



[2020] JMSC COMM 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00309

BETWEEN	BRUCE JAMES	CLAIMANT
AND	JAMAICA MONEY MARKET BROKERS MERCHANT BANK LIMITED	DEFENDANT

IN OPEN COURT

Mr. Garth A. McBean, Q.C. and Ms. Dian C. Johnson instructed by Garth McBean & Co. for the Claimant

Ms. Shanique T. Scott instructed by Hylton Powell Attorneys-at-Law for the Defendant

Heard: June 29, 30 and December 3, 2020

Civil practice and procedure– Mortgage– Duty of mortgagee in exercising power of sale–Whether mortgagee liable for selling property below market value

PALMER HAMILTON, J

BACKGROUND

[1] This dispute concerns property located at Lot 42 Spring Farm Drive, Rose Hall in the parish of Saint James comprised in Certificate of Title registered at Volume 1065 Folio 986 (hereinafter called “the property”). The Claimant and his mother Ms. Edna James, now deceased, were the registered proprietors of the property.

[2] Between 2006 and 2011, Jaaz Import and Export Company Limited obtained several loans from Capital & Credit Merchant Bank, the Defendant’s predecessor (hereinafter “the Bank”). The Claimant and his mother acted as guarantors for

those loans and granted the Bank a legal mortgage over the property as security for those loans.

- [3] In or around 2011, the Claimant defaulted on the repayment of those loans which were consolidated into one bad debt. In an effort to extinguish the debt, the Bank sought to exercise its power of sale. In or around 2012, the Bank merged with and was acquired by the Defendant, resulting in the Defendant's acquisition of the Claimant's bad debt portfolio.
- [4] In or around June 2015, the Defendant, in exercise of their power of sale, sold and transferred the property to Mr. Balwin Jarrett and Ms. Sonia Jarrett by way of private treaty for the sum of Seven Hundred and Sixty Thousand United States Dollars (US\$760,000.00). The Defendant also seized and sold a D5M CAT Bulldozer and two water pumps that were owned by the Claimant to satisfy the debt.
- [5] These events provided the reagent that caused the Claimant to file a Claim alleging that the Defendant has breached their duty to act in good faith when exercising their power of sale, by primarily selling the property at a gross undervalue, without obtaining a current valuation report for same and without taking all reasonable steps to obtain the best price possible.
- [6] The Defendant vigorously opposes the Claim and indicates that it took reasonable steps to get the best price that was obtainable at the time of the sale.
- [7] I will not reproduce the evidence of the witnesses in their entirety but will summarize them so far as they affect my findings in my analysis. I will forge ahead by outlining the general position of the parties below.

THE CLAIMANT'S POSITION

- [8] The Claimant and Mr. Gordon Langford, Chartered, Land Surveyor gave evidence on behalf of the Claimant and were subject to cross-examination.

- [9]** The Claimant in his Particulars of Claim described the property as being residential and located in Spring Farm, an exclusive and extremely upscale/upper income district which lies in close proximity to the town of Montego Bay. He further indicated that Spring Farm lots have elaborate split and tri-level houses permitting aesthetical views of the Caribbean Sea. The lot, he stated is 5,382.06 square metres or 57934.00 square feet.
- [10]** The Particulars of Claim disclosed that in or around 2011 the Claimant fell into arrears with the payment of the mortgages and as such the loan was deemed as bad debt by the Defendant. In an effort to extinguish the debt, the Claimant approached his then realtor, Ms. Lorna Nunes at Neighbour Realty instructing her to advertise the property for sale and Ms. Nunes acted in accordance with those instructions.
- [11]** The Claimant averred that on the 29th day of May 2012 the Defendant wrote Ms. Nunes instructing her to withdraw from selling the property. At the time the letter was received, the Claimant already had offers to purchase from individuals interested in the property, one such offer being that of Two Million Five Hundred Thousand United States Dollars (US\$2,500,000.00). The Claimant indicated that there was no option but to discontinue the discussions with the proposed offeree.
- [12]** The Claimant stated that he sought to have discussions with the Defendant about the necessary steps to clear the arrears but the Defendant did not facilitate him. He indicated that he did not receive any correspondence from the Defendant between May 2012 and October 2015 and he was oblivious to the steps being taken by the Defendant to recover the outstanding debt. The Defendant subsequently exercised its power of sale and the Claimant averred that his thirteen (13) year old son was served with the eviction notice indicating that the Claimant and his family should vacate the property.
- [13]** Mr. James stated that he did not receive a statutory notice and has never seen any advertisement in the newspaper or any real estate agency's website or listing

about the sale of the property. He became aware that the Defendant sold the property when his son was served with the eviction notice.

