

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
GRENADA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO.: GDAHCV2008/0004

BETWEEN:

**DELANO IRVINGTON GIBBS
CHRISTINE INGRID GIBBS**

Claimants

AND

THE BANK OF NOVA SCOTIA

Defendant

Appearances:

Celia Edwards QC, Celine Edwards and Deloni Edwards for the claimants
James Bristol for the defendant

2017: October 19
November 10
2018: March 5

JUDGMENT

[1] **GLASGOW, J:** The trial of this claim filed by the claimants (“the Gibbs”) against the defendant (“BNS”) centres on 2 complaints about the manner in which BNS exercised its power to sell property mortgaged by the Gibbs to BNS –

- (1) BNS informed the Gibbs that they could not negotiate and conclude the sale of the property after BNS had decided to sell the same; and
- (2) BNS did not seriously consider offers made for the purchase of the mortgaged property.

Facts

- [2] In 1989 the Gibbs purchased land located at Mount Gay, St. George. They decided to build their marital home on the land and sought financing from BNS to do so. In the year 1997, they took a mortgage from BNS which was secured by the property. In or around 2004, the mortgage fell into arrears. BNS informed the Gibbs by way of letter dated 21st April 2006 that the loan was in arrears. BNS demanded payment of the arrears by 26th May 2006. The Gibbs responded by way of letter dated 23rd May 2006 in which they asked BNS for *“an extension of time re settlement of the account”* as they had *“decided to offer the property for sale”*. Of note is the fact that the Gibbs also informed BNS in the 23rd May 2006 letter that *“several persons have expressed interest in purchasing and as soon as more details become available we will advise you further.”*
- [3] There is no evidence that BNS responded to the Gibbs' 23rd May 2006 letter. However, on June 28, 2006 Henry, Henry and Bristol, attorneys for BNS wrote to the Gibbs requesting payment on behalf of its clients by a deadline of 26th July 2006. BNS also stated that it would enforce the security for the loan if payment of the full sums due was not forthcoming. On 24th July 2006, the Gibbs responded to the demand letter by writing to BNS informing them that there were 2 prospective buyers interested in purchasing the property.
- [4] Having not received the sums due, BNS instructed Henry, Henry and Bristol by way of letter dated 1st September 2006 to *“commence Power of Sale action against”* the Gibbs' property. BNS promised to provide appraisals of the property and a reserve price in a subsequent letter. The property was in fact valued by Messrs. Kenrick Gabriel & Associates and Messrs. Joseph John and Associates Ltd for the sums of \$721,476.000 and \$613,000.00 respectively. BNS set the reserve price at the higher sum of \$721,476.00. There is no evidence that the Gibbs were aware of these instructions at the time BNS issued the same to the

lawyers. However by letter dated 22nd January 2007, the Gibbs confirmed a 2 weeks extension to "*actively advertise the mentioned property until February 14th 2007, after which it's [sic] sale will be publicly advertised.*"

[5] The property was not sold by the Gibbs during that extended period but there seems to be ongoing discussions between Mrs. Gibbs and a number of BNS' staff. In his witness statement, Mr. Sterling Lyons, one of the bank's employees, recites several of those communications. Among these conversations between Mrs. Gibbs and Mr. Lyons was talk of a potential sale to an interested buyer by the real estate Mr. Calkins Munro. That interested buyer was said to have offered the sum of \$900,000.00. BNS provided the Gibbs with a copy of the title deeds to the property and the mortgage deed. There was also discussion about a potential second buyer who was at one point interested in not only buying the property in question but the adjoining property belonging to the Purcell family. There were several discussions on whether the Purcell family would sell. Mrs. Gibbs later informed BNS of the progress with the sale to other potential buyers including one Franklyn Joseph who had left Grenada and did not sign an agreement for sale. Mr. Lyons testified that he called Mrs. Gibbs a number of times to ask for details of the progress of the sales but no offers were forthcoming.

[6] In the meantime, Henry, Henry and Bristol informed BNS on 26th March 2007 that, as instructed, it had advertised the property for sale. 2 days later, BNS wrote back to Henry, Henry and Bristol advising them to halt the sale of the property. It appears that the advertisements proceeded until sometime in April 2007 notwithstanding BNS' instructions for the same to be stopped. BNS wrote to the Gibbs on 15th June 2007 informing them that a further extended deadline of 14th June 2007 had expired without settlement of the mortgage arrears. In that letter, BNS said that it was going to proceed with the sale without further notice to the Gibbs. BNS again instructed Henry, Henry and Bristol to further advertise the property for sale.

