ltd v Emerton** [1968] Ch. 94 and **Duke v Robson** [1973] 1 All ER 481

mortgagor's equity of redemption is suspended and the mortgagor is precluded from exercising the right to redeem the property even on tendering payment or payment into court. See **Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd** ³⁰ for the view that an unconditional contract for sale of the mortgaged property precludes a mortgagor's right of redemption so long as the contract of sale subsists. The mortgagee is given licence to sell as it sees fit subject to the discussions above on acting in good faith and obtaining the true market value. It is only if the mortgagee is acting in breach of these duties that the mortgagee may obtain an injunction to stop the sale. Mr. Joseph contends that there is no such limitation on the equity of redemption in Grenada and as such the mortgagor may redeem at any time. In light of my observation above on sections 101 of the Law of Property Act 1925 (UK) and section 9 of the Act, I find that Mr. Joseph's point of view on this matter to be unpersuasive. In Grenada as in England, a mortgagor's right of redemption is suspended and he is precluded from exercising that right where the mortgagee has entered into a contract for sale. If the sale falls through or is not completed, he may redeem by tendering the sums due under the mortgage or pay the same into court. In the case where a sale otherwise proceeds, he may restrain the exercise of the mortgagee's right of sale on the grounds that the mortgagee is failing to exercise that right properly.

Payment into Court as a condition of the grant of an Injunction

[32] The learned authors, Fisher and Lightwood also comment on the rule that payment into court is required as a condition for the grant of an injunction to restrain the sale by a mortgagee. The authors suggest that the rule is *'merely an aspect of the general rule that the mortgagor must offer to redeem before he can bring the mortgagee before the court.'*³¹ Fisher and Lightwood explain that the rule operates to require³²

³⁰ **Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd** [1967] 3 All ER 321

³¹ Supra, note 25 at para. 30.37

³² Ibid

payment into court ... where the mortgagor seeks to restrain the mortgagee selling prior to any contract for sale having been made and where the mortgagee is acting properly. However, it seems that the mortgagor need not offer to redeem where the mortgagee is not exercising his powers in good faith, nor otherwise acting improperly. It seems that if after the contract the mortgagor is alleging that the power of sale has not arisen, or, there has been a lack of good faith, there is likewise no need for payment into court; but a payment in is necessary if the mortgagee is seeking to stop the sale for any other reason.

[33] The applicability of the rule in our jurisdiction has not garnered much judicial comment. I have been assisted by some of the judicial comment emerging from the courts of Jamaica. The contemporary articulation of the rule was considered by the Jamaican Court of Appeal in the case of **Mosquito Cove Ltd v Mutual Security Bank Ltd et al**³³. Morrison JA in his characteristically lucid manner traced the application of the rule in Jamaica from the pronouncements in **SSI (Cayman) Limited v International Marabella Club SA**³⁴ and the **Inglis and Another v Commonwealth Bank of Australia**³⁵ decision. His Lordship explained that in cases where the mortgagor seeks to restrain the mortgagee's exercise of the power of sale³⁶,

... the rule was settled that courts of equity would not order restraint in such a case "without providing equivalent safeguard which is, the payment into Court of the amount due or claimed in dispute"...

In **Inglis**, Walsh J enunciated on the principle thusly³⁷ -

³³ Supreme Court Civil Appeal No. 57/2003 (Jca.)

³⁴ SCCA 57/1986 (JCA)

³⁵ [1971] HCA 64

³⁶ Supreme Court Civil Appeal No. 57/2003 (Jca.) at para. 43

³⁷ (1972) 126 CLR 161 at 164-165

If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon the terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.

The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.

[34] Quoting from his Lordship Downer JA in **Marabella**, Morrison JA elucidated that the strictures of the rule are applicable even in cases where there is an allegation of fraud, *‘for if they were not, where there is an allegation of fraud by the mortgagor, then the mortgagee would be deprived of his rights under the mortgage if a restraint is imposed without the appropriate conditions attached.’*³⁸

[35] While observing at paragraph 55 of **Mosquito Cove** that the rule as articulated in the **Marabella** case is ‘alive and well”, his Lordship went on at paragraphs 57 et seq. to highlight some ‘exceptional cases’ in which the rule was not applied or its strictures were somewhat tempered. His Lordship noted at paragraph 57 that *‘given that an injunction is a discretionary remedy, it is hardly surprising that there have been exceptional cases in which payment in by a mortgagor has not been insisted on as a precondition to the grant of an injunction.’* His Lordship then considered the cases of **Gill v Newton**³⁹, **Macleod v Jones**⁴⁰ and the Jamaican case of **Rupert Brady v JRDF and others**⁴¹. In **Gill v Newton**, the court of appeal allowed an appeal from the judge’s refusal to grant an injunction in circumstances due to the ‘peculiar’ nature of the deed in question which allowed the mortgagee

