IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013CD00084

BETWEEN **DOYEN ARTHUR WILLIAMS** **CLAIMANT**

AND **FIRST GLOBAL BANK LIMITED** **DEFENDANT**

Mortgage – Exercise of Power of Sale – Duty of mortgagee – Sale on Open Market – Valuation –Whether valuation current - Description of property –Whether error material – Whether fact that mortgagor prevented inspection material – Negligence – Whether claim to be struck out – No subdivision or building approval – Whether mortgagee to await grant.

Gillian Mullings instructed by Naylor & Mullings for Claimant.

John Graham and Peta-Gaye Manderson instructed by John G. Graham & Co. for Defendant.

Heard: **2nd, 3rd, 4th, and 18th October 2017 & 8th December, 2017**

BATTS J

1. On the first morning of trial counsel for the Claimant made two applications. The first was an application to amend the claim to insert the words 'bad faith". This was not opposed and was granted as prayed.

2. The second application was to be allowed to file a new witness statement from one J. Soares. That application was strongly opposed. I granted the application having heard submissions, and in particular the Claimant's explanation for the

lateness of the application (that witness could not be located). Permission to file and serve the statement was granted on condition that the witness would be the last one called, so as to give the Defendant's attorney maximum time to take instructions.

3. The matter concerns the Defendant's exercise of powers of sale contained in a mortgage. The Claimant alleges that the Defendant breached its duty and ought to have obtained a higher price. Allegations of negligence and fraud ,and after the amendment bad faith, were made. The Defendant traverses all these allegations.

4. The Claimant called ordinary and expert witnesses in support of his claim. The thrust of the evidence of each will be shortly stated. I will not, except to the extent necessary to articulate the reasons for my decision, rehash details of the evidence.

5. The Claimant first gave evidence. His witness statement signed on the 20th March 2017, stood as his evidence in chief. He described himself as a medical doctor but later admitted to the cross examinor that he is not a medical doctor. He is a chiropractor. No adequate explanation was provided for this miscategorisation. He gave an account of the relationship with the Defendant and the circumstances under which funds were borrowed. The money was to be used to renovate the premises the subject of the mortgage. The premises contained an apartment building with civic address 10 Rovan Drive Jacks Hill St. Andrew, registered at Volume 1121 Folio 102 of the Register Book of Titles.

6. The Claimant describes his apartments after the improvements as "luxury apartments" with a total building area of 7,206 square feet comprising –

    - 2 three bedroom,
    - Three two bedroom including a townhouse with 2 ½ bathrooms.
    - Two studio apartments

7. He accuses the Defendant of wrongfully and/or negligently doing the following:

a. Misdescribing the property in its advertisements for auction as:

> "a three storey detached building thought to consist of 5 separate fully self-contained apartment units with a building area of 5000 square feet."

b. Misdescribing the property in the advertisements in support of the sale by private treaty as

> "a three storey detached multi-facility dwelling consisting of 5 separate self-contained apartments."

c. Listing the property with Valerie Levy & Associates for a price of $30,000,000. This although the reserve price at the earlier auction had been $46,000,000 and the Defendant had, in February 2010, a valuation which stated the market value of the property to be $80 million.

d. Selling the property in 2012 for $24.4 million, only 33% of its appraised value.

8. Tendered in evidence through the Claimant, as **Exhibit 1,** was a listing of the property by Valerie Levy & Associates for US$351,288. It is there described as-

> '... three storey detached multifamily dwelling is configured into 5 separate self-contained apartments. (A composition of two (2) bedrooms, 2 bathrooms, two 3 bedrooms, two bathrooms and one 3 bedroom, 2 bathrooms respectively."

9. Tendered into evidence by consent as **Exhibit 2** was an Agreed Bundle of documents (labelled as Agreed List of Documents).

10. When cross-examined the Claimant admitted that the loan was denominated in United States dollars in the Guarantors Mortgage (document # 13 of Exhibit 2).

