

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2013/0147

BETWEEN:

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

-AND-

AUSTIN FRASER **DEFENDANT**

Appearances: Mr Stephen Williams, Counsel for the Claimant, Mr Jaundy Martin Counsel for the Defendant.

2015: Oct. 22
Dec. 3

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** The Bank of Saint Vincent and the Grenadines Ltd (“Bank”) loaned Mr Austin Fraser approximately \$211,000.00 to acquire residential property at Wallilabou. Mr Fraser agreed to repay the loan by monthly installments of just over \$3400.00 and he executed a mortgage agreement to this effect. Mr Fraser defaulted on the repayments. The Bank seeks to recover the sums outstanding with interest. The Bank also seeks an order for vacant possession of the property and authorizing it to exercise its power of sale by sale to the highest reasonable bidder. Mr Fraser contends that while the Bank is entitled to sell the property for this purpose, it has a duty to advertise the property for sale

extensively and not sell at an undervalue unless it is impossible to get a higher value. He objects to the sale below the assessed value of \$625,000.00, and in particular to the lone person to submit an offer to purchase it at a price of \$500,000.00.

- [2] Before the trial commenced, learned Counsel Mr Williams indicated to the court that the offer received by the bank had been withdrawn and was no longer being considered. In addition no other offer has been made to date.

ISSUE

- [3] The issues are whether the Bank owes a contractual, statutory or other duty to Mr Fraser, and has acted in breach of that duty:
1. not sell the property at a price below market value unless it is impossible to get a higher price? and
 2. advertise the property for sale extensively before exercising its power of sale?

ANALYSIS

Issue No. 1 - whether the Bank owes a contractual, statutory or other duty not to sell the property at a price below market price unless it is impossible to get a higher value?

- [4] Although Mr Fraser filed a Defence, he did not make a witness statement. The Bank's only witness was its Recovery's Officer, Mr Norman Robinson. His testimony is contained in his witness statement¹ and oral testimony under cross-examination. His account is unchallenged and chronicles the events from which the issues emerge. In summary, Mr Robinson indicated that Mr Fraser owns land at Wallilabou which he mortgaged² to the Bank in April 2009, to secure a loan of

¹ Filed on May 21, 2015.

² By Indenture of Mortgage Deed Number 1215 of 2009.

\$211,500.00. He explained that Mr Fraser last made payment towards the mortgage on April 2, 2013 and that the outstanding balance as at June 2013 was \$408,463.41, being an aggregate of principal and interest. Mr Robinson testified further that Mr Fraser has defaulted on loan payments and that the Bank has made repeated unsuccessful requests for him to honour his obligations to repay. He indicated that Mr Fraser last made a payment towards the interest on April 8, 2010. The Bank wishes to sell the property pursuant to its power of sale in the mortgage.

[5] Mr Robinson deposed that the Bank advertised the property for sale on December 14 and 21, 2012 in the Searchlight and News newspapers, copies of which are attached³ to the Claim Form. He stated that on February 13, 2013, the Bank received a letter offering⁴ \$500,000.00 for the property and no subsequent offers. He explained that subsequently on March 10, 2013, the Bank obtained a valuation⁵ report which ascribed a market value of \$625,000.00 to the property. Mr Robinson testified that Mr Fraser still occupies the mortgaged property. The Bank seeks an order for payment of the outstanding arrears, liberty to exercise its power of sale, vacant possession of the property and liberty to accept the highest reasonable bid even if it is below the open market value.

[6] The Bank is granted a power of sale under clauses 7 and 8 of the mortgage which state respectively:

“7. It shall be lawful for the Mortgagee and every person for the time being entitled to receive and give a discharge for the Principal Loan or the balance thereof hereby secured when the same has become due to sell or concur with any other person in selling the said hereditaments or any part thereof whether subject to the prior charges (if any) then affecting the same or discharged therefrom and in the latter case upon such terms as to the payment of such charges as

³ And marked “G”.

⁴ Exhibited as “NR8”.

⁵ Exhibited as “NR9”.

the Mortgagee shall think fit and either together or in lots by public auction or private contract subject to such conditions respecting title or evidence of title or other matter as the Mortgagee may think fit with power to vary the contract for sale and to buy in the same at any sale by auction and to rescind any contract for sale and to resell without being answerable for any loss occasioned thereby and to convey the property sold for such estate and interest therein as is the subject of the present mortgage freed from all estates interests and rights to which the said mortgage has priority but subject to all estate interests and rights which have priority to the said mortgage.”

