

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2004/010

BETWEEN:

CARIBBEAN BANKING CORPORATION

Appellant/Respondent

and

ALPHEUS JACOBS

Respondent/Counter Appellant

Before:

The Hon. Mde Ola Mae Edwards
The Hon. Mr. John Carrington
The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. C. D. Burnette and Ms. Shantiyah Ali-Schneider for the Appellant/Respondent
Mr. Hugh Marshal for the Respondent/Counter Appellant

2008: July 7, 8;
October 6.

Civil Appeal – Property Law – chargee’s statutory duties upon the exercise of its power of sale – good faith – duty to have regard to the interests of the chargor – Valuation of property – whether negligently obtained – whether bank liable – Auction - Advertisement – whether sufficient and proper in all of the circumstances of the case – section 75 of the Registered Land Act Cap. 374

Pleadings – sufficiency of pleadings – rule 10.7 of the Civil Procedure Rules 2000

Caribbean Banking Corporation (“the bank”) loaned \$3,309,000 to Alpheus Jacob (“the respondent”) who executed a promissory note in the bank’s favour and charged three properties to the bank: the Fryers Bay property, the Fitches Creek property and the Coolidge property. The properties were together given a value at \$4,708,554.00 at the time of the loan by the respondent’s architect, Mr. Farrell. The respondent defaulted on

the loan payments and the bank issued a demand for the loan which the respondent was unable to meet. The bank then exercised its power of sale in relation to the three properties, engaging a valuer, Mr. Smith, who valued the properties at \$2,705,859.00 less than Mr. Farrell had, and Mr. James as auctioneer. The properties were advertised and the Fryers Bay and Coolidge properties were sold. The bank brought proceedings in the court below claiming the balance of the debt. The respondent counter claimed that the sales were effected in breach of the bank's duties as chargee under the **Registered Land Act Cap. 374** ("the Act") in that the bank should have sought a further valuation in the light of the discrepancies between the Farrell and Smith valuations and that the properties were not properly advertised. Both the claim and counterclaim were dismissed by the High Court and both parties appealed. At the commencement of the appeal, the court exercised its power under section 33 of the **Eastern Caribbean Supreme Court (Antigua and Barbuda) Act Cap. 143** to remit the claim to the High Court for the determination of the real issue, as had been identified by the court.

Held: allowing the counter-appeal in part, varying the order of the judge by ordering an inquiry into the damage suffered by the respondent with respect to the sale of the Coolidge property and awarding the respondent half of his costs in the court below and in the counter-appeal that:

- (1) Upon the exercise of a chargee's power of sale, the chargor no longer has an interest in the land itself but has an interest in the proceeds of the sale of the land, in accordance with the equitable doctrine of conversion. The chargor's interest is however, limited to the recovery of any surplus above the debt owed to the chargee.
- (2) In exercising the power of sale, the chargee is required by section 75(1) of the Act to act in good faith and to have regard to the interests of the chargor. Section 75 represents a codification of the existing equitable duty. The statute does not create an absolute duty on the part of the chargee who is not required to sacrifice his own interest in favour of those of the chargor but is required to take reasonable care to obtain the true market value of the property at the time of sale.
- (3) Valuation is not an exact science so that the mere fact that the valuation obtained from the bank's valuer differed significantly from that of the respondent's was not conclusive evidence of negligence. The respondent in fact failed to prove that there was any negligence on the part of the bank's valuer in conducting the valuation. There was accordingly no duty on the bank to seek a further valuation so as to comply with its duty under section 75 of the Act.
- (4) On the question of the pleadings in relation to the advertisements, the Defence and Counterclaim contained a sufficient averment that the respondent was raising an issue concerning the bank's breach of statutory duty as chargee in the exercise of its power of sale. The witness statements supplied particulars of the alleged breach by referring to the inadequacy of the advertisements for the sale of the properties. The pleadings were accordingly sufficient in the circumstances.