- [14]** It was disclosed that the Claimant commissioned a Valuation Report from V.B. Williams Realty Company Limited which is dated February 15, 2015 which gives the value at the time as Three Million Three Hundred Thousand United States Dollars (US\$3,300,000.00) or Three Hundred and Eighty Million Five Hundred Thousand Jamaican Dollars(JM\$380,500,00). The forced sale value being Two Million Seven Hundred Thousand United States Dollars (US\$2,700,000.00) or Three Hundred and Four Million Four Hundred Thousand Jamaican Dollars (JM\$304,400,000.00).
- [15]** The Claimant indicated that before the property was sold, he told the Defendant's Attorneys-at-Law about the said valuation, but he was told that the Defendant already had an offer that it was contemplating. It was not until after the completion of the sale that the Claimant became aware that the property was sold for Seven Hundred and Sixty Thousand United States Dollars (USD\$760,000.00) or Eighty Million Jamaican Dollars (JMD\$80,000,000.00).
- [16]** The Claimant also proffered that he was made aware that the valuation the Defendant relied on in carrying out the sale was done externally and differed significantly from other valuations which included an assessment of the internal features of the property.
- [17]** The property was transferred to Mr. Balwin Jarrett and Ms. Sonia Jarrett in June 2015. The claimant averred that the purchasers are in fact connected to principals at the Defendant company and were given preference during the process of the Defendant exercising its power of sale. The Claimant is therefore suspicious of the Defendant's secrecy during the exercise of the power.
- [18]** The Claimant also stated that as at the date of filing this Claim, land in Spring Farm without any buildings thereon is being sold for between Five Hundred Thousand United States Dollars (US\$500,000.00) or One Million Jamaican

Dollars(JM\$1,000,000.00). This, the Claimant maintained, is evidence that the property was sold below the market value at the time and the forced sale value, in the circumstances where reasonable offers were being made closer to the actual value of the property as early as three (3) years before the Defendant was able to sell the property.

- [19] The Claimant also indicated that no account has been given for the sale of his D5 CAT Bulldozer and the two (2) water pumps seized by the Defendant. There is no indication whether the proceeds of sale of the equipment or their value has been applied to the outstanding debt.
- [20] The Particulars of Claim indicated that despite repeated attempts by the Claimant as well as his then Attorney-at-Law to obtain information as to the status of the account with the Defendant in relation to the sale of the property, the Defendant has not provided same. He states that as a result of the Defendant's breach of duty to act in good faith and its negligence he has suffered loss and damage.

THE DEFENDANT'S POSITION

- [21] Ms. Trudy Ann Bartley Thompson, Legal Counsel for the Defendant and Mr. Norris Marston, Land Surveyor gave evidence on behalf of the Defendant and were subject to cross-examination.
- [22] In its Defence, the Defendant denied that it did not facilitate attempts made by the Claimant to discuss steps to clear the arrears. The Defendant met with the Claimant in February 2011 to discuss clearing the arrears, however, the arrears were not cleared and as a result, the Claimant issued a demand to the Claimant and the principals for the repayment of the loans.
- [23] The Defendant also denied that the Claimant did not receive a statutory notice and asserted that it served the statutory notices dated the 28th day of February 2011 on the Claimant, Edna James and Jaz Import & Export Limited by registered mail on the 11th day March 2011. The Defendant also asserted the following: -

1. The Claimant knew from 2011 that the Defendant was attempting to sell the property because his then Attorneys-at-Law had written to the Defendant on the 25th day of October 2011 about an advertisement that was placed in the Observer;
2. The Defendant advertised the property for sale at public auction and by private treaty in the Gleaner and Observer on several occasions in 2011 and 2013;
3. The Defendant listed the property with various realtors, who also advertised the property for sale during the period 2012 to 2014.

[24] In relation to the valuation report procured by the Defendant, it stated the following in its Defence; -

1. It retained Keith Alexander Limited to prepare a valuation of the property in March 2011 and August 2012;
2. The valuation report that was done in March 2011 was done based on an external inspection only because the Claimant had denied the valuator access to the property to carry out an internal inspection on two occasions;
3. The Defendant does not know whether the information used in the 2011 and 2012 valuations was taken from a previous valuation of the property which had a then value of Five Million United States Dollars (US\$5,000,000.00);
4. The 2011 valuation report states that the size of the buildings on the property was approximately 18,992 square feet;
5. The valuation could have been used to inform the sale of the property even though the valuations were based on detailed

external inspection and previous appraisal reports conducted on the property.

[25] The Defendant asserted that it had no prior connection with the purchasers and that the offer from the purchasers came through a realtor. The Defendant further avowed that it exercised reasonable care to obtain the best price that was obtainable by doing the following: -

1. Procuring a valuation report from a licensed valuator in March 2011 and August 2012;
2. Issuing a statutory notice to the Claimant, Edna James and Jaz Import and Export Limited;
3. Seeking to sell the property at public auction in May 2011 so that it could be exposed to a wide market;
4. It only sought to exercise its power of sale by private treaty after it was unsuccessful in selling the property by public auction;
5. Listing the property with several realtors for them to sell the property by private treaty between 2012 and 2014;
6. Advertising the property for sale in the Gleaner and Observer newspapers; and
7. Seeking to obtain the highest price it could for the relevant property.

