



[2017] JMSC Civ. 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV 03476

BETWEEN	ANTHONY JOHNSON	1ST CLAIMANT
	ARLENE JOHNSON	2ND CLAIMANT
AND	JAMAICA NATIONAL BUILDING	DEFENDANT
	SOCIETY LIMITED	

Mr L Cowan instructed by Lancelot Cowan and Associates for the Claimants

Mr S Gibbs instructed by Hylton Powell for the Defendant

Duty of mortgagee in exercising power of sale – Whether mortgagee liable for selling property below market value

Heard: November 17, 2016 and February 24, 2017

LINDO J.

[1] The Claimants (The Johnsons), were the registered owners of land located at Lot 11 VIP Avenue, Cardiff Hall, in the parish of Saint Ann, registered at Volume 1292 Folio 495 of the Register Book of Titles. By Claim form and Particulars of claim filed on June 10, 2013, they are seeking damages against the defendant for breach of fiduciary duty for selling their property for less than the market value. They also claim interest on any award of damages at a commercial rate, and costs.

- [2] In the Particulars of Claim they allege that they granted mortgages to the defendant over the subject property to secure two loans of \$1,202,145.00 and \$8,000,000.00 both with interest and at material times they defaulted on the loans, and as a result the defendant exercised its power of sale on January 22, 2013 and sold the property for \$20,500,000.00.
- [3] The Claimants also claim that an independent valuation of the property in February 2013 reflected a value of \$38,000,000. They further aver that in June 2009, the Defendant's own valuation reflected a value of \$27,500,000 and that in selling the property for \$20,500,000.00, the defendant knew or should have known that it had a duty to the claimant to sell the subject lands for its market value at the time of the sale and that it was selling it for a 'drastic undervalue'. They claimed "damages in a sum of not less than \$17,500,000.00."
- [4] By its defence filed on August 2, 2013, Jamaica National Building Society Limited (JNBS), avers that the mortgages each secured all sums payable by the claimants. It denied owing a fiduciary or any other duty to the claimants and denied selling the property at an undervalue. It further states that the valuation relied on was prepared by an independent valuator and it did not sell the property at a drastic undervalue as alleged. It also states that the circumstances warranted the property being sold at its forced sale value, it was sold at a price above the forced sale value and the defendant took reasonable steps to obtain and did obtain the best price available in the circumstances.

The Claimants' Case

- [5] The evidence in chief of the witness David Johnson, as contained in his witness statement signed on August 30, 2016, mirrors that of the 1st Claimant Anthony Johnson signed and filed on the said date, save for a few minor differences. They both state that the claimants borrowed money from the defendant, granted mortgages to it over the property in question, defaulted on the loans and made efforts to renegotiate the mortgage and that each reasonable attempt to save the

mortgage agreement was denied by Total Credit Services Ltd. (TCS), the collection agent of the defendant.

- [6] They state further that the defendant had requested that the property be insured for about \$45,000,000.00 and that on more than one occasion it was valued by independent valuers for up to \$38,000,000.00 and at the time of the sale, the defendant's valuation reflected a value of \$27,500,000.00. They add that in selling the property for \$20,500,000.00, the defendant knew or should have known that it had a duty to the claimants to sell the property for its market value at the time of sale.
- [7] When cross examined, the 1st claimant stated that he believed the defendant did a valuation subsequent to the one done in 2009 but that he was not sure which valuation the defendant relied on or if he was told which one was relied on. He agreed that the letter dated January 23, 2013 from TCS to his attorney enclosed a copy of the valuation on which the defendant relied, and that letter dated February 11, 2013 was a letter from his attorney to TCS in which the attorney thanked them for the copy of the valuation.
- [8] He agreed that his attorney communicated with him and he indicated that he was aware that the defendant relied on a valuation which he said "came in lower". He admitted that his witness statement made no mention of the January 2013 valuation and admitted that he chose to highlight the 2009 rather than the 2013 valuation, although he thought the 2013 valuation would be relevant.
- [9] The 1st claimant indicated that it was fair to say the only valuation he knew of which was done by the defendant would be the one done in 2009 and that it was after the property was sold he became aware of the valuation dated January 10, 2013 which stated \$25,000,000.00 as the market value and \$20,000,000.00 as the forced sale value.
- [10] Mr David Johnson indicated that the 1st claimant was his brother. His witness statement was admitted as his evidence in chief and he was not cross examined.