- (5) In advertising the properties for sale, the bank was required in accordance with its statutory duties to describe the properties properly in the advertisements and ensure that the advertisements were sufficient in number and content and made sufficiently in advance of the sale to reach the appropriate market. The bank was also required to ensure that the auction was held under reasonable conditions. There is however, no absolute duty to advertise wisely and what is proper advertisement depends on the circumstances of each case.
- (6) On these facts, the bank was in breach of its duty in advertising the Coolidge property for sale for the advertisements were confusing, insufficiently particularised, insufficiently advertised and failed to give reasonable notice of the auction dates.

Becker v Bank of Nova Scotia [1986] LRC (Comm) 638, **Cuckmere Brick Co. v Mutual Finance Ltd.** [1971] Ch D 949 and **Apple Fields and Others Limited v Damesh Holdings Ltd.** [2004] 3 LRC 221 applied.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 followed.

JUDGMENT

- [1] **CARRINGTON, J.A. [AG.]:** In November 1996, Caribbean Banking Corporation lent \$3,309,000 to Mr. Alpheus Jacobs with interest payable at the effective rate of 14% per annum. In order to secure the loan, Mr. Jacobs executed a promissory note in favour of the bank and charged three properties to the bank. Mr. Elrie Farrell, an architect engaged by Mr. Jacobs, valued the three properties at \$4,708,554 in valuations carried out between 1994 and 1996. In making the loan the bank appeared to accept these valuations.
- [2] Under the loan agreement, Mr. Jacobs was to make monthly repayments of approximately \$50,000 towards the loan and interest. He defaulted, and in April 1999, the bank issued a demand for payment of the balance of the loan. Mr. Jacobs was unable to satisfy the demand and the bank then decided to sell the properties. The bank engaged Mr. Haynes Smith, a valuer, to value the three properties. Mr. Smith valued the properties at \$2,705,859 less than Mr. Farrell had. The bank succeeded in selling two of the properties, using the services of

Mr. Nathaniel James, an auctioneer, for a total of \$1,377,000 and brought proceedings in the High Court against Mr. Jacobs for the balance of his debt. Mr. Jacobs counterclaimed against the bank in the High Court for damages claiming that the bank was negligent in obtaining and assessing the values of the three properties and had sold two of these properties at prices grossly below their market value in disregard of his interest as chargor of the properties.

[3] The High Court dismissed both the claim and the counterclaim. In dismissing the claim, Creque J. held that the bank had failed to make presentment of the promissory note as required under the **Bills of Exchange Act** Cap. 48. In dismissing the counterclaim, the learned judge accepted Mr. Smith as an expert witness and held that Mr. Smith's figures represented the fair values of the properties at the date of the valuation. The learned judge further held that the mere fact that there was a wide disparity between the valuations, was not in itself evidence of negligence of either valuer as the respective valuations had been conducted approximately four years apart and it was not clear whether both valuers had used the same methodology in arriving at their conclusions. The learned judge also found that the sales were properly advertised and the bank could not have achieved a better price at the time of exercise of its power of sale by taking any further steps. Mr. Jacobs therefore, did not satisfy her that his interests had been disregarded by the bank in the exercise of its power of sale.

[4] Both parties appealed the decision. At the adjourned hearing of the appeal and counter appeal on 8th July 2008, the court, after hearing arguments from the parties, ruled that the real issue arising on the claim was whether the defendant owed the claimant the principal sum of \$2,214,281.74 with outstanding interest thereon, as at the date of the commencement of the claim in the sum of \$1,068,540.60 and thereafter at the rate of 14% on the principal sum. The court therefore exercised its power under the **Eastern Caribbean Supreme Court (Antigua & Barbuda) Act** Cap. 143 section 33(1)(c) and (2) to remit the claim to the High Court for determination of the real issue as identified above. No order

was made as to costs of the appeal. The court then heard the arguments on the counter appeal and reserved its judgment.

