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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C/L G.056/96

BETWEEN	**GILBERT GARDINER**	**PLAINTIFF**
A N D	**INTERNATIONAL TRUST & MERCHANT BANK LTD.**	**DEFENDANT**

Mrs. Marvalyn Taylor Wright for the Plaintiff.

Miss Andrea Walters, and Miss Debra Newland for the Defendant.

**HEARD: JUNE 11, OCTOBER 5, 6, 7, 8,
DECEMBER 6, 7 ,8 & 9, 1999
SEPTEMBER 22, 2000**

RECKORD, J.

THE PLAINTIFF'S CASE

This is an action for negligence. The plaintiff Mr. Gilbert Gardiner, is an 86 year old retired plumber. He was the owner and registered proprietor of a parcel of land numbered 13 and 13A Princess Alice Drive, Mona in St. Andrew, registered at volume 1005, Folio 190 of the register book of titles. In 1993 and 1994 he borrowed monies from the defendant bank which held a first legal mortgage as security on the said premises to secure $400,000.00 and $416,368.14.

In June 1994, the plaintiff fell into arrears with the monthly payment due to the bank. In November 1994, the defendant informed him that his property

was being put up for auction. Due to failure of obtaining a high enough bid, the auction set for the 3rd of December, 1994 fell through. He made efforts thereafter to sell the property to the tenants and his two grandsons but without success.

A second auction was advertised by the defendant for 10:30am on 1st February, 1996. The plaintiff says he attended the auction at C.D. Alexander Co. in Kingston arriving at the premises at 9:35am. He saw a lady whom he recognized as the auctioneer and a gentleman Mr. Bisnott in the auction room.

The plaintiff claims that no auction was held; there was no bidding. He saw Mr. Bisnott leaving and the auctioneer was preparing to leave. He said to her "It looks like the auction late" she made no response. Then he told her that he was the owner of the property and she informed him that the place was sold. He enquired to whom it was sold and she replied "That man that gone through the door there." He told her there was no bidding and asked how much it was sold for and she told him $1.9 million. He told her that this was not a quarter of the value of the property and that this was the sum the defendant Bank would pay for it. The auctioneer advised the plaintiff that if he did not agree with it, he should go and see the bank.

The plaintiff told the court that he had gone to the auction that morning to make a bid on behalf of his grandsons. He never got any opportunity to bid. When he arrived in the auction room the auctioneer and Mr. Bisnott were sitting at one end of a long table. She had some paper in her hand and they were writing and talking in low tones. He was seated at the other end of the table and

did not hear their conversation. His grandsons were prepared to pay $4.2 million for the property.

In order to get the loan the plaintiff got a valuation from Magnet Real Estate Agency dated 1st of October, 1993 for $2.53m, which was admitted in evidence as exhibit 3. In February 1996 he owed the defendant bank 1.5m.

On leaving the auction room the plaintiff went to see the loans officer Mr. Sloley at the bank. He told him what took place at the auction. "When I told him it was sold for 1.9m, Mr. Sloley said, "Well, that is what you owe us, if you not satisfied you can go to your lawyer."

In February 1996, he obtained a valuation from Mr. Robert Taylor giving value of $4.5m. in April 1996 he got a letter from the bank advising him that after the auction he still owed the bank $60,420.00. The bank sued him for this amount.

The hearing continued on the 5th of October, 1999. The plaintiff was cross-examined by Miss Walters. The 1st auction was advertised for the 22nd of December, 1994. About 12 persons came to the auction. It was called off when there was no bid over $1m. He was trying to sell the property privately with an asking price of $2m which he increased to $2.5m in 1995. No one made any deposit. He never told attorney Miss Llewellyn that he received a deposit of $850.000.00. There were two houses on the property and the tenants were interested in purchasing. The plaintiff agreed to that up to February 1996, he never got anyone to buy the property. The auctioneer had asked him if he was there for the auction and he told her yes. She handed him a paper and offered

him a seat. The paper called for his name, his bid and his address. He filled in his name only. It was then 9:40am. He denied that he arrived after 10:30am. He was not late for the auction. It was five minutes to 10 when Mr. Bisnott left saying he was going to the bank and would be back in half an hour. When the auctioneer started packing up her files he said to her "It seems nobody is coming to the sale, but it is still early ." It was then he learnt from her that it was sold to Mr. Bisnott, who had just left through the door. When he asked what was the price, "she stood with her papers, looked at me stern. I said I have to know, it is my place; how much you sell it for"? She said $1.9 million and if he did not agree he was to go to the bank and enquire "for this is what the bank tell her to sell it for."