The Defendant's Case

- [11] Ms Suzette Campbell, the General Manager of TCS Ltd, the loan recovery agency affiliated with the Defendant , gave evidence on behalf of the defendant and was subject to cross examination.
- [12] She states that it is her responsibility to manage the exercise of the power of sale, that she decides whether offers from prospective buyers will be accepted or refused and that in March 2006 the claimants accounts fell in arrears for more than 90 days, and TCS sent a demand notice to them and made several attempts to sell the property without success, prior to January 22, 2013.
- [13] Her testimony further is that the defendants engaged, Scott's Realty to conduct an auction of the property in August 2006 and the auction was advertised by them in the Jamaica Gleaner four times in the month of September 2006. It is also her evidence that at all times, the advertisements described the property fully and accurately and that "the number, timing and contents of the advertisements were consistent with the usual practice in Jamaica" and that the auction took place on September 26, 2006 and the three bids received on the property were between Fifteen and Sixteen Million Dollars (\$15,000,000 - \$16,000,000) and these bids were not accepted by the auctioneer.
- [14] She also states that following this unsuccessful attempt to sell the property at auction, the property was listed in the private treaty listing on the defendant's website in the six year period between November 2006 and November 2012 and that the defendant (through TCS) received six written offers to purchase the property, which were either rescinded by the prospective buyers, or not accepted by TCS because they were below market value or not as high as other offers.
- [15] Her evidence also is that TCS intermittently obtained valuation reports from several companies during this period and the estimates ranged from \$28,000,000 in December 2009 to \$25,000,000.00 and at the time of the sale in January 2013, the property was estimated as having a market value of \$25,000,000.00 and a

forced sale value of \$20,000,000. She indicates that Mr. Andre Henriques, after initially making an offer to purchase the property for \$22,000,000.00, revised his offer and proposed a purchase price of \$20,500,000.00 because the property was in a state of disrepair and this revised offer was accepted by TCS, given that it was still above the forced sale value of the property.

[16] In cross examination, Ms Campbell stated that there was a letter that indicated that the claimants made an offer to TCS to make a lump sum payment of the arrears, she was not sure of what happened at the time but the property was sold and that she made the decision to sell as Chief Executive Officer of TCS and she did not consult with anyone at JNBS. She indicated that she would have relied on the latest valuation which would not have been the December 2009 valuation.

[17] She admitted that in December 2012 when she accepted the offer from Mr Henriques, another valuation had been commissioned, it was not yet in hand, but she accepted the offer of \$22,500,000.00. She also stated that when there are offers for properties, if there is an older valuation, a new one would be requested and this is done “100% of the times”.

[18] She admitted to getting a valuation dated January 10, 2013 from David Thwaites and Associates Ltd. which stated the market value as \$28m and the forced sale value as \$20m and admitted to having seen letter dated December 4, 2012 from JNBS to Anthony Johnson in relation to insurance, where JNBS was requesting that the property be insured for \$42,000,000.00. She indicated that “replacement cost” is different from valuation and that “we insure for replacement cost”.

[19] She agreed that Mr Henriques’ offer of \$22,500,000.00 was November 2012 and that in letter dated January 18, 2013 to TCS, a new offer of \$20,500,000.00 on behalf of Mr Henriques was made and accepted, and the property sold for that amount. When asked why the property was sold for two million dollars less, she indicated that “we sell for the highest offer we would have got at that particular time”. She admitted that on January 16, 2013 she got the new valuation and that in 2012 she had the valuations dated December 29, 2009 and August 2, 2011,

and that as at December 2012, the later valuation, the market value was \$24,000,000.00 - \$25,000,000.00.

The submissions

[20] Both Counsels provided written submissions which the court found to be quite illuminating. I will not restate these submissions and if I fail to discuss any authority cited, Counsel can rest assured that I have given due consideration to all the points that have been raised by them.

The issues

[21] As the facts are not in dispute, it falls to be determined whether JNBS acted reasonably in the exercise of its power of sale, whether the sale price was reasonable or whether the property was sold at an undervalue and ultimately whether the claimants have shown on a balance of probabilities that they are entitled to the damages claimed. In order to come to a determination I find it necessary to examine duty of JNBS as a mortgagee, the circumstances of the sale, as well as whether the sale price was reasonable.

The duty of JNBS as mortgagee

[22] From the outset, it was conceded by Counsel for the claimant that the defendant did not owe a fiduciary duty to the claimants in the exercise of the power of sale. His reference to **Halsbury's Laws of England**, 4th Edition, Volume 32, paragraph 729 which states.

“A mortgagee is not a trustee for the mortgagor as regard the exercise of the power of sale; he has been so described, but this only means that he must exercise the power in a prudent way, with a due regard to the mortgagor's interests in the surplus sale money... and so long as he keeps within the terms of his power, exercises the power in good faith for the purpose of realizing the security and takes reasonable precautions to secure a proper price, the court will not interfere.”

[23] I find that the authorities show that a mortgagee owes a duty of diligence in respect of the price for which the mortgaged property is sold, as the mortgagee has a responsibility to take reasonable precautions to obtain a proper and reasonable price for the mortgaged property at the time of the sale. Although a mortgagee's conduct when exercising its power of sale is not subject to any duty of care in tort to the mortgagor, this does not mean that the defendant does not have a duty to act in good faith.