The document bore a notation that "J$ equivalent of $25 million was for Stamp duty purposes only." The Claimant endeavoured to distance himself from those words and insisted that his document (the commitment letter) did not have that equivalency. When shown the commitment letter (document #8 Exhibit 1 in the Agreed Bundle) he denied that was the correct one. He referred to another document which he said he had in his possession. He produced an unsigned document. This was marked 'A' for identity. It was never put in evidence. This attempt by the witness to establish that the loan was denominated in both United States and Jamaican dollars is symptomatic of the witness's general approach to the evidence. I was not particularly impressed and did not find him to be a person of candour. He was similarly inaccurate on the question whether he had paid the insurance premiums for the premises. Although the witness asserted he had obtained/applied for subdivision approval and approval of NEPA/KSAC for the construction work on the premises, cross-examination revealed these had not been produced. The Claimant says they were done on his building as he had given instructions to that effect, but he had not seen them. The position was the same with respect to applications to modify the restrictive covenant on the title.

11. On the morning of the 3rd October 2017 Claimant's counsel purported to file and rely on an Affidavit In Response to Request for Information and a Supplemental List of Documents. These included approved plans. Mr. Graham objected. The Request for Information had been filed on the 12th October 2016. He claimed to be taken by surprise and if this late filing were to be allowed he would require an adjournment to take instructions. I decided to refuse the Claimant permission to rely on documents filed so late in the day and out of time. A copy of the alleged approved strata plan was already attached to the expert report of Mr. Easton Douglas. That report was later put in evidence as Exhibit 5. The plans bore a stamp from the Kingston and St. Andrew Corporation dated 20th March 2012.

12. The other issue of concern to me, which arose in the cross–examination of the Claimant, concerned the willing buyer Mr. Tony Tesang who the Claimant says he had identified. It turns out that the Claimant at no time disclosed the identity of this person to the Defendant. He told the court that an agreement was signed with Mr. Tesang and yet no such document was produced. Indeed this part of his evidence is worthy of quotation.

> **"Q. You emphasise how somebody willing to offer money for property.**
>
> **A. Yes Tony Tesang**
>
> **Q. did you sign an agreement with him**
>
> **A. I did**
>
> **Q. have you disclosed it**
>
> **A. No**
>
> **Q. You never completed any agreement with Mr. Tesang**
>
> **A. No he was waiting on Strata Title**
>
> **Q. up to when property sold you never got Strata Title.**
>
> **A. no, [but] application was made**
>
> **Q. are you saying bank should have waited until you got Strata Title.**
>
> **A. Yes**
>
> **Q. Did you write to them saying you apply for Strata Titles**
>
> **A. No, I had a meeting with them**
>
> **Q. You offered to pay all the money in 2010 within 30 days, did you mention anything about you having a purchaser**

A. No I did not write

Q. Your lawyer did

A. I don't know if he mentioned it."

13. This evidence is indicative of a Claimant who is not truthful. It does seem remarkable that whilst knowing the Defendant was taking steps to sell his property he neither brings to their attention a pending application for Strata Titles nor a purchaser with whom he has an agreement at a price that would have liquidated his loan. The Claimant asserts that Mr. Tesang had agreed to pay $45 million for one apartment.

14. The Claimant's next witness was Mr Ryan Mortell. A witness summary had been filed. He is a realtor employed to Valerie Levy & Associates. He stated that the property was listed for $30 million on behalf of the Defendant. It was listed on their website. He identified Exhibit 1 as a 'snapshot' of the listing. When cross-examined the witness stated that in the year the property was listed no offers were received for it.

15. Mr. Easton Douglas a chartered Valuation Surveyor, Real Estate Consultant and Realtor was the Claimant's expert witness. His expert report was tendered and admitted as **Exhibit 5**. The Claimant's attorney was allowed by way of amplification, to ask whether the lack of necessary building approvals would have negatively affected the sale price. His answer I will quote in its entirety,

> **"It would not really affect sales price, because if permission not given it is not illegal until enforcement notice is served. So no effect on a valuation once building is being done.**
>
> **Many building not need it until promulgation of 2017 Development Order. Also note under the Local Improvements Act dealing with subdivision also not**

affect value because a subdivision is personal and it depends what action the local authority takes in dealing with a subdivision."