The plaintiff said he had taken $200.000. cash to make a down payment. He was going to bid on behalf of his grandsons. He denied telling auctioneer that he had only come to observe as it was his place. After leaving his son Kirk drove him to the bank arriving there at 11:05 am. His grandsons had given him cheques for $210,000.00 each not $2.1 million each as he said the day before. The form the auctioneer handed him had C.D. Alexander on it.

In re-examination the plaintiff said that the amount of money he had could not compensate for the amount he owed and that was why he never took the $420,000 to the bank.

Mr. Robert Taylor, valuator presented valuators report in respect of premises 13 – 13A Princess Alice Drive – admitted in evidence as exhibits 7 and 8. Cross-examined, valuation was done on the 12th of February, 1996. He did

not know that the property had been auctioned when he did the valuation. The property is near to August Town and close to the University of the West Indies, beside University houses, next to the College Common. Accessibility and location influence valuation. Princess Alice Drive is in a favourable location. Getting good houses in favourable areas in St. Andrew is difficult. He was surprised that this property could not be sold for over 14 months. He was a licensed Real Estate Dealer for about 8 years. Between 1993 and 1996 movements in real estates property values were moving upwards at a rapid rate. In 1995 property on Princess Alice Drive would value $3.1 million. To have his valuation he used information from the stamp Commission and Titles Office and advertised prices in the Gleaner. In October 1993 price on Princess Alice Drive valued $2.5 - $3 million.

Mrs. Margaret Brodie, a registered nurse and daugther of the plaintiff had discussion with Mr. Sloley, the Loans Officer at the Defendant's bank, on the 25th of January, 1996, concerning her father's outstanding debt. She said she asked Mr. Sloley for 30 days to finalize all that was due which Mr. Soley said was $1,541,933.00. She had given Mr. Sloley 2 letters from her nephew and his wife indicating they were serious about purchasing the property and "I got the impression from Mr. Sloley that the 30 days I asked for had been granted." During the 30 days she considered having the property sub-divided and Mr. Haddad a surveyor was contacted to do the sub-division. She knew her father's house -- it was in a strong middle class neighbourhood with well kept gardens.

When cross-examined, Mrs. Brodie said she knew the property was up for auction on the 1st February, 1996. When she saw the advertisement she realised her assumption was not correct. That was why "I started jumping around to put things together to take the property off the auction block."

Due to her illness she could not go to the auction and her son had commitment at the work place and could not go. Her brother Kirk drove her father. She had come home from abroad in December, 1995, to assist her father to clear the debt and get him out of his misery. In answer to the court, Mrs. Brodie said that on the morning of the auction she tried to contact Mr. Sloley by telephone but he was not available. She however, got him in the afternoon. "I questioned him about carrying out the sale despite my conversation with him. He was quite ambivalent and said I could do what I have to do."

Earl Hardy is the plaintiffs' grandson. He is a payroll supervisor at N.C.B. In January, 1996, he was employed to Mutual Security Bank. The plaintiff told him that his house was up for sale. He and his wife went and looked over the property. They were interested in purchasing same. His cousin Wesley Brodie also had interest in the property. They had planned to offer $4.2 million. Their share would come from the bank and the National Housing Trust.

Mr. Hardy knew the property was up for auction on the 1st of February, 1996, and he gave his grandfather a cheque for $210,000. His cousin also gave him a cheque for similar amount.

Under cross-examination, Mr. hardy said he knew of a 1993 valuation but his bank wanted a current valuation. He was not aware that the property was

account was three months in arrears and requested payment within 14 days. Notices of sale were dated 21st of October 1994 were also exhibited indicating to the plaintiff the amount outstanding and informing him that his premises would be sold if the amount is not paid within one month. She also produced a copy of letter she wrote to C.D. Alexander Co. on the 24th of November, 1994, indicating that the property was held under mortgage to the defendant bank, that the loan was in arrears and requested them to proceed to auction on behalf of the mortgage company. A reserved price of $2,053,400.00 was set.

