

GRENADA

IN THE COURT OF APPEAL

HCVAP 2009/009

BETWEEN:

THE BANK OF NOVA SCOTIA

Appellant

and

[1] DELANO IRVINGTON GIBBS

[2] CHRISTINA INGRID GIBBS

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

Appearances by way of written submissions:

James Bristol for the appellant

Sabrita Khan for the respondents

2009: November 13.

JUDGMENT

[1] **BAPTISTE, J.A. [AG.]:** The Bank of Nova Scotia (the Bank) applied to strike out the statement of claim in this mortgage claim brought by Delano Gibbs and Christina Gibbs (the respondents) on the ground that it does not disclose any reasonable ground for bringing a claim. In the alternative, the Bank sought an order for summary judgment on the ground that the respondents had no real prospect of succeeding on the claim. The learned judge granted the application to strike out only to the extent of striking out the claim for wrongfully clogging the Bank's right to redeem. The judge denied the application for summary judgment. The Bank has appealed the judge's decision. Before considering the grounds of appeal it is necessary to refer to the averments in the statement of claim.

- [2] The facts as alleged in the statement of claim are that the respondents gave the Bank a legal mortgage over land in Grenada, subject to the Bank's right to redeem the mortgage. The mortgage fell into arrears and the respondents made efforts to sell the property. The property was sold by auction on 12th August 2007 and on 16th August 2007 the respondents wrote to the Bank indicating that they had received three offers for the property before the sale and provided the details thereof. On 10th October 2007 the Bank informed the respondents by letter that the property had been sold by auction and subsequently provided the details of the application of the proceeds of sale and provided a cheque for the balance of the monies. The respondents further alleged that by denying them the opportunity to sell the property at a price negotiated by them, the Bank interfered with their right to redeem the mortgage. At paragraph 25 of the statement of claim the respondents alleged that in exercising its power of sale as mortgagee the Bank failed to act in good faith in breach of its duty to sell the property for the best possible price.
- [3] The notice of appeal contains three grounds of appeal. I will deal with them separately. Ground (a) alleges that the judge erred in law by holding that the mortgagee had a duty in selling the property to obtain the best possible price. Learned Counsel for the Bank argued that the learned judge erred in law in allowing paragraph 25 of the statement of claim to subsist and in so doing holding that the statement of law contained therein that the mortgagee's duty was to sell the property for the best possible price was an accurate statement of the law. Counsel stated that the accurate statement of the law is that the mortgagee's duty was to sell the property for the best price reasonably obtainable. **Tse Kwong Lam v Wong Chit Sen** (1983) 3 ALL ER 54. Learned Counsel also stated an alternative statement of the law is that the mortgagee has a duty to obtain the true market value of the property. Learned counsel cited **Cuckmere Brick Co. Ltd. V Mutual Finance Ltd.** [1971] 2 ALL ER 63, as authority. Learned counsel for the respondent contended that this ground of appeal was inconsistent with the judgment of the judge.

[4] An examination of the judgment shows that the learned judge simply set out the averment in paragraph 25 of the statement of claim. The learned judge never held that the statement of law contained therein was an accurate statement of the law. Interestingly, the learned judge proceeded to refer to the case of **Cuckmere Brick Co. Ltd. V Mutual Finance Ltd.** [1971] 2 ALL ER 63 and quoted from Salmon J who said:

"I accordingly conclude both on principle and authority that a mortgagee in exercising his power of sale owes a duty to take reasonable precaution to obtain the true market value of the mortgage property at the date on which he decides to sell it."

The judge was clearly mindful of the relevant law. It is noteworthy that learned counsel for the appellant also cited the **Cuckmere Brick** case as providing an alternative statement of the law. The judge never held that the mortgagee had a duty in selling the property to obtain the best possible price. In the premises, this ground of appeal fails.

[5] Ground (b) alleges that the judge erred in her finding of fact that the appellant had knowledge of offers received by the respondent before the sale by auction when the pleadings are to the contrary. That ground of appeal can be dismissed quite quickly as the judge made no finding of fact on that issue.

[6] Ground (c) alleges that the trial judge erred in law in allowing the respondents' claim for general damages for interferences with the right to redeem to subsist, having struck out paragraph 20 which alleges the said wrongful interference. This ground calls for an examination of paragraph 26 of the statement of claim which deals with the relief claimed. Paragraph 26(a) has two aspects: general damages for breach of duty to act in good faith and for wrongful interference with the right to redeem the mortgage. Having struck out paragraph 20 the learned judge erred in not striking out that part of paragraph 26(a) which dealt with damages for wrongful interference with the right to redeem the mortgage. The third ground of appeal accordingly succeeds.

[7] In conclusion it is ordered that grounds (a) and (b) of the grounds of appeal are

dismissed. The Bank succeeds on ground (c). With respect to costs, both sides had a measure of success albeit that the respondents were more successful. I would reduce the amount of costs that would be awarded to the respondents. The respondents are awarded \$2,000.00 in costs.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]