16. That evidence was immediately followed by the following exchange in cross-examination.

> "**Q. At the beginning you say affect price you mean not affect value you attribute to it.**
> **A. It affects neither price nor value"**

The expert then indicated the difference between price and value and how each might be determined. His last answer to the cross examiner was of seminal importance ,and should be considered in tandem with page 12 of his Opinion on Appraisals of Premises Known As Lot 11 Rovan Heights (attached as ED5 to his expert report Exhibit 5). His exchange with Mr Graham went thus :

> **"Q. In November 2008 to 2010 would it surprise you that no one made an enquiry from prominent realtors to purchase the property for $30 million.**
>
> **A: Not surprised because at that time the market was sluggish all over the island."**

17. The Claimant's third witness was Cynthia Mullings in respect of which a witness summary had been filed. She was a real estate broker at Mullings Allison Real Estate Limited. She also owned the business. Her evidence in chief established that her agency had listed the property but that it had been listed elsewhere for $30 million. This was a price much lower than that for which she had advertised it i.e. $80 million. In cross-examination the witness admitted that for the period she had it listed no one, interested enough to view it, had contacted her. She also stated that although the apartments were well appointed she may not have described them as luxurious. She however felt the property was capable of fetching $80 million. This ended the case for the Claimant.

18. The Defendants' first witness was Aleca Green the person in charge of collections at the Defendant Company. Her witness statement dated 1st June 2017 was allowed to stand as her evidence in chief. She had no personal knowledge of the facts and her evidence was taken from the files and records of the Claimant which are in the Defendant's possession. In a nutshell the Claimant received a Home Equity loan of US $340,000. It was disbursed in 2 tranches, one each on the 7th May 2008 and 27th May 2008. The witness said the account fell into arrears in November 2008. On the 8th January 2010 a letter was sent to the Claimant enclosing a final notice under the Registration of Titles Act. The Defendant procured a valuation report from Property Consultants Ltd. dated 8 March 2010 (Exhibit 2 document #21) which suggested a market value of ($36 million, forced sale $28 .8 million).

19. Miss Green states that on or about the 15th March 2010 the Defendant listed the property for sale at public auction. The reserve price was $46 million being the average value of the Property Consultants Valuation and another valuation they had from Easton Douglas & Co. (Exhibit 2 document #22). There were no bids received at auction. By letter dated 15 June 2010 from E. D. Davis & Associates attorneys at law (Exhibit 2 document #30), writing on behalf of the Claimant, a promise was made to pay the outstanding balance within 30 days of a statement showing the balance being produced. A Statement of sums due was requested. This was provided by Naylor & Turnquest attorneys for the Defendant. No payment was made within 30 days. By letter dated 22nd July 2010 (Exhibit 2 document #37) the Defendant's attorney wrote a follow up letter to E D Davis & Co. By letter dated the 2nd September 2010 John G. Graham and Co. [Exhibit 2 document #42] wrote on behalf of the Defendant issuing formal demand for payment of the balance. There were no written responses to these communications.

20. On or about the 15 October 2010 the bank received an offer of $32 million which was subject to access to the premises. By letter dated the 15th October 2010

the Defendant wrote to the Claimant requesting access (Exhibit 2 document #45). On the 2nd November 2010, the Claimant wrote to John G. Graham & Co. asking to be allowed 90 days to settle and promising to allow access. After several exchanges, the Defendant ultimately commenced action in Claim No. 2010 HCV0544J against the Claimant seeking "access to/possession of the mortgaged property." The prospective purchaser withdrew his offer.

21. Ms. Green further stated that In August 2011 the Defendant received another offer to purchase. That offer was accepted and the sale was eventually completed for $24.4 million on the 21st March 2012. The witness expressed the view that,

> ***Para 31 "In my experience the lack of necessary building approvals the construction of this unit [sic] would have negatively affected the sale price."***

22. In the course of an extensive cross-examination the following notable bits of evidence emerged. The witness admitted that the size of a property can affect price but that there were also other considerations such as location and amenities. She added

> "I am a banker really...."

A phrase she would repeat throughout her cross-examination. She admitted that fixtures and fittings also impact value. The witness was shown both valuations of Easton Douglas (Exhibit 2 documents #5 and 22). It was admitted that the square footage was adjusted upwards from 5,800 to 7,206. She admitted that Mr. Easton Douglas' 2010 valuation was in the Defendant's possession prior to 15th March 2010. She admitted that Mr. Douglas appears to have accessed the interior of the premises, Mr. Mark Harris from Property Consultants had not. The witness indicated that the bank used the words 'valuation' and 'appraisal' interchangeably. The witness admitted that their advertisements do not indicate how many apartments were contained in the building. In answer to the suggestion that a prospective purchaser would have been unable to tell the size

of the building, the witness responded that an 'approximate size' (5000 sq. ft.) was given.