[7] The evidence reveals that notwithstanding the 15th June 2007 letter, BNS and the Gibbs continued their discourse on the issue of the debt with BNS testifying of several conversations with Mrs. Gibbs who spoke of various potential buyers. Of particular significance to this case is a telephone conversation held between Mrs. Gibbs and Mr. Lyons on or around 7th August 2007. Mr. Lyons recalls that Mr. Gibbs indicated in that telephone call that an interested buyer property would be visiting the property. Mrs. Gibbs remembers the call differently. She testified that she received a call from one Mrs. Superville who expressed an urgent intention to buy the property before its advertised auction date of 10th August 2007. She further testified that she advised Mrs. Superville to speak with Mr. Lyons since he had earlier advised her that she could not negotiate a price for the property once it was advertised for sale. Mrs. Gibbs further testified that she was later informed that Mrs. Superville had sent her agent, Mr. Bryan Strachan to Mr. Lyons who informed him that the bank would not entertain a private sale but Mr. Strachan could attend the public auction and place a bid. Mrs. Gibbs complained that BNS did not treat privately with Mrs. Superville or cancel the auction. She avers that this failure to “treat” with the Supervilles was a breach of BNS’ duty to act in good faith. Mr. Lyons strenuously maintained in his evidence that he did not advise Mrs. Gibbs that she could not negotiate sale of the property. He recalls that further to the telephonic discourse with Mrs. Gibbs, Mr. Strachan visited the bank on or about 8th August 2007. When he met with Mr. Strachan he showed him pictures of the property. He explained aspects of the auction process to Mr. Strachan and thereafter referred him to Henry, Henry and Bristol for details of the auction exercise. Mr. Lyons testified that Mr. Superville called him on the same day and told him that Mr. Strachan would visit the property to advise the Supervilles whether they should place a bid for the property.

[8] Mr. Strachan attended the auction on 10th August 2007 on behalf of the Supervilles. The property was sold to the Supervilles for the sum of \$721,476.00 and a deposit of \$144, 295.20 was paid. A memorandum of sale was signed by BNS and Mr. Strachan on behalf of the Supervilles. The sale was completed on

12th November 2007 when the Supervilles paid the balance to BNS and the necessary conveyances were signed. Mrs. Gibbs explains in her evidence that while she was aware that BNS was going to put the property up for sale by auction, she had no idea that it was sold until the bank sent her a letter dated 10th October 2007 wherein she was notified that the auction was held as advertised on 10th August 2007 and the property was sold to Mr. Keith Superville for the sum of \$721,476.00. BNS' 10th October 2007 letter stated that it was in response to a letter dated 16th August 2007 from Mrs. Gibbs to BNS in which she referred to a meeting held on even date with BNS officials Roger Palmer, Pam Wilson and Sterling Lyons. In the 16th August 2007 letter Mrs. Gibbs recounted the discourse with the bank officials and herself regarding Mr. Lyons' alleged instructions to her that she could not negotiate the price for the property with interested buyers. She described her instructions to Mrs. Superville to contact Mr. Lyons and Mrs. Superville's promise to take her chances at the auction. Of significance is Mrs. Gibbs' recollection of a meeting held with Mrs. Wilson on 8th August 2007. She recalls in the 16th August 2007 letter that Mrs. Wilson had advised her that it "*is the banks' policy that staff do not negotiate Sale and I Should have been informed that the client negotiate with my husband and myself and inform the bank to have auction cancelled, once the reserve price was satisfied.*" Mrs. Gibbs then closes the 16th August 2007 letter with the assertion that in light of what had transpired, she would not accept the auction fees as the fees could have been avoided. Mr. Lyons, on the other hand recalls the 16th August 2007 meeting differently. He recalls that the meeting informed Mrs. Gibbs of the details of the sale and confirmed that the property had been sold at the auction. I note that by letter dated 10th September 2007, Mrs. Gibbs wrote to BNS reiterating her disappointment that she was not allowed to have the sale of the property "executed out of auction." She also lamented the fact that she had not, to date, received any information confirming the sale of the property. She also notified BNS of an offer for \$800,000.00 from one David McKee and an offer from Grant, Joseph & Co. in the sum of \$750,000.00. Mrs. Gibbs closed the letter by requesting confirmation of the sale of the property or permission to proceed with alternative negotiations with

interested buyers. Mrs. Gibbs also sent a letter dated 1st October 2007 to BNS in which she informed the bank that she received an offer for the property in the sum of \$825,000.00.