[26] The Defendant maintained that by virtue of the abovementioned circumstances, the Claimant is not entitled to the relief sought.

ISSUES

[27] The primary issue for the determination of the Court is whether the defendant properly exercised its power of sale and if so, whether it took reasonable care to obtain the true market value of the property. The resolution of this issue will determine whether on a balance of probabilities, the Claimant is entitled to the reliefs sought.

[28] Both Counsel provided written submissions which the court found to be instructive. I will only restate these submissions to the extent that they guided my decision, however, Counsel can rest assured that I have given due consideration to all the points that have been raised by them.

SUBMISSIONS OF THE CLAIMANT

[29] Queen's Counsel Mr. McBean adumbrated his submissions by stating the relevant law in so far as it concerns the duty of a mortgagee to a mortgagor when exercising a power of sale. A plethora of authorities were cited to support the submission that a mortgagee owes a mortgagor a duty of diligence in respect of the price for which the mortgaged property is sold. This duty requires the mortgagee to act in good faith, to act prudently, in a business-like manner 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.

[30] The Claimant submitted that upon a review of the circumstances surrounding the sale, the Defendant breached its duty as a mortgagee in exercising the power of sale in a number of ways. I will summarize them as follows: -

1. The Defendant failed to adequately or sufficiently advertise the property when exercising its power of sale in 2015 as all advertisements for the property were placed during the period of April 2011 to November 2011, save and except for a single advertisement which was placed in February 2013;

2. The Defendant failed to obtain a current valuation report or other expert advice concerning the value of the property when they exercised their power of sale in 2015. Having regard to the qualification stated in the Keith Alexander report that the interior of the property had not been inspected, the Defendant ought to have been alerted that the figure in said reports in 2011 and 2012 would need to be updated in 2015, particularly having regard to the amount of time which had lapsed since the last valuation and the value for which the property was also being insured at the material time;
3. The period of approximately two weeks for which the property was allegedly listed was far too short for a realistic assessment of market conditions, particularly in the absence of any evidence of attempts being made to secure a sale being provided by the Defendant for the period of January 2012 to January 2012;
4. The Defendant has failed to present any evidence of offers received for the property, in order for the Court to assess same and determine whether the prevailing market conditions were such that would reasonably justify the sale of the property below the market value;
5. The property was sold at a price which is significantly below the forced sale value in the outdated valuation reports of Keith Alexander on which the Defendant relies and at a sum which was unable to discharge the debt;
6. Without adequately exposing the property on the market for a period not less than three years immediately preceding the sale, and in the absence of any evidence supporting how the sale price was determined in 2015, the Defendant unjustifiably sold the

property at a gross undervalue and at a sum which was grossly inadequate to satisfy the debt, the balance of which the Defendant continues to apply interest and is actively seeking to recover from the Claimant to date;

7. The Defendant deliberately and unreasonably obstructed all attempts by the Claimant to secure a sale for the subject property for market value and further withheld information from the Claimant in the period immediately preceding the sale of the subject property at a gross undervalue, despite his attempts to urge them to ascertain a correct and current value of the property.

[31] Mr. McBean acknowledged that the Defendant is not obliged to obtain an independent prior valuation to determine market value but indicated however, that the Defendant in accordance with its duty to act prudently would nonetheless be required to seek valuation advice in order for them to make an informed business-like decision as to the appropriate price for which the property may be sold in 2015. It was submitted that the Defendant breached its duty as no evidence has been submitted by the Defendant to substantiate how the reserve price of Eight Hundred Thousand United States Dollars (US\$800,000.00) and by extension the sale price of Seven Hundred and Sixty Thousand United States Dollars (US\$760,000.00) was arrived at in the circumstances.

[32] The Claimant averred that having regard to the lapse of approximately three (3) years between the date of the last valuation report commissioned by the Defendant and their attempt to secure a sale of the property in 2015, and also the Defendant's inability to provide the Claimant with any information concerning the proposed sale of the subject property after stymieing all attempts by the Claimant to secure a sale at market value or attempts by way of suit to secure a current valuation prior to the exercise of their power of sale. Mr. McBean submitted that such conduct leading up to the sale of the property can hardly be described as actions in good faith or best endeavours to obtain the true market value.

[33] It was further submitted by the Claimant that the Defendant failed to act prudently nor had they done all that they reasonably could, in the circumstances, to obtain the best price available at the time of the exercise of the power of sale. Further, the Defendant has failed to present any evidence conveying the steps that were taken to assist them as mortgagee in arriving at the price for which the property was sold, which would be determinative of whether or not the power of sale was properly executed.

