

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2012/0275

BETWEEN

**BANK OF SAINT VINCENT AND THE GRENADINES LTD
Formerly THE NATIONAL COMMERCIAL BANK (SVG) LIMITED**

CLAIMANT

AND

C & R ENTERPRISES LTD

DEFENDANT

Appearances:

Mr. Stephen Williams for the claimant.

Ms. Maia Eustace for the defendant.

2016: Nov. 16
Nov. 30

DECISION

BACKGROUND

[1] **Henry, J.:** This is an application by Bank of Saint Vincent and the Grenadines Ltd ('the bank') for an order to sell C & R Enterprises Ltd. ('C & R')'s mortgaged property at a price below the market value or for directions on how to proceed. The property is located on Bay Street in Kingstown, Saint Vincent and the Grenadines and comprises two stories. It houses commercial businesses occupied by C & R's tenants. C & R opposes the sale of the property at a price below the market value.

ISSUE

- [2] The issue is whether an order should be made for sale of the property below the market value and if not, what directions should be issued to the bank?

ANALYSIS

Issue – Should an order be made for sale of the property below the market value or should directions be issued to the bank?

- [3] In 2012, the bank initiated action against C & R to recover monies loaned to them. That case was tried in April 2016 and judgment entered for the bank for the outstanding balance on the loan with interest. The property and mortgage are registered respectively by Deed of Conveyance¹ and Indenture of Mortgage.² The bank was also authorized to sell the mortgaged property to satisfy the debt, by 'public auction or private contract to the bidder or offeror' who made the highest reasonable offer, if that offer amounted to at least 80% of the value ascribed to the property and to apply to the court for further directions or order if the highest offer received was less than 80% of such value.
- [4] The bank obtained two valuation reports in May 2016³ from licensed valuers Franklyn Browne and Chris Browne which placed values of \$2,094,000.00 and \$3,130,000.00 respectively on the property. They ascribe a forced market value of \$1,675m and \$1.6m respectively. The bank has accordingly brought this application for directions or order of sale. Between May 20th, 2016 and 24th June, 2016, the bank advertised the property for sale on the website of licensed realtor Liberty Properties and in six consecutive issues of the Vincentian and Searchlight, two weekly newspapers circulating in Saint Vincent and the Grenadines, as directed by the court.
- [5] The bank's recoveries officer Mr. Norman Robinson testified that the judgment was served on all

¹ Deed No. 505 of 2008.

² Deed No. 506 of 2008.

³ Respectively on 7th May, 2016 and 13th May, 2016.

occupants of the mortgaged property. He averred⁴ that to date the bank has received only two offers to purchase the property, one in the amount of \$550,000.00 and the other for \$1,600,000.00. He deposed that the bank wishes to sell the property to the person who offered the higher amount.

- [6] In his affidavit⁵ and oral testimony C & R's managing director and one of its shareholders Mr. Cleve Lewis responded to the bank's assertions. He testified that C & R has repaid a total of \$200,000.00 to the bank. He deposed the bank is seeking to sell the subject property at less than 50% of the market value. He asserted that the two valuation reports exhibited by the bank contain two vastly different valuations. He submitted that Franklyn Browne's valuation is anachronistic because his valuation of:
- (1) 12th February 2012 reflected a market value of \$3.16m and a force sale value of \$2.55m; and
 - (2) 2nd February, 2013 ascribed a market value of \$3.06m with a forced value of \$2.25m.

- [7] Mr. Lewis described the differences in valuations as an 'incredible disparity'. He deposed that he commissioned his own valuation from licensed property valuator Franklyn Evans who valued the property at \$3.025m with a forced sale value of \$2.72m. That valuation report was produced. He charged that Franklyn Browne is the bank's in house valuator and therefore lacks the independence to assess the property now that the bank's relationship with C & R has changed. He argued that Chris Browne's valuation is consistent with Mr. Evan's.