[9] On 20th November 2007 BNS wrote to the Gibbs informing them that the sale was completed on 12th November 2007 to the Supervilles in the sum of \$721,476.00. The details of the sale and the various disbursements are then recited. A cheque for the excess in the sum of \$72,301.18 was enclosed. On the same day, the lawyers for the Supervilles penned a letter to the Gibbs asking that they vacate property within 7 days. The Gibbs responded to the Supervilles' attorney on 28th November 2007 requesting 2 months to vacate the property. The Gibbs filed this claim on 25th January 2008.

Discussion

[10] As stated above, the Gibbs complains that the above facts demonstrate that BNS failed to act in good faith and acted negligently in respect of the sale of the property¹. These complaints immediately bring into focus the types of duties, if any, BNS owed to the Gibbs in respect of the sale of the property. In Grenada the power of the mortgagee to sell the property where there is default by the mortgagor is set out in section 9 (1) (a) of the Conveyancing and Law of Property Act –

(1) *A mortgagee where the mortgage is made by deed shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely)—*

¹ The Gibbs also claimed that BNS, by its conduct, clogged their right to redeem the property. BNS applied to strike out this allegation. The court struck out the allegation on 22nd May, 2009. The Gibbs appealed against the strike out order. On 13th November 2013, the Court of Appeal upheld the strike out order.

(a) Sale.—A power, when the mortgage money has become due, to sell, or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he or she may think fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss occasioned thereby...

- [11] The statutory power of sale was specifically agreed by the parties in the mortgage agreement at clause 5(iv). It has been said that this statutory power of sale is for the benefit of the mortgagee and that the mortgagee is not a trustee of the mortgagor in its exercise. In **Cuckmere Brick Co. Ltd and another v Mutual Finance Ltd**, Salmon LJ explained that ²

It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything 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. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.

² [1971] 2 ALL ER 633 at 643

[12] See also **Warner v Jacob**³ where Kay J observed that –

... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bonâ fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

[13] While the mortgagee has the right to sell as it wishes, the law does impose certain parameters within which the power of sale must be engaged. In the Privy Council Lord Moulton gave this advice⁴ –

It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

[14] In **Cuckmere** the duty to act reasonably with respect to the sale of the mortgaged property was elucidated thusly⁵ –

Counsel for the defendants contends that the mortgagee's sole obligation to the mortgagor in relation to a sale is to act in good faith; there is no duty of care, and accordingly no question of negligence by the mortgagee in the conduct of the sale can arise. If this contention is correct it follows that, even on the facts found by the learned judge, the defendants should have succeeded. It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which

³ (1882) 20 Ch D 220 at 224

⁴ *McHugh v Union Bank of Canada* [1913] AC 299 at 311

⁵ [1971] 2 ALL ER 633 at 643

suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that, in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, Kennedy v de Trafford with Tomlin v Luce ((1889) 43 ChD 191 at 194). The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the 'proper price', others to the 'best price'. Vaisey J in Reliance Permanent Building Society v Harwood-Stamper ([1944] 2 All ER 75 at 76, 77, [1944] Ch 362 at 364, 365), seems to have attached great importance to the difference between these two descriptions of 'price. My difficulty is that I cannot see any real difference between them. 'Proper price' is perhaps a little nebulous, and 'the best price' may suggest an exceptionally high price. That is why I prefer to call it 'the true market value'.

I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe 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 it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

[15] The complaints about the failure of BNS to sell with regards to its duties can be answered by asking the following questions –

- (1) Did Mr. Lyons on behalf of BNS give Mrs. Gibbs the advice that she could not negotiate the sale of the property;
- (2) If he did so, was this a breach of the BNS' duties in respect of the realisation of its security;
- (3) What, if any, were BNS' obligations in respect of the information received from Mrs. Gibbs in respect of prospective buyers?
- (4) If it held obligations to the Gibbs in respect of the information on offers, was BNS in breach of any of those obligations?