“8. Provided always and it is hereby declared as follows:

- (i) The Power of Sale hereby conferred shall not be exercised unless and until one of the following events shall have happened namely:-*
 - (a) Notice requiring payment of the Principal Loan or the balance due thereon has been served on the Mortgagor and default has been made in payment of the Principal Loan demanded for three (3) months after such service;*
 - (b) Some interest under these presents is in arrears and unpaid for four (4) weeks after becoming due; or,*
 - (c) There has been a breach of some condition or provision contained in these presents and on the part of the Mortgagor to be observed and performed other than the covenant for the payment of the said Principal Loan and interest thereon;*
- (ii) Where a conveyance is made in professed exercise of the present power of sale the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly exercised but this provision shall not prejudice a claim for damages against the person exercising this power by any person damnified by any unauthorized or improper or irregular exercise thereof;*
- (iii) On any such sale as aforesaid the receipt in writing of the person exercising the present power shall be an effectual discharge for the purchase money and shall not be bound to see to the application or be responsible for any loss or misappropriation of the same;*
- (iv) The money which is received by the person exercising the present power arising from such sale as aforesaid shall be held by such*

person in trust to be applied by such person first in payment of all costs charges and expenses properly incurred by such person and incident to the sale or any attempted sale or otherwise and secondly in discharge of the mortgage money due under these presents and the residue of the money so received (if any) shall be paid to the person entitled to the said hereditaments or authorised to give receipts for the proceeds of sale thereof.

[7] The two foregoing clauses impose certain contractual pre-conditions to the Bank's exercise of the power of sale. In this regard,

1. the Bank must demand payment of the arrears by notice in writing; and
2. Mr Fraser must have defaulted in making payment of the loan for at least three consecutive months after service of the notice on him;
3. Some part of the interest must be at least four weeks in arrears; or
4. Mr Fraser must be in breach of some other contractual obligation under the mortgage.

[8] Based on the available evidence, these pre-conditions were all satisfied before the Bank received the offer from the single bidder and entered negotiations based on the offer. The mortgage contains no express stipulation against sale of the property at a price below the market value. Accordingly, the Bank is not in breach of the express pre-conditions to the exercise of the power of sale. There is accordingly no specific contractual prohibition against exercise of this power of sale.

[9] However, when it invokes its power of sale, the Bank is bound not only by its contractual obligations but also by other duties towards Mr Fraser in equity. These were considered in **Cuckmere Brick Co. v. Mutual Finance Ltd.**⁶ and

⁶ [1971] Ch. D. 949.

Caribbean Banking Corporation v Alpheus Jacobs.⁷ The court in the **Cuckmere Brick** case examined the strict equitable duties imposed on mortgagees, while in the **Alpheus Jacobs**' case the court was concerned with a mortgagee's statutory duties in the Antigua and Barbuda Registered Land Act.⁸ It is noteworthy that the court in the latter case opined that those statutory duties effectively codify the equitable position.⁹

[10] In both scenarios, the court recognized that a mortgagee has a duty to act in good faith when exercising its power of sale,. As respects the price at which the property is offered for sale, the mortgagee must have regard to the mortgagor's interests and take reasonable precaution to obtain a price for the mortgaged property which reflects its true market value.¹⁰ Where the property is sold at auction, it is established that there is nothing to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. In addition, a mortgagee who sells such property by private treaty must act honestly and without reckless disregard for the mortgagor's interest. This duty includes a need to take reasonable precaution to "obtain the true market value of the mortgaged property at the date on which he decides to sell it."¹¹ Provided that none of these adverse factors is attributable to the mortgagee, he can do as he like. Where the mortgagee's and the mortgagor's interests conflict, the mortgagee is entitled to "give preference to his own interests,..."¹²

⁷ ANUHCVP2004/0010.

⁸ Cap. 374 of the Laws of Antigua and Barbuda.

⁹ Ibid. at para. 9 of the **Alpheus Jacobs** case, per Carrington, J.A. (Ag).

¹⁰ Ibid. per Salmon LJ at pg. 646 of the **Cuckmere Brick** case and per Carrington J.A. (Ag.) at para. 9 of the **Alpheus Jacobs** case.

¹¹ Ibid. per Salmon LJ at pg. 646 of the **Cuckmere Brick** case.

¹² **Cuckmere Brick Co Ltd and another v Mutual Finance Ltd**. [1971] 2 All ER 633, pg 643 per Salmon LJ.

[11] Based on the foregoing principles, it is clear that once a mortgagee acts in good faith and obtains the best price he can under all the circumstances, he would not be held to have acted in breach of his duty to the mortgagor even if he sells the property at a price below the market value. In this regard, he should ensure that he obtains a proper valuation of the property based on prevailing market conditions which should serve as a benchmark for deciding the purchase price.

[12] Mr Fraser submits that the Bank seems to want to sell property at any value below the market value and it has failed to show that it has made all efforts to obtain a sale at fair market value and it is impossible to do so despite its efforts. He contends that the Bank's request to sell the property at an unspecified undervalue, exposes him to serious prejudice. There is no evidence before the court that the Bank wishes to sell the property at a particular price or below \$625,000.00 accepted by Mr Fraser as representing the market value. Its efforts to conclude a sale with the sole offeror were futile and ended when the offer was withdrawn. Furthermore, the newspaper advertisements solicited offers to purchase the property without ascribing a minimum or other value. I therefore make no finding that the Bank has breached its duty to Mr Fraser in this regard, to act in good faith by securing a price as close to the market value as reasonably possible. Mr Fraser has failed to establish such breach.