23. It was suggested to the witness that the loan was disbursed without a request for building approval. Her response was "loan was for purpose of refurbishing" for which building approval was unnecessary. The witness indicated that it was not the practice of the bank to list properties. The witness was unable to say that the Easton Douglas valuation was sent to Valerie Levy & Associates. She said that the Defendant does not normally send valuation reports to realtors who will be listing it for sale by private treaty.

24. The witness admitted that between March 2010 and August 2011 the valuation report had not been updated. She agreed that between August 2011 and January 2012 the Defendant entered into an agreement for sale without doing an updated valuation. The witness further agreed that she had no document to explain why notwithstanding an offer of $26 million the property was ultimately sold for $24.4 million. In answer to the court, the witness said that it appears that the intended purchaser submitted a revised offer.

25. The parties each relied on written submissions and on the 18th October 2017, I heard oral submissions. I do not intend to repeat those submissions. It suffices I believe to indicate that I have carefully considered all the oral and written submissions made.

26. Neither do I intend to embark upon a review of the cases which consider the mortgagees duty when exercising its power of sale. The Australians appear inclined toward an equitable "good faith" test. The English formulate the duty in the more familiar language of a duty to take reasonable care. I am prepared to respectfully adopt the approach, recently articulated by my brother Laing J in **Andrea Ball v Victoria** M**utual Building Society [2017] JM**

SC Civ. 171 (unreported 8th November 2017),which reflects the law as I understand it to be. At paragraph 96 of his judgment Justice Laing stated,

> "**I *wholeheartedly and unhesitatingly adopt the conclusion of the court in Cuckmere that a mortgagee owes a two-fold duty to the mortgagor, (i) to exercise its power of sale under a mortgage in good faith and (ii) to take reasonable care to obtain the "fair value" or "proper price" of the property sold. I find that this is logical, sensible and "represents the true view of the law."***
>
> ***Accordingly the submissions of counsel of VMBS, whether purporting to rely on the case of Rudolph Daley v RBTT Bank (Ja.) Ltd. et al (unreported) Supreme Court Jamaica Claim No. CL1995D162, judgment delivered 30th January 2007, or otherwise, do not find favour with me, to the extent that it is being suggested that the VMBS duty is otherwise in this case."***

27. The Defendant's counsel urged me to strike out the claim insofar as it references Negligence. Reference was made to the judgment of Sykes J in **Khiatani Jamaica Ltd et al v. Sagicor Bank Jamaica Ltd.[2016] JMMC Comm 34 (Unreported 9th December 2016).** I however respectfully depart from my brother on the approach to the matter. It seems to me that if, as the authorities show, there is a duty to take reasonable care then the obligation is to not exercise the power negligently. Equity imposes a duty of reasonable care. The administration of law and equity have been fused for over 100 years. If therefore someone pleads negligence and particularises the acts related to the conduct of a sale, that is sufficient. It matters not whether one sues at law or in equity. This is now one superior court of justice. The days when one is non-suited for filing in the wrong division should be long past. The tort of Negligence as we now know it was developed in the early twentieth century long after courts of common law and equity were fused. In the case at bar the Claimant's statement of case was sufficient to raise, and properly so, the issue of the mortgagee's power of sale and whether the duty to take reasonable care had been breached.

28. In this case, as I suspect it will be in the great majority of situations, the result will be the same whichever test is applied. It is now well established that a mortgagee need not await favourable market conditions before exercising powers of sale. The duty of care (and/or good faith) arises whenever the decision to sell is made. In other words it is a duty to take reasonable care to obtain the true market value (that is the proper or fair price) as it exists at the time the power is exercised, ***Cuckmere Brick Company Ltd. V Mutual Finance Ltd. V Cuckmere Brick Co. Ltd. [1971] 2 All ER 633.***

29. In the matter at bar Mr. Easton Douglas, the expert witness called by the Claimant, was clear that in the period under review the real estate market was "sluggish". So much so that although in February 2010 he valued the premises at $80 million, he was not surprised that it could not be sold although advertised for $30 million. I find as a fact that the sale at $24.4 million was not a sale at an undervalue given the conditions in the market. Value and price in this context are quite different things. An expert valuer will give, based on his appraisal of the premises, an opinion as to value. That is the price he expects which can be had in the open market. His opinion will normally be based on research as to what price other properties similarly situated have fetched. The market price on the other hand is no more nor no less than that which a willing buyer and a willing seller are prepared to agree upon at any given point in time.