Did Mr. Lyons give the alleged advice to Mrs. Gibbs?

[16] The controversy on this matter has been stated in the facts above. In a supplemental witness statement filed on 30th June 2015, Mr. Lyons flatly denied that the comments were made. He reiterated that he did intimate to Mrs. Gibbs that the imminent auction could only be cancelled if the mortgage debt was settled or a binding purchase agreement was presented. Under cross examination he maintained that he did not give Mrs. Gibbs the alleged advice. He also maintained that at the 16th August 2007 meeting Mrs. Gibbs did raise an issue about the sale process and the auction fees but that he never got the sense that she was complaining about anything that he had done. BNS' manager, Pamela Wilson also

gave testimony on this issue. In her witness statement, she recalled a 8th August 2007 phone call from Mrs. Gibbs in which she complained that there were other persons who wished to pay more for the property but that Mr. Lyons had informed her that the price would have to be the reserve price. Mrs. Wilson also recalls that she advised Mrs. Gibbs that the staff of the bank cannot negotiate price since this is a matter for the mortgagor. Mrs. Wilson also recalls that Mrs. Gibbs was told that the auction could only be cancelled if the full loan arrears or the full balance of the loan was paid. In a supplemental witness statement, she expanded on her earlier statements by explaining that she told Mrs. Gibbs that she could sell the property even though the bank was proceeding with the auction. Mrs. Wilson's further witness statement also explains that when she told Mrs. Gibbs that the staff should not negotiate price she was referring to a private sale rather than the bank's exercise of its power of sale by auction. She testified that the bank does not get involved in the private sale conducted by mortgagors. Under cross examination, she admitted that on 8th August 2007 Mrs. Gibbs did complain that Mr. Lyons told her that she could not negotiate a sale price. She also admitted under cross examination that she would have spoken to Mr. Lyons about this complaint but she could not recall when she held such a conversation with Mr. Lyons. She recalled that Mr. Lyons denied that such an exchange took place with Mrs. Gibbs. Mrs. Wilson also explained that she understood that Mrs Gibbs was not complaining at the 16th August 2007 meeting about the advice allegedly given by Mr. Lyons but that she was complaining about having to pay the bank fees when she was not permitted to sell the property.

[17] Having looked at the course of dealings between the parties, their testimony and their demeanour at trial, I have formed the view that Mr. Lyons did give the advice to Mrs. Gibbs that she could no longer negotiate the price for the property with interested buyers once BNS had decided to proceed with the auction of the property. Several features of this case lead me to this conclusion –

- (1) Mrs. Gibbs raised this concern from as far back as the 8th August 2007 telephone call with Mrs. Wilson. Mrs. Wilson acknowledges in her witness statement and under cross examination that the complaint was raised as far back as that time;
- (2) The record of this complaint was memorialised in the 16th August 2007 letter from Mrs. Gibbs in which she outlined the details of the meeting of even date. The record of that meeting refers to the fact that she did discuss her disappointment with having been “*declined the opportunity to have the sale of my property ... executed out of auction.*” She specifically references the discussions with Mr. Lyons in which he advised that she could not negotiate price, “*...he will deal with everything*”; and
- (3) Mrs Wilson does not deny that the issue was raised by Mrs. Gibbs at the 16th August 2007 meeting. Mrs. Wilson does recall having a discussion with Mr. Lyons about this specific complaint even though she does not recall when that discussion was held or what she said to Mr. Lyons.

Was the bank in breach of its duties to the Gibbs?

[18] Mrs. Gibbs submits that the consequence of BNS’ advice was that she was not able to negotiate a price. At the very minimum, she surmises, “*...the claimant lost the money that they had to pay in respect of the expenses of the auction and lost the excess paid in withholding taxes.*”⁶ I fear that the Gibbs’ posture exposes some confusion as to the mortgagor’s rights once the mortgagee decides to exercise its section 9 power of sale. The section itself empowers the mortgagee to sell “*the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such*