³⁸ Supreme Court Civil Appeal No. 57/2003 (Jca.) at para. 43

³⁹ (1866) 14 WR 490

⁴⁰ 1883) 24 CH.D. 289

⁴¹ SCCA No. 29/2007

into possession of the mortgaged property and ultimately created certain trusts independent of the deed. The court in **Macleod** found that the rule should not apply in circumstances where the mortgagee acted as the solicitor for the mortgagor and owed fiduciary obligations to the mortgagor. In this instance, the injunction was granted not on condition that the mortgagor pays the full sum due under the mortgage but on condition that she pays a sum equal to the amount actually disbursed to her by the mortgagee. In **Rupert Brady**, the applicant was attacking the mortgage deed itself on the grounds that he had not signed it or given anyone authority to sign the same on his behalf. The court of appeal of Jamaica allowed an appeal against the part of the judge's order which imposed the payment in of the full sum due under the mortgage as a condition for granting the injunction against sale sought by the mortgagor. The court of appeal found that it would be unjust in those circumstances to require the mortgagor to pay in the sums due 'in order to protect his rights'. The court of appeal observed that⁴²

The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged...

- [36] His Lordship Morrison JA concluded that while other exceptions to the rule no doubt exist and will emerge, the recent judicial trend suggests that the rule will only be departed from in 'highly exceptional cases'. Instances of a fiduciary relationship between the mortgagee and the mortgagor and cases of forgery are two of the instances referenced by his Lordship as instances of exceptional circumstance. **Prasad** is also an example of an occasion on which the rule was not applied. In that case, among other things, the mortgagee served as the solicitor for the mortgagor on the transaction and as solicitor for the mortgage company. The solicitor and his daughter were the only directors of the mortgage company. There were serious questions regarding the sums claimed under the

⁴² See **Mosquito Cove Ltd v Mutual Security Bank Ltd et al** Supreme Court Civil Appeal No. 57/2003 (Jca) at para. 62

mortgage and indeed whether the mortgage agreement itself was enforceable. The court granted the injunction restraining the sale of the mortgaged property taking into account, inter alia, the fact that the mortgagor had already paid into court the sum of \$30,000.00. Quoting from the case of **Harvey v McWatters**⁴³, the court reiterated the view that the rigidity of the rule is attenuated in certain cases. Sugarman J's articulation of the exceptions is recited thusly⁴⁴–

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There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question... What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of similar type. But this is a rule resting on different principles and reasoning. These permit of a greater flexibility. They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to adequate protection to the mortgagee.

[37] The foregoing suggests to me that the general rule subsists subject to the exceptional circumstances as discussed above. Fisher and Lightwood helpfully put the exceptions more broadly into the category of cases where the mortgagee fails 'to act in good faith or instances where the power of sale has not arisen'⁴⁵. In those cases it is said that a payment in may not be required before the court will grant an injunction to restrain the sale by the mortgagee.

⁴³ (1948) 49 SRNSW 173

⁴⁴ **Harvey v McWatters** (1948) 49 SRNSW 173 at 178

⁴⁵ *Supra*, note 25 at para. 30.37

Should an Injunction be granted in this case?

[38] It is fairly well established by now that the courts will consider the grant of an interlocutory injunction on the guidelines set out in the **American Cyanamid** case. The court will generally consider –

- (1) Whether there is a serious issue to be tried or put another way, does the applicant have a real prospect of obtaining a permanent injunction;
- (2) Whether or not damages would be adequate remedy for the applicant;
- (3) Whether or not damages would be an adequate remedy for the respondent if the injunction is granted; or
- (4) Does the balance of convenience lie in favour of the grant or refusal of the injunction;

[39] On the question of whether there are serious issues to be tried in this case, it will be useful to recall that Mr. Joseph will not be granted an injunction to restrain the sale of the mortgaged property unless RBTT has acted in bad faith or has failed to take reasonable steps to obtain the '*best price reasonably available*'⁴⁶. I conclude therefore that Mr. Joseph will have to satisfy the court that he has '*prospects of success which in substance and reality exist*'⁴⁷ to demonstrate that RBTT is either acting in bad faith or has failed to take reasonable steps to obtain the true market value for the property. The gravamen of his complaint is that –

⁴⁶ Fisher and Lightwood use this description of the obligation at para 30.24 of the text **Law of Mortgages**. Salmon LJ in **Cuckmere Brick Co. Ltd v Mutual Finance Ltd**[1971] 2 All ER 63 describes the obligation as one to 'obtain the true market value'.

