

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

SUIT NO 133/96

BETWEEN

GRENVILLE RADIO LTD

Plaintiff

And

NATHANIEL PADDY JANES

CIBC CARIBBEAN LTD

Formerly CANDAIAN IMPERIAL BANK OF COMMERCE

Defendants

Appearances:

John Fuller for the Claimant

Eleanore Clarke for the Defendant

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2004: March,4 and 12;April,6
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JUDGMENT

- [1] **Joseph-Olivetti J:** This is an application for damages to be assessed pursuant to judgment herein dated 13th January 2003 in which the claim against Nathaniel Paddy (**'the auctioneer'**) was dismissed and judgment given against CIBC (Caribbean) Limited (**'the Bank'**)
- [2] **Background facts taken from the Judgment and from the affidavits relating to this application.**

- [3] This is a banker and customer case and involves a question of the duty of care owed under the Registered Land Act Cap. 374 (**'the Act'**) by a chargee to a chargor in realising a registered charge on land.
- [4] Grenville Radio Limited (**'Grenville Radio'**) was the owner of certain lands at McKinnons, St John's Antigua comprising approximately 21 acres (**'Parcel 58'**). It is owned by members of the family of the former Prime Minister, Mr. Lester Bird. The Bank made a series of loans to Grenville Radio commencing in 1987 and as part of the security took a registered charge over Parcel 58. Grenville Radio defaulted in repaying the loan and by 7th December 1992 owed some \$2,290,000.00 to the Bank.
- [5] The Bank sold Parcel 58 by public auction through the agency of the auctioneer on 27th May 1993. The purchaser was Mr. George Ryan who bought it for EC,\$1,600,000.00. The reserve price was EC 1,400.000.00 and that was based on a valuation of Mr Haynes Smith. Grenville Radio questioned whether this was a fair representation of the value at the time and subsequently filed suit which resulted in the judgment against the Bank.
- [6] The Court defined the issue before it at the end of paragraph 7 of its judgment as the narrow one of whether in arranging for the auction of the parcel 58 the Bank whether by itself or its agent the auctioneer met the standard of care required of it by the laws of Antigua and Barbuda and the

subordinate issue, if the court found that it did not, as, the extent if any of the loss suffered by Grenville Radio.

[7] It is this subordinate issue which concerns us now the court having found that the Bank did not meet the required standard of care. The omissions of the Bank are set out in paragraph 20 of the judgment comprise omissions to replace boundary marks, omissions in the report to describe the land, failure of the report on which the Bank relied to fix the reserve price in omitting to describe all the features affecting the land which resulted in inadequate advertising and no particulars of sale.

[8] **The evidence at assessment**

[9] Grenville Radio relied on the testimony of Mr. Elpert Winter and the Bank on the testimony of Mr. Ewald Samuel and Mr George Ryan.

[10] Mr Ryan bought the property at the auction. In direct response to Mitchell J's query at paragraph 23 I find that this was an arm's length transaction and that that there was no private arrangement between Mr Ryan and Grenville Radio. Mr. Ryan deposed that he was familiar with Parcel 58 as he resided in close proximity to it and thought it would make a good investment. He apparently had no difficulties in obtaining information from the auctioneer to enable him to know what he was buying beforehand as his evidence is that he after he purchased the

property he visited it. See paragraphs 6 and 8 of his affidavit. Mr Ryan expended in excess of \$600,00.00 dollars on back-filling Parcel 58 after he bought it. His evidence which I accept is that a significant part of the land was swamp, that he commenced back-filling after he bought and that he is still back-filling at the present time. Save for this activity he has not built anything on or developed Parcel 58. He produced an abundance of copy invoices the bulk of which substantiated his evidence. Mr Ryan, is among other things, a successful property developer and there is no reason to believe that he would expend monies on back filling if it were not necessary.

- [11] Mr. Winter is a licensed land surveyor with 40 years' experience. He held the position of Chief Surveyor of Antigua and Barbuda for many years. He carried out his valuation in 19th December 2003 some 10 years after it had been purchased by Mr Ryan. In fact this is also true of Mr. Samuel's valuations. His brief was to provide a valuation of the market and forced sale value of the property in 1993 and in 2003. He stated that his estimate of the value reflects the value of the site as if it were vacant and ready to be improved to its highest and best use. The method he used to arrive at his estimate was based on land sales in the neighbourhood or from competitive market areas. See paragraph 6 of his affidavit of 12th December 2003 ("Winter's Affidavit") or abstraction from comparable improved sites.