On the afternoon of the 22nd of December, 1994, the plaintiff came to her and reported that the property was not auctioned as had been planned for that morning and he was requesting that the bank take no further action for a few weeks to allow him to secure sale of the premises . She had discussion with management and on the 11th of January, 1995, wrote to the plaintiff indicating that he would be allowed two weeks to complete.

The plaintiff had several discussions with her always indicating he had interested purchasers including family members. She also made efforts by writing to United Realtors Ltd. seeking a purchaser. However, no executed sale agreement came to her.

On the 8th of January, 1996, Mrs. Llewellyn re-submitted the property for auction to C.D. Alexander Co. with a reduced reserve price of $1.8 million. From her experience as former employee at the Titles Office sub-division plans would take no less than a year to complete. "I did not obtain valuation of premises in this case prior to the second auction. There is requirement in Law for valuation

prior to public auction". When cross-examined she said it was Mr. Sloley who fixed the reserve price for the 1994 sale. It was the auctioneer who prepared the notice of the auction. The mortgage company is under a duty, to try obtain a fair price - the best price ascertainable at the time of exercising its power of sale. At the auction in February 1996 it could be about $1.7 million that the plaintiff owed. After sending off all the particulars to the auctioneer that would be the end of her functions.

Mrs. Llewellyn had seen a valuation report done in October, 1993 – no fresh valuation was done for the auction of December, 1994. The valuation report she sent, Ex. 3, to the auctioneer indicated that there were two dwelling houses in the property and there was separate valuation for each house. "I agree that the auctioneer's notice does not paint an accurate picture of the report in the valuation.

"From my knowledge I don't recall the company doing anything else with regard to the plaintiff obtaining a fair price. No legal steps would be taken by company without me."

She never commissioned any valuation.

Mrs. Llewellyn admitted getting a letter dated 19th February, 1996 from Mrs. Taylor-Wright, the attorney for the plaintiff, complaining about the proceedings at the auction. In a letter dated the 5th of February, 1996, she had obtain a report of the auction from Mr. George D"Agûilar, the auction manager at C.D. Alexander & Co. She also received a copy of the bidding sheet. Mrs. Llewellyn gave instructions for the defence to be filed . She had seen the statement of

claim – she admitted that the statement of claim and the letter of 19th February, 1996 both spoke of sale by private treaty. She never received any information that the plaintiff arrived late and appeared not to have understood what was going on at the auction.

Mr. D'Aguilar never told her that the plaintiff came to the auction only to observe. She did not know Mr. Bisnott. She prepared the transfer after the auction. Although his name was on the bidding street, the names of the transferees were Clive Fitzgerald Barnes, Prudence Natalee Barnes and Marie Karen Barnes as tenants in common for consideration of $1.9 million. Date of the transfer was 27th March, 1996. She did not agree with the suggestion that in January, 1996, the bank was prepared to sell the property at all costs without regard to the plaintiff's interest. She was not aware of what interest the plaintiff was paying.

Miss Sandra Samuels is a realtor employed to United Realtors Company Limited. She is a director and General Manager of the company for the past five years. She is a licensed realtor and salesman since 1989. She holds a certificate for estate agency; did a Land Economy Valuation Survey at C.A.S.T. and is a qualified broker. She is now involved in real estate sales, leases, property management and valuation.

In February, 1995, she received a letter from Mrs. Llewellyn concerning this property. In August, 1995, she replied advising Mrs. Llewellyn there were no takers for the property and requested her to reduce the sale price. The sale was advertised in a display advertisement in the Daily Gleaner. She had several callers but they all asked for a reduction in price due to the location. The bottom price then was $2m. She had arranged to meet the plaintiff to have access to the property but he never turned up. She regarded the property as containing one building with two entrances. The valuation of the property was half the 1996 valuation. She had formed her opinion after looking at Mr. Taylor's report.

The final witness called by the defence was Mrs. Norma Breakenridge, a chartered Valuation Surveyor. She holds an MSc. Degree in Farm Management and Rural Valuation from University of Canterbury, New Zealand; Administration and Urban Valuation from East London University and Diploma in Applied International Management; a certificate in Marketing and certificate in Advanced Financial Management. Presently she is the owner of her own firm, Breakenridge and Associates, since January, 1999. Before that she was Managing Director of C.D. Alexander Realty Company Limited for four years.

