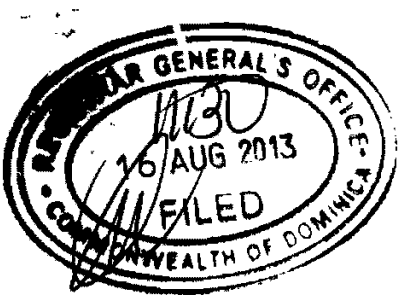

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

COMMONWEALTH OF DOMINICA

DOMHCV2007/0190

BETWEEN:

DOMINICA AID BANK	**Claimant**
and	
ATHENIA HENRY	**Defendant**

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Steven Isidore for the Claimant

Mr. Kondwani Williams for Defendant

JUDGMENT

[2013: May 1st, 3rd]

[August 16th]

[1] **Cottle J:** The parties entered into a loan agreement in 1997. The defendant used the loan funds to purchase a motor vehicle and executed a bill of sale in favour of the claimant bank. In 1998, while the loan was still unpaid, the defendant migrated to the United States of America. She informed the bank of her impending departure. Three weeks after the defendant left, the claimant repossessed the vehicle. The vehicle was then valued at $16,000.00. The claimant bank exposed the vehicle for sale at the valued price on its premises where repossessed vehicles are displayed for the public to

make offers. No offers were received. After some five months the bank was able to secure a sale at $7,500.00. The proceeds of sale were applied to the loan balance. These proceeds were not sufficient to liquidate the loan. The defendant was aware of the price at which the vehicle was sold. She made no effort to pay the outstanding balance. She returned to Dominica in 2005. The bank instituted the present proceedings in 2007 to recover the outstanding balance and the interest that had accrued over the intervening years.

[2] The defendant consented to judgment but required that the damages due to the claimant be assessed. The case for the defendant at the assessment was that the bank breached its duty of care towards her by selling the vehicle at a grossly undervalued price. The defendant also protested that the bank demonstrated bad faith by its inordinate delay in bringing proceedings, thereby allowing the interest on the principal loaned to accumulate for 8 years before instituting the present claim against the defendant.

[3] Counsel for the defendant also submitted that, "having sold the vehicle at an undervalue would have rendered the continuation of repayment of interest over the next 14 years by the defendant as an unconscionable bargain. According to counsel for the defendant, the issues which fall for consideration are three. They are set out thus:-

> ***"Whether the claimant as mortgagee acted recklessly and/or in bad faith and was in breach of its equitable duty of care owed to the defendant?"***
>
> ***"Whether the actions of the claimant as mortgagee in the manner of and/or exercise of its power of sale amount to a clog or fetter on the equity of redemption?***
>
> ***"Whether the claimant as mortgagee in its attempt to recover, having sold the motor vehicle at an undervalue would have rendered the continuation of repayment of interest over the next 14 years by the defendant as an unconscionable bargain?"***

Issue one

[4] There is an obligation imposed on a mortgagee at common law to take reasonable care to obtain the true market value upon sale of the mortgaged property. (See for example Cuckmere Brick Co. Ltd. v Mutual Finance Ltd [1971] 2 WLR 1207) The agreed facts in the present case are that the vehicle, when repossessed, was valued at $16,000.00. No formal advertisements were placed in the local mass media. The usual practice of local lending institutions is to expose repossessed vehicles for sale at a location well known to the buying public.

[5] The bank has used its parking lot for the purpose for several decades. The vehicle was exposed in the parking lot with the asking price of $16,000.00 for some 5 months. The best offer received was $7,500.00. The bank accepted this offer and sold the vehicle. Against that factual background, can it be said that the bank failed to discharge its duty of care towards the defendant?

[6] Valuation is not an exact science. The valuation of the vehicle $16,000.00 was merely the opinion of the valuer of what the vehicle would fetch. Better evidence of the true market value is the amount that the buying public is willing to pay for the item being valued. To my mind, the fact that no one was willing to pay $16,000.00 over 5 months in a small market such as Dominica offers good evidence that the true market value was not $16,000.00. There can be no complaint about the lack of advertisement in my view. Blenman J put it this way in Hauser et al v National Bank of Anguilla AXA HCV 2010/0025; "I accept it to be the true position of the law that there is no absolute duty to advertise widely and what is proper advertisement depends on the circumstances of the case." I consider the course of action of claimant bank to have been sufficient advertising in the present case.

Issue Two

[7] As I understand this submission by counsel for the defendant, the sale by the bank at an undervalue imposed a clog or fetter on the equitable right of the defendant to redeem the mortgage. The argument is that, had the bank acted in good faith and secured a proper sale price this would have been enough to pay the mortgage. The Cuckmere Brick case above offers a good example of the duty that is imposed on a mortgagee in situations like the present case. Salmon LJ at paragraph 9 on page 965 of the judgment points out that 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 that none of these adverse factors is due to any fault of the mortgagee.

[8] I find that there was no fault due to the bank which would have caused the price obtained on sale of the vehicle to be only $7,500.00. In any event it is for the defendant in this case to show that there has been some breach of duty by the bank. I find that the defendant here has not done enough to show a breach of duty by the bank.

Issue 3

[9] The only matters raised by the defendant, in his cross-examination of Mr. Curtis Lloyd for the bank had to do with the failure of the bank to obtain the appraisal or valuation of the vehicle prior to sale. Mr. Lloyd also accepted that there was no advertisement in the local media before sale. As indicated above, I find there was no requirement in the circumstances of this case to advertise. It is common knowledge in our small community that repossessed vehicles are displayed at the premises of the local lending institutions. I find this to be sufficient advertisement. Nor do I fault the bank for not obtaining a new valuation. The bank was content to accept the value of $16,000.00 placed on the vehicle by the defendant. They tried to obtain a sale at the price for several months. There is no merit in this complaint by the defendant.

[10] Having analysed the matters raised by the defendant and found them to be without merit, I assess damages for the claimant in the amount pleaded. The defendant knew since 1999 that the vehicle was sold for $7,500.00 and that a loan balanced remained. It is not for the court to remake the

defendant's bargain. She agreed at an interest rate for the unpaid balance and took no steps for many years to pay. She cannot now complain that the bank took too long to sue and thereby caused her indebtedness to increase. The fault for the interest amount resides in the failure of the defendant to pay as agreed not in the delay by the bank to bring the claim.

[11] Judgment for the claimant is assessed at $42,451.33 being principal of $9,637.46 and interest of $32,783.87. The defendant will pay the claimant prescribed costs on this sum of 60% of $6, 367.70 amounting to $3,820.62. The defendant will pay interest on the judgment debt at the rate of 5% per annum from today until payment.

Brian Cottle

High Court Judge