30. A mortgagee who decides to exercise powers of sale may solicit expert advice in order to guide the method of marketing as well as to inform on reserve prices and bargaining positions. It is advisable to do this because among other things it demonstrates prudence and that some care is being taken to obtain as high a price as may be fetched in the market at that time. The Defendant in this case solicited the opinion of two valuers before putting the property up for auction. These opinions were a guide to the reserve price. No bids were received. The Defendant then listed the property

with at least two realtors. It was advertised on the internet. Yet again, no one was interested enough in a price of $30 million even to view the premises. This for a period of one year. In such circumstances can the Defendant be faulted for, after 18 months , accepting an offer and completing a sale for $24.4 million. I think not.

31. The Claimant criticised other aspects of the Defendant's conduct. It is said, the relevant duty was breached because the advertisements repeatedly described the premises as containing less than the 7,206 square feet it actually contained. I accept that this was so. However, the relevant advertisers use the words "approximately 5000" square feet or are "thought to consist of." Those words to my mind are sufficient to alert any interested person that the square footage may be more or less. The argument has a major pitfall. If it is contended that the premises were worth much more than the $24.4 million for which it was sold, then advertisements offering lower square footage ought, all other things being equal, to have attracted offers. They did not. Finally on this point I accept the Defendant's evidence that the Claimant was in part responsible for the failure to accurately state square footage. This because he for some time failed to allow access to the Defendant or its representatives. Even therefore, had the misdescription impacted seriously the price obtained, I would have declined relief on this ground. One who comes to equity must do so with clean hands. It ill behoves a Claimant to prevent a mortgagee inspecting and then to complain about an advertisement that might have been better informed after an inspection.

32. In similar vein, the Claimant complains that there were 7 apartments in all whereas the advertisement described it as having only 5. This inaccuracy is again partly due to the Claimant's failure to permit an inspection. However, I find that given the market conditions at the time, misdescription had no significant impact on the price ultimately achieved. The evidence to support this is the fact that although seven apartments were advertised as five at a price of $30 million for one year, there were no takers. In a viable market, prospective purchasers

would have been jumping at the bit, the moreso because the Claimant contends the obtainable price was $80 million not $30 or $45 million.

33. The Claimant also complains that the valuations on which the Defendant relies were too old. The Defendant they say ought, prior to completing the sale in the period August 2011 to March 2012, have commissioned updated valuations. "Recent" valuations it was submitted are required. The law let me reaffirm does not make valuations, recent or otherwise, mandatory. If done they evidence prudence. In this case the Defendants were in a sluggish market. They obtained valuations in 2010. They had gone to auction and tested the market. They attempted alternate marketing strategies by listing with realtors. It seems to me that to incur the expense of a further valuation would have been a waste of money. An opinion as to what the property may or may not fetch was by that time irrelevant as the bank already had the experience of what the marketplace was saying about that property. The Defendant cannot be faulted in that context for pursuing negotiations with someone who expressed an interest at a price that was not unreasonable given the sluggish market then existing.

34. There are other aspects of this case worthy of mention. The Claimant contends that he had a buyer prepared to pay a much higher price. I do not believe him. In the first place, that person has not been produced. In the second place, is it probable that faced with the imminent sale by the Defendant, the Claimant would not have alerted the Defendant to the details of his pending sale. He had attorneys advising him at the time and yet no concrete steps were taken to document the existence of this purchaser.

35. Then there is the matter of building and subdivision approvals. It seems to me, and contrary to the view expressed by Mr. Easton Douglas, that their existence would, all other things being equal, affect the price. Premises which boast subdivision have a greater appeal. It means for one thing that separate titles can be had and hence individual apartments more readily sold. A building without

building approval will be less attractive, all other things being equal than one which can boast approval. This notwithstanding there was no evidence placed before me, expert or otherwise, to suggest that these matters had a direct impact on the price obtained. It is clear on the evidence that, up to the time that the property was put on the market in February 2010, there was neither building nor subdivision approval in existence. The Defendant was under no obligation to either obtain them or await their grant prior to exercising its power of sale. In this regard it is to be noted that the intended purchaser from the bank referenced some engineering concerns see, (Exhibit 2 document #56).

36. In the result, and for the reasons stated, there will be judgment for the Defendant against the Claimant. The Claim is dismissed with costs to the Defendant to be taxed if not agreed.

David Batts
Puisne Judge