She has been in the business for twenty-one years and worked at Land Valuation Department for a number of years. She does work in all areas of real estate practice, sales, rentals, leases, and auctioneering valuation and property management, expert witness in arbitration and general property consultancy. She gave in details all the steps to be taken to complete an auction sale.

On the 1st of February, 1996, she was the auctioneer on duty at C.D. Alexander. She had three auctions scheduled for that morning – one at 10 a.m.; the next at 10:30 for the Princess Alice Drive premises and the third for 11:30 a.m. The auction for Princess Alice Drive started at 10:30 a.m. at their auction room. One gentleman turned up at the start. He said he was there for this auction. She gave him an application form to complete. The form came back to her after she had read the particulars and conditions of sale. Two forms came back to her, one by Mr. Bisnott who was present at the beginning.

While Mrs. Breakenridge was reading, another gentleman arrived about 7 to 10 minutes after 10:30, it was the plaintiff. She asked him if he was here for the Princess Alice Drive auction and he said yes. She gave him an application and asked him to complete it. He filled the form and went and sat at the foot of the table. She was at the head of the table. After she had finished reading the description she asked for the application forms. She noticed that the plaintiff's form was blank so she asked him if he wanted to take part in the auction and he said no. She then passed out the bidding sheet to Mr. Bisnott. He made a bid by writing it on the sheet. She made an auctioneer's bid on the same sheet. He

made three bids in all while she made two. His last bid exceeded the reserve price. The bidding started at $1.5m and ended at $1.9m.

The evidence of this witness continued on the 6th December, 1999.

Mrs. Breakenridge regards Princess Alice Drive as a very small Hermitage Community with strong August Town influence and that August Town is a lower income volatile area, special to people like students using the university.

When this witness was cross-examined she said C.D. Alexander had done several auctions for the defendant bank. They would have been in the auction room before 10:00 a.m. She could not recall what time Mr. Bisnott came, but it could be close to ten. An Auctioneer would always try to get the best price for a property being sold. She never had any particular reason not to wait to see if other interested person would appear. In her opinion one person would afford her the opportunity to get the best price available. The property had previously been put up for auction. She was not present but said nobody came, then she said she was not sure if anybody came in the previous auction.

The bidding sheet is an accurate reflection of what happened in the auction room. The last entry on the sheet was the last bid made. She denied making a bid of $2m after the $1.9 bid. She never saw the report which was sent off to the mortgage company. "I was told that the property was sold, I had nothing to do with it. Mr. D'Aguilor was the auction manager. He could advise the mortgage company."

She made no attempt to increase the reserve price to $2m, this is fixed by the client and she as auctioneer has no authority to increase or decrease this

price. In answer to the question "if a bidder shows no further interest in an auction what does the auction master do?"" Mrs. Breakenridge replied "you call 'any further bids'. If it is above the reserve price – going once, twice, three times – sold to the highest bidder. If below the reserve price then the auction is called off." She thought she told Mr. D'Aguilor ;that the plaintiff came late. She did not tell anyone she invited the plaintiff to take bid in the auction. When the plaintiff passed back the form to her she had asked him if he is not taking part in the auction and he said no. When he left the room the auction was finished. "I commenced the auction while Mr. Gardiner was sitting at the table. He was still sitting at the table when I said going 1,2, 3 times." Under further cross-examination the auctioneer said "I was reading the condition of sale when plaintiff walked in. When he came in I had not yet read the description" "yet she agreed that the description of the property was the first thing on the form. She did not recall that the plaintiff said it appeared the auction was going through late. She did not recall telling the plaintiff at that time that the property was already sold to the man who just went through the door. She recalled that the plaintiff and herself had discussions at the door, she don't recall hearing him say he heard no bid. She don't recall discussing with the plaintiff how much the property was sold for. She don't recall discussing that it was sold for $1.9m. They were discussing for an extended period as the plaintiff was telling her the whole history of the property. She don't recall telling the plaintiff that the defendant said she could sell for $1.9m. She did tell him if he had any concerns he should go to the defendant bank. "The auction was held while Mr. Gardiner was there. It is

incorrect that when the plaintiff arrived in the auction room that I was already discussing sale with Mr. Bisnott."