⁴⁷ **Mothercare Ltd v Robson Books Ltd** [1979] FSR 466 at 474

- (1) He became the owner of the land on which the property stands in October 1995;
- (2) He and his wife mortgaged the property to RBTT in September 2008. The matrimonial home was built with proceeds of the mortgage;
- (3) He and his wife divorced in 2011. However during the currency of the marriage, the mortgage was satisfied by a salary assignment from his wife to RBTT. Shortly before the marriage ended he found out that his wife was not paying the mortgage. He paid up the balance then due and thereafter expected his wife to make the usual payments from her salary. After the marriage ended he came to realise that his wife had stopped making the mortgage payments;
- (4) He discovered during the year 2016 that RBTT was trying to sell the property pursuant to its power of sale. He found out about the proposed actions of Terra Caribbean when someone from Terra Caribbean called to ask for permission to visit the property to conduct a valuation. Other than the request to give access to the agent conducting the valuation, he received no other word from RBTT about the sale of the property;
- (5) He gave access to Terra Caribbean's agent to conduct the valuation but that he never received a copy of the same in spite of his repeated requests;
- (6) Further to his efforts to sell the property he received a true valuation conducted in 2015 by one Boris Horsford who is a known 'valuator'. The property was valued at 1.45 million dollars at that time;
- (7) He tried to sell the property and received various offers. It was during one of those discussions with potential buyers that he found out that

Terra Caribbean was advertising the property on its website at a price of USD 259,973.00. He surmises that the low price arises from the inaccurate listing of the property at a size of 1903 square feet;

(8) He wrote to the bank complaining of the wrong advertising and received a reply indicating the bank's acceptance of Mr. John's offer of USD 635,000.00;

(9) Terra Caribbean are known to be realtors and not professional valuers;

(10) He is likely to suffer grave hardship if the property is sold at the listed price since he would be saddled with the burden of the balance owed to RBTT; and

(11) At his age it would be difficult to discharge his other financial obligations including alternative accommodations and bearing the cost of the debt to RBTT.

[40] RBTT's response to these assertions is set out in the affidavit of Nikisha Alexander filed on 21st November 2017 –

(1) Mr. Joseph and his wife signed a mortgage dated 19th September 2008 with RBTT. Further to that mortgage, a promissory note was signed by which they jointly and severally obligated themselves to repay the mortgage;

(2) The last payment made on the loan was the sum of \$2960.00 paid on 5th September 2014;

(3) A demand letter for payment was issued to Mr. Joseph and his wife on 29th December 2014. The arrears of the debt at that time was

\$161,934.00. The letter was clear that if the arrears was not paid the total sum due of \$856,704.07 would become due;

- (4) In response to the letter dated 29th December 2014, Mr. Joseph wrote to RBTT on 16th January 2015 and 9th February 2016 requesting a period of (10) days to liquidate the demanded arrears;
- (5) RBTT responded by way of letter dated 3rd March 2015 in which several proposals were put to Mr. Joseph to resolve the arrears. Mr. Joseph did not respond;
- (6) By letter dated 9th April 2015, RBTT wrote to Mr. Joseph informing him of its right to sell the property and advising him of Tera Caribbean's visit to conduct the valuation;
- (7) A notice to vacate was issued to Mr. Joseph and his wife in July 2017;
- (8) RBTT informed Mr. Joseph by letter dated 5th July 2017 that it had accepted Mr. John's offer;
- (9) Mr. Joseph was fully aware that once the loan fell into arrears that RBTT could fully exercise its right to sell his property;
- (10) RBTT was not made aware of any efforts to sell the property or of any offers therefor. BY Mr. Joseph's own evidence the Horsford valuation is more than 2 years old and the valuation at November 2017 is self-serving. Mr. Barry is an engineer and not a 'valuer' and as such he is not qualified to give such evidence. On the other hand, Terra Caribbean is in the business of valuing, advertising and selling properties;

(11)RBTT never intimated any offers to Mr. Joseph other than the one made by Mr. John since there were no other offers;

(12) RBTT disputes the accuracy of the Horsford valuation as it does not include the square footage of the building. The valuation is said to contain inaccurate insurance assessment information; and

(13)Mr. Joseph is seeking to restrain RBTT's lawful right to sell the property. Mr. Joseph acknowledges that RBTT has the right to so sell.