Grounds of the counter appeal

- [5] The respondent's counter appeal contained three grounds of appeal alleging breaches of the bank's statutory duties towards Mr. Jacobs. The first two grounds can be readily combined and raise the issue whether the bank acted in breach of its statutory duties in accepting the valuation from Mr. Smith and not requiring a further valuation in the light of the discrepancies between the valuations of Mr. Farrell and Mr. Smith. The third ground raises the issue whether the bank had acted in breach of its statutory duties in failing to advertise the properties properly and sufficiently when they were sold.

Bank's statutory duties

- [6] The statutory duties of the bank in selling the properties are set out in the **Registered Land Act** Cap. 374 section 75(1):

"(1)A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby."

- [7] In order to determine the extent of the statutory obligation of a chargee to have regard to the interests of the chargor, it is necessary to examine what those interests are at the time that the chargee is exercising his power of sale. By this time, under the equitable doctrine of conversion, the chargor no longer has an interest in the land itself because of the exercise of the contractual right of the chargee to dispose of such land, but only in the proceeds of sale as the real property is deemed to have been converted into money. The chargor's interest therefore, is limited to the recovery of any surplus above the debt owed to the chargee.

[8] The statute does not create an absolute obligation on the part of the chargee. It does not require the chargee to sacrifice his own interests in favour of the interests of the charger, but he is required to be aware that the chargor has an interest in the outcome of the exercise of his power of sale and would be affected by the chargee's acts in the exercise of the power of sale. This section therefore, recognises the relationship of proximity between the chargee and the chargor in the circumstances and imposes on the chargee a duty to take reasonable care to obtain the true market value of the property at the time of sale.¹ This is the most that could be expected of him when selling the property. In **Cuckmere Brick Co v. Mutual Finance Ltd.**² two members of the English Court of Appeal concluded that the obligation to have regard to the interests of the chargor was part of the duty to act in good faith. In **Apple Fields and Others Limited v. Damesh Holdings Ltd.**³ the Privy Council opined that the equivalent section from New Zealand created independent duties.

[9] In my view, section 75(1) codifies the existing equitable duty owed by a chargor in the exercise of his power of sale. There is judicial dicta that the obligation to take reasonable care to obtain the proper market value is also part of the duty to act in good faith.⁴ I therefore, do not accept the respondent's argument that the learned judge had applied an incorrect test to determine the statutory duties owed by the bank.

[10] The bank, in the exercise of its power of sale, is liable for the negligence of its agents.⁵ The onus is on the respondent to prove the breach of duty of the bank.⁶

¹ see *Becker v. Bank of Nova Scotia* [1986] LRC (Comm) 638,649c per Zacca P in the Cayman Islands Court of Appeal

² [1971] Ch D. 949, 966C and 969G

³ [2004] 3 LRC 221, 229 f

⁴ see *Fisher and Lightwood's Law of Mortgage* 10th ed p 389

⁵ *Cuckmere Brick Co* at p. 973A-E

⁶ see *Cuckmere Brick Co* at p.965D

The valuations

[11] The nub of the respondent's argument on the first issue is that the disparity in valuations at the time of the sale meant that the bank should have been put on inquiry and required confirmation of the values of the properties from an independent valuer and that its failure to do so was in breach of its duties to act in good faith and to have regard to the interests of Mr. Jacobs.

[12] In the instant case, the bank relied on the report of Mr. Smith, a qualified valuer of 30 years experience, to establish the values of the properties for the purpose of the exercise of its power of sale. Mr. Smith was not an employee of the bank but an independent contractor. The respondent did not challenge the methodology applied by Mr. Smith, which was accepted by the learned judge as leading to a fair value of the properties, neither did the respondent challenge the conclusions reached. The sole challenge arises from the fact that Mr. Smith's conclusion was greatly different from that of Mr. Farrell and therefore the bank should have sought a third valuation.

[13] In **Cuckmere Brick Co**⁷ the English Court of Appeal, in considering the duty of good faith owed in equity by a chargee exercising its power of sale, opined that:

"Valuation is not an exact science. Equally careful and competent valuers may differ within fairly wide limits about the value of any piece of land. But there are limits. When there is conflict, it is for the judge to decide which evidence is to be preferred".