This was the end of the defendant's case.

ADDRESSES

Mrs. Taylor-Wright, on behalf of the plaintiff, submitted that the defendant owed a duty of care to the plaintiff to ensure that a fair price was obtained at the auction; that in exercise of its power of sale, it failed to act with due regard for the rights of the mortgagor and in fact was negligent and acted with complete disregard for the plaintiff's interest in the said property. (see paragraph 10 of the Statement of Claim)

The Plaintiff's daughter had requested a period of 30 days to settle. She had reasonable expectation that her request would be granted. This was not to be, as by the following week the sale took place.

Counsel complained of the conduct of the auctioneer. No bidding took place, instead there were suspicious discussions between the auctioneer and Mr. Bisnott who left saying he was going to the bank. She also complained about the advertisements for the sale. Although there was evidence of a bid of $2m, yet this is not recorded on the bidding sheet. (see paragraph 13 of the Defence)

In May, 1996 the defendant through its Attorneys admitted that the sale on the 1st February, 1996 was by private treaty. However, in 1999, it claims it was by public auction.

On the question of the duty of care Mrs. Taylor-Wright, made reference to the case of ***Cuckmere Brick Co. v. Mutual Finance (1971) 2 A.E.R. page 633,*** Which was cited with approval in the local case of ***Dreckett v. Rapid Vulcanizing Co. Ltd. (1988) 2 J.L.R. page 130.*** In the instant case the defendant had failed to put in the advertisement that it was a duplex house, that this went to the root of the ad; in that it might have failed to attract persons who would be otherwise interested. Reference was also made in support of her case of the case of ***Pendlebury v. The Colonial Mutual Life Assurance Society Ltd. (1912)*** 13 CLR p. 676, a decision of the High Court of Australia also the local Supreme Court case of ***Joan Adams v. Workers Trust and Merchant Bank Limited*** (unreported) Suit No. C.L. A-130/89. Again, she complained that there were material omissions and material mistatements in the advertisement. There was a failure to refer to the number of habitable spaces, the size of the house; failure to include proximity to favourable and nearby locations. No independent competitive bids, the defendant had no current valuation – See Exercise of the Mortgagee's power of Sale in Jamaica by Alison Dunlcky dated June 15, 1997 at page 18.

Counsel next referred to the impropriety in the auction for the auctioneer to bid; The right to bid ought to have been specifically reserved in the particulars of sale. The auctioneer holds a duty of care to the mortgagor, the mortgagee and the members of the public – See Harts Law of Auctions, 3rd Edition at page 18 and 19.

When auctioneer bidded without specific authority reserved she stepped outside the bounds of her authority. There was no memorandum of sale signed by the purchaser at the sale. The memorandum tendered exhibit 24, which the auctioneer said she witnessed, Mr. Bisnott's signature is dated the 27th of March, 1996, i.e. over 7 weeks after the date of the sale.

If the court accepts evidence of the plaintiff that there was no sale by public auction, then any sale which took place would be one of private treaty and if so, certain considerations would apply.

There must have been a current valuation; and the property must have been adequately advertised. See ***Adams v. Workers Trust and Merchant Bank*** ***(1992) 29 JLR p. 447.***

Counsel submitted that the defendant cannot say that they had discharged its duty of care by leaving the sale in the hands of a reputable auctioneer – see ***Cuckmere Brick Co. v. Mutual Finance*** (supra) p.634.

On the issue of the onus of proof counsel submitted that in all civil cases, the plaintiff must prove his case on a balance of probabilities. However, there is a very heavy burden on the mortgagee to show that they had taken all reasonable precautions to ensure that they obtained a fair price at the auction. See Dreckett and the Privy Council case of Tse Kwong Lam.

In all the circumstances of the case and having regard to the evidence, the plaintiff has shown on a balance of probabilities, that the defendant has failed to discharge the duty of care owed to the plaintiff. Further, the mortgagee has not discharged the onus put on it in law to show that it had taken all reasonable

precaution to ensure a fair price. Both these considerations apply to whether sale was by public auction as stated by defendant in its amended defence or is private treaty as averted by the plaintiff in his statement of claim.