[34] Mr. McBean asserted that even if the Court was persuaded that the Defendant acted honestly when exercising their power of sale, such a finding ought not to avail the Defendant who has failed to exercise their power of sale in a business-like manner by taking reasonable care to obtain a proper price for the property that takes account of the Claimant's interest while at the same time pursuing their own self-interest. The process employed by the Defendant suggests that the Defendant recklessly sold the property at an undervalue without any regard for the Claimant's interest.

[35] The following cases were cited in support of the submission: -

1. **Anthony Johnson and Arlene Johnson v JN Building Society** [2017] JMSC Civ. 25;
2. **Moses Dreckett v Rapid Vulcanizing Company Limited** (1988) 25 JLR 130;
3. **Rudolph Daley v RBTT Bank (Jamaica) Limited** (unreported), Supreme Court, Jamaica, Claim No. 1995/D162, judgment delivered on the 30th day of January 2007;
4. **Don Foote v JMMB Merchant Bank Limited** [2018] JMSC Civ.13;
5. **Andrea Ball v Sagicor Bank Jamaica Limited** [2017] JMSC Civ. 171; and

6. **Khiatani Jamaica Limited, Sunil Khiatani and Shiela Khiatani
v Sagicor Bank Jamaica Limited** [2018] JMSC COMM 10.

THE DEFENDANT'S SUBMISSIONS

[36] Learned Counsel Ms. Scott commenced her submissions by dealing with the Claimant's Claim for breach of duty and negligence. She submitted in relation to the service of statutory notices, the Defendant served statutory notices on the Claimant, his mother Ms. Edna James and Jaaz Import and Export Company Limited by registered mail on March 11, 2011 advising them that the Bank will sell the property if the outstanding debt was not paid. Ms. Scott further submitted that notwithstanding this, the Bank was not required to serve the statutory notices pursuant to clause 2(m) of the Instrument of Mortgage dated April 12, 2006. The case of **Diane Jobson v Capital & Credit Merchant Bank Limited** [2007] UKPC 8 in support of this submission.

[37] As it relates to the issue of the property being sold at an undervalue, the Defendant maintained that a mortgagee does not have a duty to get the market price or the best price when exercising a power of sale. The duty is only to take reasonable steps to obtain market value. Additionally, a court should not find a mortgage in breach of his duty unless that mortgagee is clearly on the wrong side of the line. The case of **Cukmere Brick Co. Ltd and another v Mutual Finance Ltd and another** [1972] 2 All ER 633 was cited in support of this submission. Ms. Scott also submitted that there is no evidence that the Defendant did anything wrong that resulted in the property being sold at a lower price.

[38] The Defendant averred that the courts have also made it clear that the market value of a property is not determined by a valuation report and the case of **Atkinson v Development Bank of Jamaica et al** [2015] JMSC Civ 161 was used to buttress this position.

[39] It was proffered that the Defendant took reasonable steps to obtain the best price that was available at the time of the sale and it accepted the best and only offer

available after having had the property on the market for approximately four years. The Defendant had advertised the property to the public on several occasions, thus exposing it to a wide market.

- [40] Ms. Scott stated that the Defendant had advised the Claimant and his attorneys of the Outstanding loan balances and how the proceeds of the sale of the property were applied to the said loans. The Defendant applied the net proceeds of the sale of the D5M CAT Bulldozer and two water pumps to the outstanding debt.
- [41] The Defendant averred that the Claimant would not be entitled to interests as the Defendant did not act negligently or in breach of its duty of care. If the Court were to award interest, it should be awarded pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act.
- [42] It was further submitted that compound interest should not be granted in this case based on the principles outlined in the cases of **National Hosing Trust v YP Seaton & Associates Company Limited** [2015] UKPC 43 and **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another** [2008] 1 A.C. 561.

LAW AND ANALYSIS

- [43] The law in relation to the exercise of a mortgagee's power of sale has been extensively dealt with by the courts over the years. Section 106 of the **Registration of Titles Act** gives the mortgagee the power of sale in cases where the mortgagor has defaulted in payment. The section directs that the mortgagee is required to give notice, and if the default continues for a month after the notice, the mortgagee may sell the land, or any part thereof, by public auction or private contract, subject to such terms and conditions as the mortgagee deems fit. It further declares that the mortgagee may sell the property without liability to the mortgagor for any loss as a result of the sale, and shall perform the tasks necessary to effect the sale.

[44] It is trite law that a mortgagee does not owe a fiduciary duty to the mortgagor in the exercise of the power of sale. **Halsbury's Laws of England**, 4th Edition, Volume 32, paragraph 729 states that: -

"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."

[45] Though it may be that 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 negate the mortgagee's duty to act in good faith. It is also reiterated throughout the plethora of authorities on this issue, 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.