The respondent did not challenge the accuracy of this principle.

[14] The first question therefore, to be answered in determining whether the bank acted in breach of its statutory duties in accepting the valuation by Mr. Smith, is whether Mr. Smith was negligent in his valuation. As illustrated by the dicta from **Cuckmere Brick Co** above, the mere fact that this valuation differed significantly from that of Mr. Farrell is not conclusive. The respondent's argument that the

⁷ at 959 D

properties were sold at an undervalue because of the disparities in the valuations is therefore, circular and I do not accept it. It follows therefore, that his conclusion that the bank acted in breach of its duties by failing to seek a further valuation, which is based on this circular argument, must also be rejected. The true position must be that the bank was only obliged to disregard Mr. Smith's valuation, if it was incorrect. Once there was no reasonable basis on which this valuation could be challenged, a bank acting reasonably would not need to disregard it and as a consequence seek a further valuation.

[15] In fact, the respondent does not appear to challenge Mr. Smith's valuation, but challenges only the bank's acceptance of it in the circumstance that it differed from Mr. Farrell's. This is no more than an example of the conflict between valuations to which **Cuckmere Brick Co** refers and the onus was on the respondent to show that Mr. Smith's valuation was negligently done. He has lead no evidence of any basis on which Mr. Smith's valuation could be properly challenged. The learned judge commented on this and made a clear finding that Mr. Smith was not negligent in conducting his valuation. I find that there is no basis for disagreeing with her conclusion in the circumstances.

[16] In **Becker**, there were two valuations of the property by the same valuer for the purpose of sale by the bank under a mortgage. These were made 19 months apart and the second valuation was approximately US\$7million less than the first. The property was sold at the lower valuation by private treaty, after an unsuccessful auction. The Cayman Islands Court of Appeal, in applying a provision identical to section 75(1), nevertheless, held that the disparity in valuations was not proof that the best price possible had not been obtained. Similarly in **Apple Fields Ltd**⁸ the Privy Council made no criticism where the High Court made a finding of the true market value by reference to one of several widely divergent valuations that were made within a two month period.

⁸ at p. 225a

[17] I therefore, find in relation to the first and second grounds of appeal that the respondent has not demonstrated that Mr. Smith was negligent in conducting his valuation. As a consequence, I find that there was no duty on the part of the bank to seek a further valuation of the properties in order to comply with its duty to act in good faith and to have regard to the interests of Mr. Jacobs.

The advertisements

[18] The alternative ground of appeal deals with the procedure with respect to the actual sales of the properties. Ms. Burnette's opening submission on this ground was that the respondent had not pleaded any particulars of wrongful acts concerning the advertisements. She submitted that the evidence and consequently the argument on this ground had not been foreshadowed in the pleadings and this issue should not have been part of the respondent's case in the High Court or before this court.

[19] At paragraph 10 of the Defence and Counterclaim, the respondent pleaded:
"That in particular the Plaintiff disregarded the Defendants (sic) interest and sold the properties grossly below their market value"

The witness statement of Mr. Jacobs at paragraph 11 refers to the advertisements for the sale of his properties and his complaints of their inadequacy. The learned judge does not appear to deal with a similar submission in her judgment nor does the Record of Appeal reflect that this submission was made before her.

[20] In **East Caribbean Flour Mills Limited v. Ormiston Ken Boyea**⁹, this court analysed the application of the **Civil Procedure Rules 2000 (CPR 2000)** part 10.7(1), on which this submission is impliedly based, and concluded that the function of pleadings is to make clear the general nature of the case to be advanced by the party so that the other side knows the case it has to meet and will not be surprised at the trial. Particulars of such case can be supplied in the

⁹ Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006

witness statements in support of that party's case. The court concluded that there is no contravention of CPR 2000 Part 10.7(1) if the general case that has been set out in the pleading is particularised in the witness statements. In this case, I am satisfied that paragraph 10 of the Defence and Counterclaim contained a sufficient averment that the respondent was raising an issue concerning the breach by the bank of its statutory duty as chargee in the exercise of its power of sale. His witness statement supplied particulars of the alleged breach by referring to the inadequacy of the advertisements for the sale of the properties. I therefore, do not uphold Ms. Burnette's submission.