What is the evidence of market value? The only evidence as to this is through the evidence of Mr. Robert Taylor, the plaintiff's witness - $4.5m. The defendant's witness Miss Sandra Samuels, never valued the property; she would have valued it for half of Mr. Taylor's value. This was not an honest or reliable valuation. She had visited the property one year before the sale .

This could not be regarded as current market value – she is a part of mortagee's company. She was never employed by them as a valuer and was not qualified as a valuer at the time she went there. She did not go into the premises at all; she was never in a position to observe the property for purposes of valuation in 1995. The plaintiff had supplied evidence of persons interested in the property – his two grandsons. They had given evidence of the sources of their financing.

On the question of damages Counsel suggested that given the evidence of the value of the property in 1996; evidence of what it was sold for in the auction, the sum representing the difference amounting to $2.6m would be the appropriate damage with interest under the Law Reform (Miscellaneous Provisions) Act at the rate of 25% per annum.

Miss Walters, on behalf of the defendant, repeated what Mrs. Llewellyn said in cross examination, "I don't know what else we could have done to secure a better price." She pointed out that at the aborted first auction the reserved

price was $2.053m. This was precisely the market value of the property given by the plaintiff's valuator one year before (exhibit 3). Efforts by the plaintiff to sell privately failed. Counsel then referred to efforts by the defendant bank. Mrs. Llewellyn writing to Miss Samuels who visited the property made efforts without success. On hearing the price, these persons showed no further interest. Mrs. Llewellyn gave instructions to reduce sale price to a figure which current market will absorb. Bank therefore had no choice but to re-submit the property for sale by auction.

Just then, there was a flurry of activity, the grandson suddenly got interested. Counsel claims that the evidence of Carl Hardy was contrived at best. The daughter Mrs. Brodie's loose indication of interest not sufficient grounds to compel the bank to hold its hand. She showed interest in creating a sub-division which is not a one day process. It took over a year to complete. There was no duty on the defendant to wait for completion of sub-division.

Admittedly, the plaintiff knew that the auction would take place on the 1st of February, 1996. Their representations having failed, they came up with a 'game plan.' His family allows this 84 year old plaintiff to go to the auction alone. He suffers from glaucoma and cataract which they knew of. These last ditch efforts seem most insincere, contrived to save the father's house and to provide further time for the grandsons.

At the auction, only one person turned up who bidded successfully after the plaintiff who came late indicated he was not interested in bidding. Auctioneer had over 21 years experience in the islands biggest industry. As between the

word of the plaintiff and that of the auctioneer, the court ought to accept that of the auctioneer, as the plaintiff cannot be believed. Counsel asked the court to accept evidence of Mrs. Breakenridge that the memorandum was signed by her on the date of the sale. Errors and alterations on it ought not to affect the veracity of her evidence.

Miss Walters next dealt with the law which gives basis to mortgagee's power of sale under Sections 105 and 106 of the Registration of Titles Act. The mortgagee determines whether sale to be by public auction or by private treaty. Counsel submitted that the defendant had complied fully with the provisions of the Act.

On the issue of the duty of care, Counsel suggested that the evidence fully supported that the defendant took reasonable care. She referred to the old case of ***Farrar v. Farrar Ltd***. (1888) where Lindley L.J. said this:

> "If in the exercise of his power the mortgagee acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress even though more might have been obtained if the sale had been postponed"

With respect to the valuations, Counsel submitted that the duty to obtain is at the point where and when it is determined whether there will be private treaty or public auction. She referred to the Dreckett case where the law in Jamaica is clearly articulated at page 144. The auction of the 1st of February, 1996 must stand as being in utmost good faith.

With respect to advertisement, Counsel said that the purpose is to arouse interest in the public (see Batesman's Law of Auctions, 11th Edition page 32 where it is stated:

> "It is usual, where property is to be put up at auction, to publish in Newspapers, or by means of circulars, advertisements announcing the time, place, and subject of the sale, and mentioning to whom to apply for further information."

However, it is not obligatory to advertise all types of sales. There was no evidence that failure to state that in this case it was a duplex house up for sale excluded any category of persons who may have been interested. No evidence had been called to contradict Mrs. Breakenridge's evidence that a duplex is a single house and no evidence as to market demands of duplex houses.

In the judgment of Cross, L.J. in the Cuckmere's case, two things ought to be established:

(i) was the misdescription or omission in fact material;

(ii) the effect thereof.