[46] From the authorities cited by the parties herein, I garner 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.

[47] At paragraph 57 of **Jamaica National Building Society v Clyde Harrison** [2019] JMSC Civ. 205 the Honourable Miss Justice Christine McDonald stated: -

"Nevertheless, the case law provides that the mortgagee owes a duty to the mortgagor to take reasonable care to obtain a proper price when exercising the power of sale. In the court of appeal decision of Cornwall Agencies Limited v The Bank Of Nova Scotia Jamaica Limited and Amalgamated (Distributors) Limited [2016] JMCA Civ. 49, Panton P, considered the following in that respect. He opined:

"The fundamental issue in this case is whether the bank acted properly in the exercise of its powers under the mortgage. That is the issue for determination on this appeal. The issues as to the appropriateness of the rates of interest awarded by the learned judge, and the role of the Registrar in the determination of the quantum of interest, are consequential issues which are of importance only if the bank is found to have breached its duty under the powers of sale in the mortgage." [my emphasis]

[48] As per the Honourable Miss Justice Audrey Lindo in the case of **Anthony Johnson and Arlene Johnson v JN Building Society** (supra) at paragraph 24:

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“...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.”

[49] It is clear that the circumstances surrounding the mortgagee’s exercise of its power of sale must be scrutinized. There is no contention herein that the Defendant’s power of sale did not arise. It was the manner in which it was exercised that is the crux of the Claimant’s contention.

[50] I will briefly address the Claimant’s contention that it did not receive a statutory notice and has never seen advertisement in the newspaper or any real estate agency’s website listing about the sale of the property, as there is no contention as to the legality of the Defendant’s power of sale. The Claimant alleged that he became aware that the Defendant sold the property when his son was served an eviction notice. The Defendant maintained that notices were served by registered mail in 2011.

[51] I echo the findings of the Honourable Miss Justice Nicole Simmons in the case of **Lorenzo Murdock and Janet Murdock v Victoria Mutual Building Society** [2012] JMSC Civil 119 at paragraph 94 where she stated: -

*“... In the case of **Zachariah Sharief v. National Commercial Bank Limited**, Suit No. C.L 1990 / S109 delivered on June 13, 1994 it was held that the provisions regarding the manner of service are directory and not mandatory. In that case the notices were not sent to the correct address but the court found that based on the recorded telephone conversation between the bank and the claimant the said notice had in fact come to the attention of the claimant. Patterson, J. in his judgment said:*

“The general object and paramount importance of the provisions of sections 105 and 106 must be ... to ensure that the mortgagor is notified of the mortgagee’s intention to exercise his power of sale and to allow the mortgagor time to fore-stall the sale. The mortgagor must be presumed to know he is in arrears, and the notice in writing, it seems to me, is intended to remind him of his obligation and to call upon him to repay the money in accordance with the demand within the time mentioned therein. The manner of service of the notice is not of general importance, and it may be

by any of the means set out in the Act or in the deed itself, ... it may be by some other means, provided that in such a case, it is clearly shown that the notice did come to the knowledge of the mortgagor. The date of the service of the notice of demand is important because it is from that date that time begins to run against the mortgagor for the exercise of the mortgagee's power of sale ..."

- [52] In examining the evidence, the Claimant has received other correspondences from the Defendant without any difficulty and the only correspondence he did not receive was that of the statutory notice. There is no evidence to suggest that the mail was undelivered or returned. I find that the notices were sent pursuant to clause 2(m) of the mortgage deed.
- [53] Even if I am wrong on this, the aim of the notice is to ensure that the mortgagor is notified of the mortgagee's intention to exercise his power of sale and to allow the mortgagor time to avert the sale. There is evidence that the Claimant knew of this exercise and was at one juncture, actively involved in the drive to secure a sale of the property for the market value. Under cross-examination, the Claimant disclosed that he saw an advertisement in the Gleaner advertising the property for sale for One Million Five Hundred Thousand United States Dollars (US\$1,500,000.00) and he spoke to a Mr. Shirley, an employee of the Defendant at the material time about this offer. I find that the Claimant in fact had notice of the Defendant's intention to exercise its power of sale.
- [54] In determining whether the Defendant acted reasonably, it is established that the burden of proof is on the mortgagor to establish that the subject property was sold at less than the market value at the time of the sale. However, the case of **Bank of Nova Scotia v. Rosegreen and others** (unreported) Supreme Court, Jamaica, Claim No. C.L. 1998/B240 judgment delivered on the 10th day of November, 2008 places the onus on the mortgagee to show on a balance of probabilities that the sale was bona fide and that precautions were taken to obtain the best price reasonably obtainable. This denotes that if the property were sold below the market price, the mortgagee must show that reasonable steps were taken to obtain the best price in the circumstances.