[24] I accept that the duty owed by a mortgagee to a mortgagor would be restricted to a duty to act prudently and to do all that it reasonably can, in the circumstances, to obtain the best price available at the time of the exercise of the power of sale. However, the scope of the duty is variable and will depend on the particular state of affairs or circumstances at the time of the sale in so far as they are apparent to the mortgagee.

The circumstances of the sale

[25] The unchallenged evidence is that the property was advertised for sale by public auction and that at the auction held on September 26, 2006 the three bids received were not accepted by the auctioneer as they were considered to be too low. The evidence as contained in the agreed documents shows that these were \$15,000,000.00, \$15,500,000.00 and \$16,000,000.00.

[26] The claimants were advised of this by letter dated October 20, 2006 at which time they were also informed that the property would be listed for sale by private treaty. In the face of the low bids received at the auction, the defendant therefore proceeded to advertise the property for sale by private treaty and did so by advertising on its website. The documentary evidence shows that there were about fifty such listings on the defendant's website between November 2006 and September 7, 2012 and each time the property was adequately described and the purchase price ranged from \$27,000,000.00 to \$38,000,000.00.

- [27] The evidence, which has also not been challenged, is that offers for purchase were received but these were either rescinded by the prospective purchasers or were not accepted by TCS because they were below market value or were not as high as other offers.
- [28] The offer of \$22,500,000.00 from Mr Henriques, was accepted by the defendant's agent in December 2012 and the court is told that at that time another valuation had been commissioned, as when there are offers, if there is an older valuation, a new one would be requested.
- [29] I note that the price of \$22,500,000.00 paid by Mr Henriques was higher than the forced sale value stated in this latest valuation, and is within range of the market value and forced sale value, as stated in the report.
- [30] Counsel for the claimants made heavy weather of the fact of the closeness in time of revised valuation as against the revised offer made by the purchaser, but there was no evidence from which I can find that the closeness in time of the revised valuation had any impact on the revised offer. I find as a fact that the revised offer was made as a result of the property being found to be in a state of disrepair.

Whether the mortgagee acted reasonably and the sale price was reasonable

- [31] In examining whether the mortgagee has acted reasonably, the Jamaican Court of Appeal case of **Moses Dreckett v Rapid Vulcanizing Company Limited** (1988) 25 JLR 130, is instructive. Carberry JA, at page 134, stated as follows:

“Courts have alternated between showing concern for the mortgagor and a wish to protect him against a mortgagee who recklessly sells the mortgaged premises, concerned only to recover his mortgage debt; while on the other hand, the courts have stated that the whole object of taking security for a loan is to enable the lender or mortgagee to recover his money on the borrower's default and that the object of the mortgage was to enable this to be done speedily and at the mortgagee's convenience”

[32] The learned Judge of Appeal in delivering the judgment in Dreckett, indicated that the case of **Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd.** [1971] 2 All ER 633 should be received and followed by the Jamaican courts. He sought to determine whether in that case, the mortgagee had taken reasonable precautions to obtain the true market value of the property at the time he decided to sell it by questioning whether or not the property had been sold at an undervalue at the time of the sale.

[33] **Dreckett's** case points to the need to examine the sale to determine if the mortgagee acts fairly towards the mortgagor and uses his best endeavours to obtain the true market value at the date he decides to sell the mortgaged property.

[34] Ms Campbell's evidence is that the property was sold for \$20,500,000.00 by way of private treaty and the date of the agreement for sale is January 22, 2013.

[35] The valuation reports which in my view have a direct impact on the issue being contemplated have been critically examined. These are:

1. Report dated May 2, 2006 by Don Juan Enterprises Ltd. which gave the estimated market value as \$27,500,000.00 and a forced sale value of \$22,000,000.00. A "Direct Sales Approach" was said to be used to arrive at this figure because of property type, data availability/reliability etc. It was noted in the report that the most appropriate approach which is used to estimate the current market value is the Cost Approach which provides market data from one database. "Cost Approach" was said to be based on the principle of substitution whereby a buyer with perfect knowledge would pay no more for the subject property than the cost of constructing a substitute property. The building was said to be "approximately 85% completed"
2. Report dated December 19, 2007 by Don Juan Enterprises Ltd. which gave a market value of \$37,700,000.00 and a forced sale value of

\$30,160,000.00 also using the “direct sales approach”. The building was described as “about 90%” complete” and was said to be structurally sound and in good state of repairs.