[41] It seems to me that Mr. Joseph's principal grievance is the fact that RBTT may sell the property at an undervalue which may cause him serious financial losses. This is not such an incredible posture to take with respect to the sale of one's property. The logic is that while the mortgagee is endowed with an almost unfettered right to sell the property, the mortgagee has specific duties to discharge in the exercise of that right. In respect of price at which the property may be sold, Fisher and Lightwood discuss the duty placed on the mortgagee⁴⁸ –

If the mortgagee decides to exercise his power of sale, he is under a specific duty to take reasonable care to obtain the best price reasonably available for the mortgaged property at the time, which will normally equate with the current market value. This duty arises in equity, rather than in tort or contract... It is a matter for the mortgagee how that general duty is to be discharged in the circumstances of any given case (eg mode of sale, advertisement, time on the market). Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, in respect of which there are no absolute requirements. The mortgagee will not be adjudged to be in default unless he is plainly on the wrong side of the line, even though he might have obtained a higher price.

⁴⁸ Supra, note 25 at para 30.24

The burden of proof is on the mortgagor, or other person seeking to set aside the sale, to prove breach of this duty by the mortgagee....

Often... an alleged undervalue will merely be the difference in the opinions of several valuers.

A mortgagee will not breach its duty to the mortgagor if, in the exercise of its power to sell the mortgaged property, it exercises its judgment reasonably; and to the extent that the judgment involves assessing the market value of the mortgaged property, the mortgagee will have acted reasonably if its assessment falls within an acceptable margin of error.

- [42] I would confess that the balancing act to determine whether Mr. Joseph has made out with a case with chances of success that RBTT has acted improperly in conducting the valuation which will ultimately lead to the property being sold at an undervalue is not without difficulty. For one thing, I would think that a court ought to be slow to restrain the mortgagee's right to sell on the basis that the mortgagor has furnished a different valuation and stated that the property may thereby be sold below the true market value if it is sold at the mortgagee's price that may be below that of the mortgagor. Such an approach is evidently rife with implications for the mortgagee's right to realise the benefits of the security for the debt not least of which is the likely march of mortgagors to the court with a better valuation every time a mortgagee seeks to sell the mortgaged property for default. The situation would be made even graver in cases such as this one where the mortgagee has already entered into a contract for sale. On this score, I bear in mind Crossman J's admonishment in **Lord Waring** that⁴⁹

s. 101 of that Act, 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 private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by

⁴⁹ (1935) Ch. 310 at 318

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.

[43] Walsh J's thoughts in **Inglis** stated above are also apposite⁵⁰ –

The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.

[44] For these reasons, the court have always restricted the instances where the power to sell is restrained to those cases where the applicant demonstrates a case with realistic prospects of success that the mortgagee is acting in bad faith or in breach of the obligation to obtain the true market value for the property. For instance in **Gill v Newton**, the 'unusual' terms of the deed was one of the underlying rationale for the grant of the injunction and the order that the rule requiring payment into court should not apply. In **McLeod**, the relationship between the mortgagor and the mortgagee who acted as her solicitor brought into serious question the underlying mortgage deed. In **Prasad**, among other things, the allegations of the impropriety of the solicitor acting for the mortgagee where he was a principal, misrepresentation as to the underlying deed and other serious questions prompted the court to find that there was a serious question to be tried and ultimately the grant the injunction. In all these cases there was more than the mere assertion

⁵⁰ (1972) 126 CLR 161 at 164-165

that the valuation was improperly conducted and/or that the sale price was not accurate.

[45] I would hasten to add that I am by no means suggesting that the mortgagee is not to have due regard to the manner in which it advertises the property for sale. It is quite conceivable that the failure to properly advertise the property may lead to a finding that the mortgagee did not act in good faith and/or failed in the duty to act reasonably to obtain the true market value of the property. **Cuckmere** was in fact a case in which the court found that the mortgagee acted negligently in that it did not take reasonable steps to adequately advertise the sale of the mortgaged property in a manner that would attract the true market value for the property. The mortgagees in that case were in possession of information that the property had received planning permission and may have fetched a higher price if it was advertised as suitable for the development of flats. They advertised the property without reference to this information. The court found that they had acted negligently by omitting this information and as such they were liable for the losses by the mortgagor. In **Tomlin v Luce**⁵¹, the property was incorrectly described in the offer for sale. The mortgagees were found liable for the losses suffered by the subsequent mortgagees as a result of the want of care in the advertisement of the sale.