- [55] The case of **Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd.** (supra) highlights the need to examine the details of the sale to determine if the mortgagee acted fairly towards the mortgagor and used its best endeavours to obtain the true market value at the date it decided to sell the mortgaged property. This will hinge on the particular state of affairs or circumstances at the time of sale.
- [56] I will now examine the conduct of the Defendant to determine whether there was a serious effort on its part to get the best price available at the time the sale is done. The documentary evidence reveals that the property was advertised for sale by public auction at the very least five (5) times in our local newspapers. The advertisements were circulated in the months of April and May 2011. According to Mrs. Bartley Thompson no offers were received at the public auction held on the 3rd day of May 2011. I believe it would have been prudent to submit this bidding sheet to the Court in the light of the contentions of the Claimant.
- [57] The Defendant thereafter advertised the property for sale by private treaty in October and November in 2011 and in February 2013. The Defendant invited offers for the property in these advertisements and listed the asking price of One Million Five Hundred Thousand United States Dollars (US\$1,500,000.00) or the nearest offer. The property was also listed with Woodland Successors in or around September 2014 with the sale price of One Hundred Million Jamaican Dollars (JM\$100,000,000.00) or Eight Hundred Thousand United States Dollars (US\$800,000.00). The only offer that came through this listing according to Ms. Bartley Thompson, was that of the purchasers for Seven Hundred and Sixty Thousand United States Dollars (US\$760,000.00).
- [58] The valuation reports commissioned by the parties herein have a direct bearing on the determination of the resolution of the primary issue before the Court. There were a total of five (5) valuation reports commissioned by the parties and I have summarized their findings as follows: -

1. Expert Report dated the 1st of November 2019 by Mr. Gordon Langford of NAI Jamaica Langford and Brown which gave the market value in 2015 as Three Million United States Dollars (US\$3,000,000.00) and the force sale value as Two Million Five Hundred Thousand United States Dollars (US\$2,500,000.00). The report indicated that the Sales Comparison Approach, the Income Capitalization Approach and the Cost Approach were used to arrive at these figures. The report also revealed that the area was not inspected in 2015 and was only inspected by air in 2019. The figures were adjusted to reflect the values as at mid-2015. This report was commissioned by the Claimant.
2. Report dated the 15th day of February 2015 prepared by Errol Moore of V.B. Williams Realty which gave the market value as Three Hundred and Eighty Million Five Hundred Thousand Jamaican Dollars (JM\$380,500,000.00) or Three Million Three Hundred Thousand United States Dollars (US\$3,300,000.00) and the forced sale value as Three Hundred and Four Million Four Hundred Thousand Jamaican Dollars (JM\$304,400,000.00) or Two Million Seven Hundred Thousand United States Dollars (US\$2,700,000.00). The report did not indicate what approach was taken to arrive at these figures. The state of repairs of the property was described as good. This report was commissioned by the Claimant.
3. Report dated the 20th day of August 2012 prepared by Norris Marston of Keith Alexander (Succ.) Ltd which gave the market value as One Hundred and Ninety Million Jamaican Dollars (JM\$190,000,000.00) and a forced sale value of One Hundred and Fifty-Two Million Jamaican Dollars (JM\$152,000,000.00). This report was an updated summary of the report dated the 21st day of March 2011. Both reports were annexed to the Expert

Report of Norris Marston dated the 27th day of May 2019. The report did not indicate what approach was taken to arrive at these figures nor did it reveal what would have attributed to a significant disparity between the values just approximately Seventeen (17) months after the report dated the 21st day of March 2011. The condition of the buildings was described as being of good structural and fair decorative condition. Both reports were commissioned by the Defendant.

4. Report dated the 21st day of March 2011 prepared by Norris Marston of Keith Alexander (Succ.) Ltd which gave the market value as Two Hundred and Forty Million Jamaican Dollars (JM\$240,000,000.00) and a forced sale value of One Hundred and Ninety-Two Million Jamaican Dollars (JM\$192,000,000.00). The report noted that the Direct Sales Comparison Approach in conjunction with the Cost Approach was used to arrive at the figures. The condition of the buildings was described as being of good structural and fair decorative condition. The report indicated that the valuation was done based on external inspection only as access to the property to carry out internal inspection were denied on two (2) occasions.
5. Report dated the 18th day of January 2006 by Andrew James of Scott's Realty Ltd which gave a market value of Two Hundred and Seventy Million Jamaican Dollars (JM\$270,000,000.00) and a reserve price of Two Hundred and Ten Million Jamaican Dollars (JM\$210,000,000.00). The report did not indicate what approach was taken to arrive at these figures. It also revealed that at the time of inspection, the buildings appeared to be in a very good state of structural and fair state of decorative repair. This report was commissioned by the Claimant.