[12] Mr. Winter testified that the land comprised approximately 21.45 acres, that based on available contours, the land was relatively flat, well drained and sloping from East to West and that having regard to the infrastructure and development within the area the land was highly marketable for commercial development, or residential development if it were to be subdivided and sold in smaller parcels. See paragraphs 7 and 9. At paragraph 10 he said that there was no notable factors such as ponds or rights of way on the official Cadastral map of the land that could detract from its value and that none was visible from his on-site inspection. He estimated the value of the land in 1993 as \$4,671,810.00 and its present value as \$6,073,353.00. See paragraph 11. Those values were arrived at using a price per square foot for the entire area. He gave the forced sale value in 1993 as \$2,270,267.00 and in 2003 as \$4,251,347.00 using what he said was the standard method of arriving at forced sale value which is usually calculated at 65 to 75 per cent of the estimated market values. See para.13.

[13] Mr. Winter was forced to admit in cross-examination that one of the comparable market areas he used to arrive at his estimate was the Jolly Harbour area. This is patently absurd as it is public knowledge that Jolly Harbour is one of the more highly developed and expensive areas of Antigua and cannot in any way be compared to the McKinnon's area where the property is situate. Even more than ten years down the line neither of the valuers could say that there is any development in that area

which compares to the Jolly Harbour area. Furthermore, Mr Winter acknowledges that the McKinnon's Pond is on the western boundary of Parcel 58 something which is obviously visible from an on-site inspection likewise something which he ought obviously to have stated in his report which he did not. It was extremely painful to see the effort he made to support his evidence –in- chief that there were no marshy a or swamp areas on Parcel 58.He however felt free to say in cross-examination that there was no swamp on the land and that Parcel 58 only had water on it in very small areas and then only when it rained.

- [14] Mr Samuel is a civil engineer and land appraiser and has considerable experience in both fields. He explained the manner in which he collected data to assist him and testified that he used the sales comparison approach as it was the best approach for appraising vacant land. See paragraphs 7 and 8 of his affidavit filed 30th January,2004. Para 1.3 and 4.1of his report explains what that entails in more detail. It is significant that his comparable study was drawn from the surrounding areas of McKinnon's development, Fort Road and Anchorage road and not from Jolly Harbour area which among other things is home to the Jolly Harbour complex with its fine marina, hotels, shopping complex, grand casino and up-scale private residences. He estimated the market value of Parcel 58 in 1994 as \$2,234,628.00 and the forced sale value as \$1,787,702.40 and the value as at January 2004 as \$4,740.547 68.

[15] One of the other significant differences between Mr Winter's evidence and that of Mr. Samuel is that M. Samuel was of the opinion that the highest and best use of the land was for light commercial purposes whilst Mr. Winter's opinion was that it was for residential purposes. Mr Samuel, unlike Mr. Winter found that the land is flat, drainage is poor and portions waterlogged and is a swamp. Approximately 70 per cent of the land is presently suitable for development consequent on the back-filling of Mr. Ryan although Mr. Samuel was forced to acknowledge that he was not familiar with the land prior to his on-site inspection in January, 2004. However the court is satisfied that the actual physical characteristics of the land would not have changed significantly save for the effects of Mr. Ryan's back-filling.

[16] When the court considers this evidence with that of Mr Winter's the court has no hesitation in preferring his evidence as the court is of the view that Mr. Winter's evidence is unreliable and his opinion flawed as it took no account of the actual physical characteristic of the land and he arrived at a value based on a highly erroneous comparison. Valuation is not an exact science and in the end a great deal depends on the impression made on the judge by the experts. See **Cuckmere Brick Co. Ltd v. Mutual Finance Ltd. 2 All ER.633**. On Mr. Samuel's evidence the forced sale value of the land was \$387,702.40 more than the reserve set by the Bank. The land was sold at \$200,000.00 more than the reserve price and this means a possible loss of \$187,702.40. One cannot be sure

that if there were no breaches as found by the trial judge that this would have made any difference in the price realized at auction having regard to the evidence of Mr. Ryan. However, the standard of proof is on a balance of probabilities and so I find that Grenville Radio suffered that loss of \$187,702.40. No other loss has been established.

Conclusion

[17] For the foregoing reasons I give judgment for Grenville Radio for the sum of \$ 187,702.40 with interest at 5% per annum from the date of the writ as fixed by the learned trial judge and prescribed costs in accordance with CPR Part 65.

Rita Joseph-Olivetti
High Court Judge