Counsel surmised that when the advertisement described the property as 13 and 13a, it may have indicated to would be purchasers that this was two lots with building thereon.

Counsel accepted that for the auctioneer to exercise a right to bid, this right must have been expressly reserved.

In determining the complaints of the plaintiff's counsel about impropriety of the auction, the court must weigh the credibility of an auctioneer of twenty-one

years experience as against the evidence of an honest but mistaken plaintiff. She submits that there is no evidence of any impropriety in law or on the facts.

On the issue of damages Counsel submitted that damages can be awarded only if the court accepts the plaintiff's case that the sale was by private treaty and not public auction as claimed by the defendant; and as to quantum, the evidence of Mr. Taylor for the plaintiff and Miss Samuels for the defendant.

CONCLUSION

The plaintiff in this suit is claiming that as a result of the negligence of the defendant and its agents, he lost the sum of $2.6m because they grossly under valued his duplex house property in exercising their power of sale. That this occurred because they failed to obtain a valuation of the property, they failed to properly advertise the extent of the property, they failed to try to obtain the best price; that the property was sold by private treaty, rather than by public auction.

In Moses Dreckett, at page 646 the Court of Appeal concluded 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."

In the instant case, the only description given of the property in the advertisement was that it was a lot "with a dwelling house thereon". They failed to specifically state that it was a duplex house on two lots of land with a land area of 6,020 square feet. The larger lot , 13A, had the larger side of the house, and contained 4 bedrooms, 2 inside bath rooms, dining room, drawing room, kitchen, helper's quarters and an outside bathroom. The smaller side had same as the other except that it had only 3 bedrooms and on inside bathroom. Dwelling

houses in this area rarely have more than 3 or 4 bedrooms. There is a vast difference between a 4 bedroom house with 2 bathrooms and a 7 bedroom house with 3 bathrooms. It can fairly be said that the mortgagee omitted these facts in their advertisement so that it failed to attract prospective purchasers.

There is no dispute that at the time of the sale the mortgagee had no current market valuation. A valuation report by Magnet Real Estate Agency in October, 1993, suggested a value of $2.053m. A valuation done on the 12th of February, 1996, less than two weeks after the sale, put the value of the property at $4.5m. This is way below a half of current value. An attempt by Miss Sandra Samuels to challenge this latest valuation failed miserably. In fact, she made no valuation at all. On her evidence she sat in her car outside the premises for about ½ an hour awaiting the plaintiff and left without going on the property. She had no idea of the condition of the building internally. However, based on her observation of the premises, and her expert opinion, "my valuation would be half of the 1996 valuation". She agreed that in the 1993-96 period there was upward movement in real estate value in the Hermitage area. Save that Miss Samuels saw the 1993 valuation report, she certainly was in no position to give a credible valuation.

Mrs. Breakenridge, the Auctioneer had over 21 years in the business. She claims that in the bidding, she made two auctioneer's bid. To do so she admitted that such a right would be specifically stated in the particulars and conditions of sale. No attempt was made to show her authority for doing so. This surely is an irregularity without any explanation.

From the very beginning of this issue, the plaintiff has been claiming that there was no bidding and alleging that there was collusion between the auctioneer and Mr. Bisnott. The plaintiff claims he arrived long before the 10:30 a.m. starting up time. Mrs. Breakenridge in cross-examination said "I commenced the auction while Mr. Gardiner was sitting at the table. He was still sitting at the table when I said going 1,2,3 times." Then a few questions later she said "I was reading the conditions of sale when the plaintiff walked in". She admitted reading the conditions of sale before reading the description although the description appears first on the form. Then in response to further questions under cross-examination the auctioneer made a series of "I don't recall".

> "I don't recall plaintiff saying that it appears the
> auction going through late".
> "I don't recall hearing him say he heard no bid".
> "I don't recall telling plaintiff at that time that the property
> was already sold to the man who just went through the door".
> "I don't recall discussing with plaintiff how much
> property sold for".
> I don't recall exact discussion of things whether
> property sold for ⅓ or ¼ of value".
> I don't recall saying to plaintiff that the defendant said
> I could sell property for $1.9m".

Surely, this sort of answer does not inspire confidence that this is a witness that the court can rely on.