- [21] The sales proceeded by way of public auction and were advertised initially by the auctioneer hired by the bank, Mr. James, on 30th September and 15th October 1999, for sales that were to take place on 20th, 21st and 26th October 1999. The learned judge found, and I agree, that the advertisements of 30th September, were confusing but were clarified in the advertisements of 15th October, although these were still lacking in particulars. Nevertheless, the advertisements indicated that further particulars could be obtained from the bank's solicitor notwithstanding, as the learned judge found, the bank had full and detailed descriptions of the properties in their possession.
- [22] The sales that were scheduled for 20th and 21st October, did not take place because of the passage of Hurricane Jose. The sale scheduled for 26th October, for the Fitches Creek property, of which there was effectively 11 days' notice, did take place and the selling price was above the value as found by Mr. Smith. In the circumstances, as I have found that this value reflected a proper value of the property, I find that the respondent cannot establish any breach of duty on the part of the bank to act with reasonable care to obtain the market value of the property.
- [23] The two remaining properties, Coolidge and Fryers Bay, were re-advertised on 5th November, for auctions to take place on 10th and 16th November, i.e. 5 and 11 days' notice respectively. The learned judge found that this advertisement was as

confusing as the first published on 30th September. No persons attended the auctions on the advertised dates and another hurricane, Lenny, struck Antigua on 16th November. The Coolidge property was then re-advertised on 16th November, for sale on 18th November. Persons attended the auction on this occasion, but due to inclement weather the sale was postponed to 23rd November. The sale was further advertised on 23rd November. The Coolidge property was sold on 23rd November, at a price that was \$127,250 less than the forced sale price given by Mr. Smith. The Fryers Bay property was not sold up to the date of trial of the counterclaim.

[24] The respondent submitted that these advertisements were grossly inadequate in substance, form and time. The learned judge concluded, impliedly, that there was no breach of the bank's duties towards Mr. Jacobs because the Fitches Creek property was sold at a higher price than the forced sale price, and, expressly, that there was no breach in relation to the Coolidge property, because by 23rd November, a reasonable time would have elapsed, that would have enabled interested persons to come forward to bid on the property, notwithstanding that the advertisements were not as particularized as they could have been. This court is, however, equally competent as the learned judge to make inferences with respect to the compliance by the bank with its statutory duty from the facts found by the learned judge.

[25] There can be little dispute that proper compliance with the bank's statutory duties required it to advertise the sale, to describe the properties properly in the advertisements and ensure that the advertisements were sufficient in number and content to reach the appropriate market. The advertisements should also have been sufficiently in advance of the sale to permit prospective purchasers to attend the auction and the auction should have been held under reasonable conditions.¹⁰ Under cross examination, Mr. Allaway for the bank conceded that it would be a good idea to advertise for a longer period to get the best possible chance, to get

¹⁰ see Fisher and Lightwood Law of Mortgage 10th ed. p. 390

best reasonable price and that the sale must be advertised for a reasonable time before the auction.

[26] In the instant case, the learned judge made several adverse comments with respect to the content of the advertisements. She found that on two occasions, they were so poorly drafted as to be meaningless. The auctioneer appeared content, for reasons that have not been disclosed as he was not called as a witness, to advertise the property by referring interested persons to the bank's solicitors. This therefore, cast the responsibility on any person who may have been interested in purchasing the properties to make time to contact the solicitor in order to confirm his interest. Ms. Burnette submitted that any defects in the earlier advertisement were cured by the greater particularisation of the later advertisements and the reference to the bank's solicitors for further information.

[27] In my view, the obligation of the bank to describe the properties for sale properly in the advertisements could not have been met by this form of advertisement, especially as the bank was dealing with properties of considerable value. The purposes of an advertisement are to provide information and arouse interest. In my view, neither purpose was fulfilled by referring the reader to a third party, especially where the information which should have been provided appeared not to be of any technical nature and, as the learned judge found, was available to the bank.