⁶ Gibbs’ closing submissions filed on November 10, 2017 at para.15

*conditions respecting title, or evidence of title, or other matter, as **he or she may think fit...***". (Bold emphasis mine). As was stated above, the mortgagee is enjoined to sell with regards to the obligations to, among other things, act in good faith and obtain the true market value. So long as the mortgagee complies with these obligations, it may sell at such time and in the manner it chooses so to do. It has been said that, before the property is sold, the mortgagor retains the equity of redemption or the right to redeem the property which he may sell but that is the entirety of his rights⁷. His rights to redeem are subordinate to the rights secured to the mortgagee under the Act and cannot affect the mortgagee's decision to sell as he sees fit. See **Duke v Robson**⁸. Indeed in **Duke**, a contract for sale by the mortgagor did not affect the mortgagee's subsequent contract for sale. The court ruled that the mortgagor may only pre-empt a sale by the mortgagee where he pays to the mortgagee or into court the full sum due under the mortgage. In **Lord Waring v London and Manchester Assurance Co. Ltd**⁹, Crossman J explained the mortgagor's rights in this way –

If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court in proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgment, perfectly clear ... that the mortgagee ... can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside.

- [19] The mortgagor may only stop the mortgagee from selling the mortgaged property as it sees fit if the mortgagor tenders or pays into court the sums due. It is a distinct feature of this case that BNS granted the Gibbs several extensions on the time required to meet the demands for payment of the sums due. Subject to what I have to say on the issue of offers below, it would appear that the Gibbs did not

⁷ **Duke v Robson** [1973] 1 WLR 267

⁸ [1973] 1 WLR 267

⁹ [1935] Ch 310 at pages 318 -319

pay in the sums due before the date that BNS proceeded with the auction. Accordingly, while I find that it was in poor form for Mr. Lyons to offer the advice that he gave to Mrs. Gibbs, the position at law is that it is the mortgagee's right to sell as it sees fit and there was no obligation on the mortgagee to give permission to the mortgagor to proceed. However, having decided to proceed in the manner that it did by advising that Mrs. Gibbs could not negotiate price, the court is required to examine whether the manner in which BNS proceeded demonstrates that it acted in good faith and the sale yielded the true market value. On this part of the case, after examining the evidence as set out above and hearing from the parties, I find that the mere assertion that BNS advised that they were the only party that could "negotiate price", does not, by itself, indicate that BNS acted without good faith and that the sale did not produce the true market value.

[20] But Mrs. Gibbs goes on to explain that the bank's conduct had a direct impact on the Superville offer since had she been allowed to negotiate the price, the property may have been sold for a higher price. Mrs. Gibbs testified that she did not know the Supervilles prior to Mrs. Supervilles' call regarding the advertised sale. There is no evidence that the Supervilles made a firm, verifiable offer to buy the property from the Gibbs or in fact intended to make any such offer to buy. In any event, even if the Supervilles and the Gibbs negotiated a sale, as was stated above, the Gibbs could only sell their equity of redemption. If they wished in any manner for BNS to stop the exercise of its right to sell, they would have to tender the full sums due. Indeed in **Duke v Robson**¹⁰, the mortgagors entered into an agreement with purchasers to sell the mortgaged property. The court found that even in the instance where the purchasers stated that they were willing to put the sums due into the joint names of solicitors, this offer did not amount to a tender of the sums due or a payment into court. On the facts before me, it is at best speculative what may have transpired if the Supervilles and the Gibbs were to negotiate a sale and in any event, subject to what I have to say below on the issue of offers, any dealings between the Supervilles and the Gibbs for a sale of the equity of

¹⁰ [1973] 1 WLR 267

redemption could have no bearing on the rights of BNS to exercise its power of sale. Ultimately, it must be shown that the course adopted by BNS shows that it was not acting in good faith or it failed to take reasonable steps to obtain the best price or the true market value for the property. There is no evidence has been presented that this conduct demonstrated a lack of good faith by BNS in the exercise of its power of sale sufficient to impugn the sale or that the price obtained at the auction was not the true market value for the property.

Did BNS have any obligations in respect of the information about offers received by Mrs. Gibbs?

[21] Both parties accept that after default in payment and after the initial demand for payment was made by BNS to the Gibbs for payment of the arrears, BNS extended the time for sale of the property on a number of occasions. The evidence also reveals that Mrs. Gibbs spoke to BNS' officials and wrote to them about several offers made to her to buy the property. Mrs. Gibbs in her closing submissions relies on the Superville offer to make the point that, when BNS, through Mr. Lyons took on the obligation to sell the property themselves, they had to take the Superville offer seriously and treat with them. Mrs. Gibbs complains that¹¹ –

...when the Superville purchasers contacted the Claimants, on the representation (wrongfully as it was) by Lyons, the Claimant went to Lyons with the information “this is the purchaser who is prepared to contract before the auction.”