3. Report dated December 29, 2009 by David Thwaites & Associates Ltd., which gave a market value of \$27,500,000.00 to \$28,000,000.00, and a forced sale value of \$24,000,000.00. A “full” inspection of the property was said to have been done on May 15, 2009. This valuation was said to be done on the basis of “market value” which was defined as “the estimated amount for which a property should exchange on the date of the valuation between a willing buyer and a willing seller in an arm’s - length transaction after proper marketing wherein the parties had acted knowledgeably, prudently and without compulsion.” This definition is by RICS Appraisal and Valuation Standards. The property was described as in “good” condition/repair and was said to be “estimated at being approximately 70% finished”.
4. Report dated August 2, 2011 by David Thwaites & Associates Ltd which gave a market value of \$24,000,000.00 to \$25,000,000.00 based on “market value” as defined by the RICS Appraisal and Valuation Standard. The forced sale value was stated as \$19,000,000.00 to \$20,000,000.00. The property was described as generally in fair condition although incomplete. The report also indicated that the general condition of the residence has deteriorated “since our last visit in December 2009”.
5. Report dated January 10, 2013 done by David Thwaites & Associates Ltd., which gave a market value of \$25,000,000.00 and a forced sale value of \$20,000,000.00. The property was described as “generally in fairly poor condition and deteriorating due to lack of occupation and use” and it was noted that the general condition has deteriorated since August 2011 when a visit was made by the valuers.

[36] The five valuations referred to above were all commissioned by the defendant.

- [37] There was no expert evidence presented as to how the valuation amounts were arrived at and neither was there any evidence to contradict the information and figures stated in the reports.
- [38] I accept that valuations will vary even among individuals carrying out the valuations and also that, with time, this will also be the case. I find however that there is no great disparity between the valuations in respect of the subject property to give cause for concern and note that it appears that with the passage of time the value of the property declined.
- [39] I find that the most recent valuation, that is the valuation dated January 10, 2013, was done at about the same time the agreement for sale was being contemplated and is in keeping with the evidence of Ms Campbell that where there is an older valuation another one would be commissioned. It is my view that this valuation report is important for the purposes of determining whether the property was being sold at a reasonable price at the time.
- [40] The price paid by Mr Henriques is higher than the forced sale value stated in this latest valuation and is within range of the market value and forced sale value, as stated in the report.
- [41] I am therefore of the view that the mortgagee having sold the property at a price which is within the range of the market value and the forced sale value took after having taken reasonable steps to secure a purchaser at the best price possible in the circumstances cannot be said to have acted unreasonably or to have acted in breach of its duty take reasonable care to get the best available price at the time of sale. Additionally, there is nothing on the evidence from which I can find that the defendant acted in bad faith or acted recklessly in the exercise of their power of sale
- [42] Bearing in mind the authorities cited, and on a critical examination of the evidence, I find that the defendant did all it reasonably could to sell the property and to sell it at a reasonable price. I note that the market value appears to have

declined with the passing years and that on occasions prospective buyers changed their minds before sale agreements could be signed.

[43] In seeking to sell the property by public auction, advertising it for sale by private treaty and commissioning updated valuation reports, intermittently, the defendant has shown that it was acting in keeping with its duty to ensure that the best possible price could be obtained for the property.

[44] The advertisements had offered the property for sale at market value as stated in the valuation report which was current and this too, I find, shows that the defendant took all reasonable precautions to secure a proper price for the property.

Conclusion

[45] On the authorities, a mortgagee has a duty to act fairly and prudently in all the circumstances in order to get the best possible price. In the case at bar, I find on a balance of probabilities that the defendant acted prudently. I am satisfied as I accept that the defendant commissioned valuations of the property and ensured that they were current, placed advertisements in relation to the sale and ensured that the property was accurately described in the advertisements and adequately advertised.

[46] The mortgagee was required at the outset to notify the mortgagor before exercising the power of sale. The notice required under the Registration of Titles Act was duly issued. The claimants were well aware of the defendant's decision and there were ongoing correspondence between the defendant and the claimants, through their attorneys, during the course of the proceedings leading up to the final sale of the property. The claimant has not claimed that there was any material omission or misstatement in the advertisements which led up to the sale.

[47] I find that the defendant acted reasonably and prudently as it sought to ascertain the true market value of the property when the property was advertised for sale

by public auction and was properly advertised and was also properly described in the advertisements leading to the sale by private treaty. I also find that the sale price was reasonable and amounted to what the mortgagee could obtain at the time in view of all the circumstances.

[48] I therefore find on a balance of probabilities that the extent to which the defendant was expected to act in the exercise of the power of sale is marked by reasonable care and this is fully supported by the evidence presented and they could not have reasonably been expected to go beyond this. It therefore cannot be said that the defendant acted recklessly in selling the property for \$20,500,000.00 or that the property was sold at an undervalue, as based on the evidence presented the court cannot make such a finding.

[49] In view of the foregoing this court finds that the claimants have not made out a case against the defendant.

[50] There shall therefore be judgment for the defendant against the claimants with costs to be agreed or taxed.