[28] Additionally, the bank was content to advertise the sale in as little as five days before the auction on more than one occasion and on one occasion on the very day of the auction. The learned judge made the finding that it was reasonable to infer that bidders who had attended on 18th November, would have been aware from that date that the sale had been postponed until 23rd November. I am of the view that such a finding was not open to her on the evidence, as Mr. Allaway's evidence did not go so far as to state that the decision to postpone the sale was communicated to the persons who came to the auction. To the contrary, his

statement only indicated that the postponement was advertised on 23rd November, the very day of the sale.

- [29] At least two of the advertisements of the Coolidge property were found by the learned judge to be confusing. The advertisements gave 6 days, 5 days, two days and no more than a few hours' notice of the sale of the property. In my view, the question whether the advertisements gave sufficient opportunity for interested persons to attend the sale, is one of fact and the respondent discharged the burden of proof by showing the relatively insubstantial periods of notice that were given. The appellant on the other hand lead no evidence that could persuade the court that this would have been sufficient notice in the circumstances prevailing in Antigua at the relevant time.
- [30] The learned judge concluded that as the Coolidge property was advertised on four occasions, there was a reasonable period for any interested bidders to obtain all requisite information to enable them to make their bids. In my view, it must be a relevant consideration that the four advertisements were not in respect of a single date of sale but for four separate dates. This effectively means that each auction date received only one advertisement, although the advertisements did all appear within a period of less than two months between 30th September and 23rd November 1999. In my view, the value of the properties demanded that there should have been more than one advertisement of each auction date, in order to maximise the exposure of and interest in the sale of the properties in an attempt to secure the true market value of the properties.
- [31] Although there is no absolute duty to advertise widely, and what is proper advertisement depends on the circumstances of each case, I cannot but think that the price obtained for the Coolidge property did not truly reflect the proper price of the property and that this may have been attributable at least in part to the fact that the auction was not sufficiently advertised and therefore, was poorly attended. There is nothing to prevent a mortgagee from accepting the best bid he can get at

an auction, even though the auction is badly attended and the bidding exceptionally low, provided none of those adverse factors is due to any fault of the mortgagee.¹¹ In the instant case, the bidding probably was \$127,250.00 below the forced sale value due to insufficient publicity for the auction. In my judgment, the bank was in breach of its duty to take reasonable care in obtaining a proper price for the properties.

[32] I therefore, find that the process of advertising the sale of the Coolidge property, fell short of the standard that should be expected of a reasonable and responsible bank in selling a property of that value and that looking at the matter as a whole, the bank failed to take reasonable steps to ensure that it would obtain the proper market value for this property and thereby disregarded the interest of Mr. Jacobs in breach of its statutory duty to him.

[33] In order for the respondent to succeed in a claim for breach of statutory duty, he must satisfy the court that he has suffered some damage.¹² I am of the view, that the respondent has met that standard by the evidence that the Coolidge property was sold for substantially less than the forced sale price in Mr. Smith's valuation. I am satisfied that the respondent has shown on a balance of probabilities that had the Coolidge property been properly advertised, there was a real prospect that it may have fetched a better price.

[34] I therefore, uphold the counter appeal by varying the decision of the learned judge, by ordering that an inquiry be made to determine any damage suffered by the respondent with respect to the sale of the Coolidge property. The orders made by the learned judge with respect to the other properties remain unaffected. As the respondent has been partially successful, I order that he should be awarded one half of his costs both in the High Court and in the counter appeal. The costs in the High Court should be prescribed costs calculated by reference to the quantum of

¹¹ see Cuckmere Brick Co. per Salmon LJ at p 965 G

¹² see Apple Fields at p 228f

damages, if any, awarded to the respondent on the inquiry. The costs of the counter appeal shall be two thirds of any costs awarded in respect of the claim in the High Court.

John Carrington
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]