Issue No. 2 - whether the Bank owes a contractual, statutory or other duty to advertise the property for sale extensively before exercising its power of sale?

[13] Mr Fraser submits further that the Bank has made no real effort to sell the property. He contends that 2 advertisements, one week apart in two newspapers seems short. He submits further that given the value of the property, the Bank failed in its duty to exert an extended effort to bring the sale to the public's attention. While the provisions of the mortgage impose no duty on the Bank to advertise the property for sale, it is settled law that a mortgagee has the added obligations to advertise the sale sufficiently in advance of the sale to provide

adequate notice to prospective purchasers. That duty includes the responsibility to describe the property properly in the advertisements, ensure that the advertisements are sufficient in number and content to reach the appropriate market and made sufficiently in advance to reach the targeted market. Further, the mortgagee must conduct the sale under reasonable conditions.¹³ Mr Fraser does not complain about the content of the advertisements. He seems concerned that there were only two such advertisements one week apart and attacks the Bank's efforts to advertise the proposed sale on this basis. He does not complain about any other aspect of the advertisements.

[14] The advertisements did not put a timeline on the date for submission of offers. In fact, on the face of the document, it does not appear that any such time limit was contemplated. Furthermore, the sole offer was received by the bank some two months after the first publication and was considered. This suggests that the bank was open to offers months later and was not motivated by a desire to make a quick sale. There is no absolute duty to advertise widely. What is a proper advertisement depends on the circumstances of each case.¹⁴ I am satisfied that the publications would have afforded adequate notice to the general public of the proposed sale. I am also satisfied that the bank did not evince an intention through the advertisements to accept the lowest bid or a bid below the market value.

[15] No evidence was given of the penetration of the Searchlight and News newspapers. In the absence of such evidence, it is difficult for the court to pronounce on the effectiveness of the advertisements. The onus is on Mr Fraser to establish such breach and he has failed to do so. I therefore make no finding that the publications of the advertisements in the two newspapers were inadequate in the circumstances. In the premises, I find that the Bank has demonstrated that it fulfilled its obligations to advertise the property for sale. I am also satisfied that the

¹³ Ibid. at para. 25 of the **Alpheus Jacobs** case, per Carrington, J.A. (Ag)..

¹⁴ Ibid. at para. 31 of the **Alpheus Jacobs** case, per Carrington, J.A. (Ag).

two publications were adequate under the circumstances. I therefore find that the Bank is not liable to Mr Fraser for breach of duty to act in good faith with respect to the number of advertisements and the length of notice provided in them.

[16] The central facts in this case are not in dispute. Mr Fraser concedes that he is palpably in default, having failed to pay anything towards the mortgage for an extended period of time. The Bank seeks a number of orders to which it is entitled in all of the circumstances. It obtained a valid valuation which could have been used to gauge the open market value of the property in respect of the aborted sale. That valuation is now dated. The Bank would need to obtain a current valuation in connection with its next attempt to exercise its power of sale.

ORDERS

[17] It is accordingly ordered:

1. It is hereby declared that the Bank of St Vincent and the Grenadines Ltd. is entitled to recover from Austin Fraser:
 - (a) the principal sum of \$408,463.41 and interest thereon of \$165,764.39 as at June 13, 2013, being a total of \$574,227.80.
 - (b) interest on the principal sum of \$408,463.41 at the daily rate of \$123.0986 from June 14, 2013 until the date of satisfaction of the judgment debt.
2. Austin Fraser shall on receiving at least 48 hours advanced notice grant access to Bank of Saint Vincent and the Grenadines Ltd. to conduct a valuation of the said property.
3. Austin Fraser shall vacate the said property and deliver vacant possession to the Bank of St Vincent and the Grenadines Ltd. on or before January 31, 2016.

4. The Bank of St Vincent and the Grenadines Ltd. shall be at liberty to exercise its power of sale over the said hereditaments to recover the principal sum and interest due and owing under paragraphs (1) and (2) of this Order.
5. The Bank of St Vincent and the Grenadines Ltd. shall advertise the said property for sale by public auction or private treaty in three consecutive issues of at least two weekly newspapers circulating in Saint Vincent and the Grenadines.
6. The Bank of St Vincent and the Grenadines Ltd. shall be at liberty to sell the said property by public auction or private contract to the bidder or offeror who makes the highest reasonable offer.
7. Mr Fraser shall pay agreed costs of \$5000.00 to Bank of St. Vincent and the Grenadines Ltd.

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Esco L. Henry
HIGH COURT JUDGE