- [8] Mr. Lewis also correctly pointed out that the value ascribed by Mr. Franklyn Browne to the building remained unchanged between 2013 and 2016 but that the land value dropped from \$1,935,450.00 to \$1,346,400.00 during that period. He argued that it is illogical that without reference to an environmental factor the land would lose 30% of its market value in 3 years while the building which has not had its customary maintenance during that time remained unchanged. He invited the court to reject Mr. Franklyn Browne's valuation for those reasons.

- [9] None of the licensed valutors testified at the hearing. While there may be good reasons for the differentiations in and within valuations, the court is unable to assess them because of the absence of

⁴ By affidavit filed on 9th September, 2016.

⁵ Filed on 5th of October, 2016.

the valuers. Having regard to the specialist nature of the expertise required to conduct valuations, I refrain from concluding whether the differences in Mr. Franklyn Browne's valuations are suspect and should be disregarded. What is evident however is that the valuations raise several questions as to the value of the subject property which have not been competently addressed by the witnesses.

[10] Mr. Lewis urged the court to accept the valuations of Mr. Chris Browne and Mr. Franklyn Evans and order that the property not be sold under 80% of its value. He referred the court to a series of deeds⁶ between the bank and his wife Mrs. Rhona Lewis, Mr. Cleve Lewis and C & R under which the Lewis family home is encumbered. He argued that if subject property is sold at the fire price of \$1.6m the bank will seek to recover the remaining debt by selling the family home, which will be insufficient to fully service the remaining \$1.7m of the outstanding debt. He argued further that if the property is sold C & R will have to close its doors thereby depriving the Lewis' of their livelihood and adversely impinging on his ability to provide for his family. He proposed another alternative: that the bank permit him to continue servicing the loan with built in yearly increases. He asserted that 'he' is now in a position to pay \$19,000.00 per month with yearly increases of \$2000.00 per month. He asked the court to accept his proposal.

[11] Mr. Robinson responded⁷ that C & R last made a mortgage payment of \$10,000.00 on 2nd February, 2016 although it has been collecting rent from the several tenants who are occupying the building. Mr. Lewis did not deny this. Mr. Robinson deposed that the sale of properties in Saint Vincent and the Grenadines has been slow, that it is now becoming difficult to sell commercial properties and that there is no guarantee that a building will sell for its appraised value. He acknowledged that it was not within the scope of his qualifications to make valuations or assessments of the market. I find therefore that he was not competent to pronounce on prevailing market conditions. His statements on that subject are therefore disregarded.

[12] On the bank's behalf, learned counsel Mr. Stephen Williams indicated that the bank relies on written submissions made at the time of the trial. Likewise, learned counsel Ms. Maia Eustace stated that she

⁶ Nos. 51 of 1993, 1486 of 1994, 3591 of 1997 and 2831 of 2006.

⁷ By affidavit file don 14th October, 2016.

would rely on her submissions filed at that time. Ms. Eustace requested and was granted an additional day to file further legal authorities. No such authorities were filed. The bank submitted that the legal principles on which the court will make an order for sale were considered in **Cuckmere Brick Co. v. Mutual Finance Ltd.**⁸ They submitted that in exercising a power of sale, the bank owes a mortgagor certain equitable duties of care including a duty to act in good faith. C & R concurred.

[13] It is established law that 'acting in good faith' means taking into account the mortgagor's interests when considering what constitutes a reasonable sale price. Accordingly, the bank must pay regard to C & R's interests. The bank is required to take reasonable precaution to obtain a price which reflects the true market value of the mortgaged property.⁹ There is nothing before the court which suggests that the bank has not done so. They advertised the sale extensively in local newspapers and also online. I am satisfied that the proposed sale has come to the attention of a wide and varying cross-sections of the local, regional and even international community.

[14] In the circumstances of this case, where the mortgaged property is being sold by private treaty pursuant to the bank's power of sale, the bank must act honestly and without reckless disregard for C & R's interest. This duty remains active right up to the date when a decision is made to sell.¹⁰ While the bank has a duty to factor C & R's interest when making its decision, if their respective interests conflict, the bank may give preference to its own interests.¹¹

[15] The court remains mindful that when a financial institution lends monies to its customers it does so intending to make a profit and expecting that the loans will be repaid promptly in accordance with the terms and conditions of the loan. The sums advanced do not belong to the bank. Rather, they belong to depositors on whose behalf the bank manages and invests those deposits. Delinquencies by mortgagors¹³ impact negatively on the bank's operations and its ability to reward depositors.