In the Australian case of Pendlebury, the sale was collusive, the advertisement for it was completely inadequate and the property was sold for exactly the reserve price. The High Court of Australia found that there had been a reckless disregard of the mortgagor's interest and the sale was not bona fide and independent. The omission to take obvious precautions to ensure a fair price, getting a proper valuation, failing to adequately advertise the sale were held to a amount to showing that the mortgagee was absolutely careless. Whether a fair price was obtained or not his conduct was reckless and that he did not act in good faith.

I respectfully agree with these findings and wish to adopt them as my own in the instant case.

The trial of this matter commenced on the 11th of June, 1999, and adjourned at the end of that day to a date to be fixed by the registrar. On the morning of the 5th of October, 1999 when the trial resumed, an application was made to the court by Miss Walters to amend the defence to the Statement of Claim which had been filed from as far back as the 18th of March, 1996, claiming in paragraph 5 that the property had been sold by private treaty. Over two months later a defence was filed on the 29th of May, 1996 stating in paragraph 1 that "paragraphs 1,2,3,4 and 5 are admitted by the defendant".

Now, three years and five months later this application was made for the defence to read:

> "Paragraph 1,2,3 and 4 of the Statement of Claim are admitted. In answer to paragraph 5 of the Statement of Claim the defendant deny that the premises were sold by private treaty and aver that they were sold by

public auction on the 1st of February, 1996."

Not unnaturally, the plaintiff's attorney vigorously objected to the application, it would severely prejudice the plaintiff's case as it went to the root of her case.

The amendment sought was granted as prayed as the court felt that it would cause no injustice to the plaintiff.

Undoubtedly, it must have been embarrassing to the defendant to be substantially changing its defence in mid-stream.

Complaint was made by Counsel for the defendant that the plaintiff, being of great age and suffering from glaucoma and cataract, was an unreliable witness, clearly inferring that he was both mentally and physically challenged. The trial took place over nine days. The plaintiff was present at court almost everyday of the trial. Each day he walked unaided into and out of court, into and out of the witness box without any assistance. From his demeanor in and out of the witness box I saw nothing to indicate that he had lost any of his senses. In fact he appeared to have been fully in charge of all his faculties.

I accept the plaintiff as a witness of truth. I accept his evidence that no bidding took place in public that morning in relation to his Princess Alice Drive residence. That through collusion between the auctioneer and the purchaser the property was sold privately. I reject the defendants amended defence and on a balance of probability find that the defendant failed to adequately advertise the property, failed to obtain a true market value and failed to try to obtain the best price. That as a result of the defendant's negligence the plaintiff suffered

damages: that is the difference between the valuation price of $4.5m and the sum the property was sold for $1.9m.

There will therefore be judgment for the plaintiff in the sum of $2.6m against the defendant with interest at the rate of 20% per annum from the date the property was transferred to the purchasers to the date of judgment.

Costs to the plaintiff to be taxed if not agreed.

put on auction in 1994. It was in January 1996, that he told his grandfather of interest in the property. He started living with his grandfather on the 26th December, 1995, but did not know that he was trying to sell the house all through 1995. He was sincere in the purchase – this was not a last minute effort to save the houses from the auction. He never went to the auction as he knew his grandfather was going to bid on his behalf. He had letters of interest from the National Housing Trust and from Mutual Security Bank. He wanted to get a part of the property and his cousin the other part. His plan was not to save grandfather but to purchase property to house his family.

In answer to the court this witness said that in 1996 he never had a home for himself. He had made a previous attempt in 1995 to purchase a house.

This was the case for the plaintiff.

DEFENDANT'S CASE

Mrs. Sonia Llewellyn was Group Legal Officer for the U.G.I. Group Ltd. from 1991 to March 1999. The International Trust and Merchant Bank Ltd. the defendant, was a member of the group. She had special responsibility for all legal issues related to the defendant. She was also a member of the legal firm of Brown, Llewellyn and Walters, Attorneys-at-law who were the Attorneys on the record representing the defendant in this action. She had prepared the mortgage documents and when the plaintiff's account fell into arrears in 1994 she was instructed to recover the bank's funds. She tendered mortgage documents in respect of the two loans made by the Defendant in 1993 and 1994 to the plaintiff as also copy of the letter of demand she wrote to the plaintiff indicating that the