[59] I adopted the precepts of the Honourable Mr. Justice Bryan Sykes (as he then was) in the case of **Rudolph Daley v RBTT Bank (Jamaica) Limited** (supra). At paragraph 51 Sykes J stated: -

“A prudent person would always seek the best possible price at the time the power was being exercised. Proof that an attempt was made to have the best possible price at the time was often evidenced by (i) getting a current valuation if there is a sale by private treaty; (ii) advertise the property properly; (iii) seeing to it that the property is accurately described in the advertisement and (iv) where appropriate a properly conducted auction. This is by no means an exhaustive list and neither do they all apply at the same time in each case, but it captures, in my view, what the case law regards as important bench marks against which any purported sale by the mortgagee is measured...”

[60] Sykes, J went further at paragraph 54 to contrast the two methods of disposition of mortgaged property by the mortgagee, that is, disposition by auction and disposition by private treaty. In regards to disposition by private treaty Sykes J said this: -

“...If there is a sale by private treaty, then a critical component of a proper exercise of the power is whether a current valuation was obtained and the efforts taken to get the valuation figure or as close as to that as possible. Each case will turn on its facts. In both instances (sale by auction and sale by private treaty) the mortgagee must act in good faith. It is difficult to see how it can be said that a mortgagee acted in good faith if he did not take reasonable steps to obtain the best price possible at the time, that is to say, lack of evidence that the mortgagee [took] reasonable steps to secure the best price may result in a finding of a lack of good faith.” [my emphasis]

[61] After an examination of the conduct of the Defendant, I cannot say that the property was not fairly and properly exposed to the market by way of advertisement and listings between 2011 and 2014. However, the cases underpin and settle that the conduct at the date of sale is what is pivotal. Lightman, J at paragraph 19 in the case of **Silvin Proprietors Limited et al v Royal Bank of Scotland PLC Limited** EWC [2003] Civ. 1409 stated: -

“When and if the mortgagee does exercise the power of sale, he comes under a duty (in equity and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain “the fair” or “the true market” value of or “the proper price” for the mortgage property at the date of the sale, and not (as the Claimants submitted) the date of the decision to sell...The mortgagee is not entitled to act in a way that unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay of his debt...He must take

proper care whether by fairly and properly exposing the property or otherwise to obtain the best price reasonably obtainable at the date of the sale.”

[62] This position was also echoed in the case of **Khiatani Jamaica Limited, Sunil Khiatani and Shiela Khiatani v Sagicor Bank Jamaica Limited** (supra) where Sykes, J (as he then was) in an effort to admonish the mortgagee formulated a checklist that will assist minimizing the risk of liability. At paragraph 57(f) Sykes, J said: -

“the mortgagee must take reasonable steps or precautions to get the best possible price at the time the property is being sold (not when the right to exercise the power arises) having regard to all the circumstances of the case;”

[63] Cooke J.A. in **Diane Jobson v Capital and Credit Merchant Bank Ltd** (supra) further reinforced this principle. At paragraph 14 he stated: -

“Therefore the guiding principle is that a mortgagee in exercising the power of sale owes 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.”

[64] The property was sold in 2015. The evidence shows the last newspaper advert being circulated in 2013 and the last listing with brokers in 2014. More significantly, the last valuation report that was used to inform the mortgagee was in 2012. Under cross examination, in response to Learned Queen’s Counsel’s question as to whether it was good practice and a legal requirement for a current valuation to be obtained prior to the sale of a property, Mrs. Bartley Thompson stated yes. It was further asked based on her answer if she agreed if that was not done and Mrs. Bartley Thompson answered *“Yes with an explanation”*. Learned Counsel Miss Scott by virtue of re-examination asked Mrs. Bartley Thompson to express her explanation and she gave the following response: -

“This matter extends from 2011 to 2015 trying to exercise power of sale. There are a lot of hurdles and issues in an attempt to have this debt extinguished on the Bank’s records. Although the property was listed by private treaty, public auction and listed with several real estate brokers the bank had not received any offers. The valuation report was updated in 2012 and it appeared based on market conditions and the fact that the bank had not received any offers that this offer from the Jarrets was a good offer and it was a cash offer. Based on that, the decision was taken to accept the only offer the bank received in almost four years.”

[65] Bearing in mind the authorities cited, this somewhat impeaching evidence I find, on the face of it, fortifies my view that the Defendant failed to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which it decided to sell the property.

[66] I formulated this position based on the pronouncements of Sykes, J in the case of **Rudolph Daley v RBTT Bank (Jamaica) Limited** (supra). Sykes, J at paragraph 85 stated: -

“...Where there is to be a sale by private treaty, as in this case, it seems that anything less than a current valuation by a reputable valuator is extremely unlikely to meet the test established by equity...In this area of law, it cannot be said that the sale of the property, in the absence of a current valuation, was conducted in the way that the sale by private treaty is ordinarily conducted in a supposedly arms length transaction.”