[46] Having reviewed the legal position, I am unconvinced that there is evidence at this point that reveals that in obtaining the valuation that RBTT acted recklessly, callously or negligently. Mr. Joseph has accepted that the assessment of the property was done on notice to him. He says that there were no measurements taken. That is an assertion disputed by RBTT. Mr. Joseph has also conducted his own valuations. RBTT says that those valuations are self-serving and hardly reliable because the persons who prepared them are not experts. Herein lays the difficulty which I have highlighted above. These are competing arguments about a valuation conducted by RBTT which are being used to restrain a sale. It cannot be

⁵¹ (1889) 43 Ch D 191. The obligations to act in good faith and having regard to the interests of the mortgagor are replicated in statute in Antigua and Barbuda.

the case that the court will restrain the sale because the mortgagor procures another valuation with a different measurement or price. The mortgagee will hardly be able to sell a property if this is permissible. Mr. Joseph says RBTT ignored his protests about the accuracy of the valuation. RBTT is entitled to sell the property as it sees fit as long as it conducts the sale in good faith and with due regard to its obligation to obtain the true market value for it. Besides the assertions that the sale may be proceeding on a valuation that includes the wrong square footage, I have not seen any evidence thus far that RBTT has set out to conduct this sale without regard to its obligations. I have formed the view based on my analysis of the law as set out above that there must be credible evidence that RBTT is acting in bad faith or negligently in selling at the price that it intends to sell. At this juncture there is not sufficient evidence to suggest that RBTT is so conducting the sale in an improper manner that it ought to be restrained from doing so until trial.

[47] I do not come to this conclusion lightly since I continue to bear in mind that RBTT has an obligation to properly advertise the property for sale and may be liable for losses incurred by Mr. Joseph if they have not taken reasonable steps to obtain the true market value for the property. RBTT may be well advised to consider the instances where it has been found that the mortgagee has failed to properly advertise the property for sale. I have already alluded to **Cuckmere** and **Tomlin v Luce**. See also the Antigua case of **Caribbean Banking Corporation v Alpheus Jacobs**⁵² where the failure to adequately advertise the mortgage property founded a viable claim for losses incurred by the mortgagee as a result. If I am wrong in my assessment and it is the case that the assertion that RBTT has not properly described the property for sale is sufficient to ground a case of bad faith and/or negligence as claimed by Mr. Joseph, then I do not find that damages will be an inadequate remedy if the injunction against the sale by RBTT was not granted at this stage and Mr. Joseph is eventually successful at trial. Fisher and Lightwood explain that⁵³

⁵² HCVAP2004/0010.

⁵³ Supra, note 25 at para. 30.24

The remedy for breach of the equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received. The prima facie measure of damages for breach of the mortgagee's duty by sale at an undervalue is the reduction in value of the equity of redemption.

- [48] While it is true that Mr. Joseph stands to lose his property, if he is ultimately successful at showing that indeed RBTT acted in breach of its obligations to him, then he is entitled to the appropriate damages for his losses. He will not be 'on the hook' so to speak for the balance of the debt. Conversely, it is a striking feature of this case that RBTT has offered the property for sale since 2015. In the intervening years the sole offer has emerged from Mr. John who has signed a contract for sale. Mr. Joseph has indicated that he has tried to sell the property. He has asserted that he has received offers for the same. He has not produced any evidence to this court other than his say so to prove this assertion. He has likewise not provided any evidence that RBTT is aware of any of these offers to buy the property. The property has therefore stood on the market for over 2 years with one offer to buy. RBTT stands to lose this offer if the sale is not concluded in a timely manner. RBTT stands to suffer serious financial loss in its ability to recover the sums owed by Mr. Joseph. Mr. Joseph has also testified of his current financial limitations which have been recited above. There is nothing on the evidence to indicate that he is in any position to meet damages that RBTT may suffer if this injunction is granted. In all the circumstances therefore, I would refuse the application for the interlocutory injunction with costs to RBTT in the sum of \$750.00.

Raulston LA Glasgow
High Court Judge

By the Court

Registrar