⁸ [1971] Ch. D. 949.

⁹ Ibid. per Salmon LJ at pg. 646 of the Cuckmere Brick case.

¹⁰ Ibid. per Salmon LJ at pg. 646 of the Cuckmere Brick case.

¹¹ Cuckmere Brick Co Ltd and another v Mutual Finance Ltd. [1971] 2 All ER 633, pg 643 (Salmon LJ).

Ultimately, non-payment by borrowers could affect the local and regional financial systems with corresponding detriment to residents of the sub-region. On the one hand, the bank must be cognizant that by exercising its power of sale, it must seek to obtain a reasonable price. On the other hand, the bank must be ever mindful that delaying a sale could conceivably deprive it of an opportunity to recover part of its customers' deposits in a timely manner if ever.

[16] I have taken into account Mr. Lewis's appeals on behalf of his family. Neither Mr. Lewis nor Mrs. Lewis or their children are party to the claim. Their interests are not relevant considerations. It has not gone unremarked that C & R has been receiving and retaining rental income and has withheld payments to the bank for over 9 months. This is unreasonable and unacceptable. This court cannot at this juncture replace judgment after a trial with a restructured repayment plan. Those are matters for negotiation between the parties.

[17] I have noted C & R's objections to the use of valuations prepared by Mr. Franklyn Browne. C & R has no such objections to the valuation prepared by Mr. Chris Browne. Since Mr. Franklyn Browne was not tendered as a witness, C & R had no opportunity to cross-examine him and the court was likewise unable to seek clarification from him. It is therefore just that his valuation be excluded from consideration.

[18] In their valuations, Mr. Evans and Mr. Chris Browne describe the amenities on the property in similar terms. Mr. Browne's report was more detailed and expressed an opinion on market trends. In this regard, he opined that there is a fair demand for rental space and commercial properties in general. He indicated that prices realized in market sales have been relatively modest and that this trend is likely to persist. For this reason, he posited that if demand is not strengthened, properties coming on to the market may take longer to sell and 'fetch comparatively lower prices' and property owners will tend to hold on to properties rather than try to sell in a depressed market. He expressed the view that commercial land values may still increase beyond their present levels in the medium term but at a slow rate.

[19] Taking all of his and Mr. Evans' report into account and applying the applicable principles as outlined

above, I am satisfied that the bank has discharged its several duties to C & R. The low offers received are conceivably a factor of the depressed market conditions described by Mr. Browne. I so infer. It seems to me that the bank has an obligation to its depositors to recover as much of the loan as possible in as short a time as reasonably practicable in face of the substantial default by C & R. The original loan was \$1,750,000.00. If they are able to recoup \$1.6m by the proposed sale they would not be breaking even.

[20] Having regard to the contents of the valuation prepared by Mr. Chris Browne and Mr. Evans, I am satisfied that the price at which the bank proposes to sell the mortgaged property is the best price which is reasonable under the prevailing circumstances, even though it is considerably below the market value. Nothing has been urged on the court which would support a conclusion that a higher price would be obtained at a later date in the short term. Furthermore, by C & R's evidence the property is not being maintained. Under those circumstances, the value is expected to be affected by such inaction. It is unnecessary to issue any further directions.

ORDERS

[21] It is accordingly ordered:

1. The Bank of Saint Vincent and the Grenadines Ltd. is authorized to sell the subject property described in Indenture of Mortgage No. 506 of 2008¹² at the price of \$1,600,000.00.
2. C & R shall pay to the bank costs to be assessed on application to be made by the bank on or before 14th December, 2016, pursuant to CPR 65.11.

[22] I wish to thank counsel for their written submissions.¹³

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Esco L. Henry
HIGH COURT JUDGE

¹² Deed No. 506 of 2008.

¹³ Paragraph [15] of the decision was corrected after judgment was initially issued, by replacing 'mortgagees' with 'mortgagors'.