[67] Sykes, J stated further at paragraph 86: -

*“The bank failed in its duty to act as a mortgagee should when exercising the power of sale. **The absence of a current valuation in a sale by private treaty is powerful evidence that the bank failed to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell...**” [my emphasis]*

[68] I also adopted the findings of McDonald, J in **Jamaica National Building Society v Clyde Harrison** (supra). In this case, in seeking to determine an application for summary judgment against the defendant, McDonald, J was tasked with deciding whether the defendant could resist the claim if it is found that the property was in fact sold at an undervalue by the claimant company. The application for summary judgment was refused. At paragraph 68 McDonald, J stated: -

“In view of the foregoing, based on the Claimant’s own evidence shows that the time period was three years between the valuation by David Thwaites and Associates which was produced in 2013 and the sale of the property in 2016. The claimant should have commissioned a new valuation since a later one would reflect the market value at the time of the sale in 2016. The Defendant did not assist the court with any evidence to support its argument. Nevertheless, the likelihood that the property value could have increased or decreased would have to be supported by evidence.”

[69] I grappled with the fact that the Defendant caused an updated valuation report to be commissioned in 2012, just approximately seventeen (17) months after its last

commissioned report but did not think it prudent to obtain an updated report after the time lapse of approximately three (3) years. I understand the hurdles faced by the Defendant in seeking to protect its interest and realize its security in good faith, especially in the light of the fact that this was the only offer received since the conception of its decision to exercise its power of sale. However, a mortgagee has a duty to act in a business-like manner and not throw away the property (see Sykes, J in the case of **Rudolph Daley v RBTT Bank (Jamaica) Limited** (supra) at paragraph 85).

- [70] The Defendant cannot escape liability by relying on valuation figures in 2012. Further, the disparity between the 2011 and 2012 valuations should have given the Defendant cause for concern that it ought to have a new or updated report commissioned in 2015 and that special care was needed to ascertain the best price possible. In any event, the property was sold below the forced value given in the 2012 valuation report and the slight justification for this was provided in Mrs. Bartley Thompson's explanation under re-examination, that is, she attributed it to the market conditions at the time. The market conditions at the time of sale could have only been assessed by a current valuation and cannot be lifted from a report dated three (3) years prior. I am in no way indicating that the mortgagee did not act honestly in the circumstances but this was not enough.
- [71] The Defendant did not commission any updated valuation report and in my view, I cannot find that this was in keeping in its duty to ensure that the best possible price could be obtained for the property at the time of the sale. I find on a balance of probabilities that the Defendant did not act reasonably.
- [72] It is settled law where a sale was set aside then the mortgagor would have his equity of redemption restored to him. Conversely, where the sale was not set aside then the mortgagor would receive the difference between market value and the sale price at the time when the power of sale was exercised.

[73] I am somewhat constrained to use the Expert report dated the 1st of November 2019 by Mr. Gordon Langford of NAI Jamaica Langford and Brown which gave the market value in 2015 as Three Million United States Dollars (US\$3,000,000.00) to assess damages herein. The figure is also aligned to that given in the only report that was commissioned closer to the time of sale in March 2015, that is report dated the 15th day of February 2015 prepared by Errol Moore of V.B. Williams Realty. This report gave the market value as Three Hundred and Eighty Million Five Hundred Thousand Jamaican Dollars (JM\$380,500,000.00) or Three Million Three Hundred Thousand United States Dollars (US\$3,300,000.00). The difference between the market value of Three Million United States Dollars (US\$3,000,000.00) and the sale price of Seven Hundred and Sixty Thousand United States Dollars (US\$760,000.00) is Two Hundred Million, Two Hundred and Forty Thousand United States Dollars (US\$2,240,000.00).

[74] I agree with the submissions of the Defendant and find in the circumstances that there is nothing to warrant interest beyond 3% per annum. Interest at that rate is to be paid on the sum awarded from the date of service of the Claim Form to the date of judgment. I also find that since it was the Defendant's failure to act prudently to obtain the optimum sale price, the Claimant should not be required to pay interest on the sum owed beyond the date of the sale because of the Defendant's failure.

[75] In the light of my findings above, I will just note at this juncture that evidence was presented to dispel the contentions of the Claimant that he did not receive any account from the Defendant for the sale of his D5 CAT Bulldozer and the two (2) water pumps seized by the Defendant.

ORDERS & DISPOSITION

1. Judgment for the Claimant in the sum of US\$2,240,000.00 from the 28th day of September 2016 to the 3rd day of December 2020 plus interest at a rate of 3% per annum from the 28th day of

September 2016 to the 3rd day of December 2020 and statutory interest at 3% thereafter until judgment is satisfied.

2. The Claimant shall not be charged interest to his account after the 19th Day of March 2015.
3. Cost awarded to the Claimant to be taxed if not agreed.
4. Counsel are to prepare and file the draft order to give effect to the findings and reasons of this judgment along with any consequential orders.