What is obvious is that Lyons did not take her seriously and refused to treat with the prospective purchaser. Even when the prospective purchaser went to him before the auction Lyons told the prospective

¹¹ Supra, note 5 at para. 12 -14

purchaser you have to go to the auction and deal like any other – that was a breach of good faith, that was a breach of contract and breach of its judiciary duty because having misled the Claimant into thinking that she could not treat Lyons then had a duty and assumed unto himself the duty of agent for the Claimant and was obliged to take the prospective purchaser seriously and treat.

He did not do so and the negligence and mal fides of the Bank was compounded by the fact that the bank contracted with the Supervilles on the same credit terms. In other words the Bank did not sell outright. The bank entered into an agreement for sale with the prospective purchasers; The Supervilles, took deposit and completed with them subsequently.

[22] BNS in response concedes that it has to act in good faith in the exercise of its rights to sell the mortgaged property. The bank also correctly concedes that in the discharge of the duty to act in good faith and to obtain the best price reasonably obtainable, it ought to “follow up” good offers made for the purchase of the property. See Aicken J in **The Australia and New Zealand Banking Group Limited v Bangadilly Pastoral Co. Pty Limited and others**¹², relying on **Fosyth v Blundell**¹³ for the proposition that the mortgagee’s failure to follow up the possibility of sale at a higher price may amount to failure to take reasonable steps to obtain the best price available for the property. Fisher and Lightwood explain the principle in this manner¹⁴ –

The mortgagee should follow up the possibility of a sale at a higher price. To accept less in a private sale than a prospective purchaser, with means, has indicated he would bid at a proposed auction may be a breach of the mortgagee's duty; the mortgagee has to balance a higher

¹² 139 CLR 195

¹³ (1973) 129 CLR 477

¹⁴ Law of Mortgage, para.30.24

offer, which is not firm, against a lower firm offer which will be withdrawn if not accepted within a specified period. (Bold emphasis mine)

[23] Mrs. Gibbs testified that she was told that Mr. Strachan visited Mr. Lyons on behalf of the Supervilles. She recalls that she learned that when Mr. Strachan met with Mr. Lyons, he (Strachan) was told by Mr. Lyons that BNS would not cancel the auction in favour of a private sale and that he (Strachan) would have to bid at the auction. Mrs. Gibbs also gave evidence that Mrs. Superville told her that she was confused with the information received about the whole arrangement for sale of the property and that she (Mrs. Superville) would send Mr. Strachan to the public auction to place a bid on behalf of the Supervilles. Mrs. Gibbs complained that BNS seriously breached its duties to the Gibbs when it refused to cancel the auction and treat with the Supervilles. Even I am permitted to accept Mrs. Gibbs' recital of what transpired when Mr. Strachan visited Mr. Lyons, there is no evidence in this case that the Supervilles made any firm offers to the Gibbs or to BNS for the private purchase of the property. I conclude that there must be details of a credible offer at a fair price by private sale before the mortgagee is tasked with an obligation to forego sale of the property by public auction. There is no evidence of such an offer by the Supervilles prior to the auction of the property. It is therefore difficult to see how BNS could be fixed with a responsibility to forego the sale by auction to "treat" with the Supervilles. It is for the mortgagor who claims that the mortgagee acted improperly to put that sort of evidence before the court and not for the mortgagor to present evidence that it had a credible offer from the Supervilles and why it failed to pursue the same.¹⁵ At the risk of courting superfluity, I would add that in the absence of evidence that the Supervilles made a credible firm offer, it was not inappropriate that Mr. Lyons encouraged Mr. Strachan to place a bid at the auction, Fisher and Lightwood opine that "*If possible, interested parties should be put in a position where they are required to compete with one another*"¹⁶.

¹⁵ Supra, note 12

¹⁶ Ibid

Offers beside the Superville offer

[24] Although the issue of the other offers received before and after the auction did not feature in the Gibbs' closing arguments, I would repeat for completeness that an obligation was imposed on BNS to consider credible or firm offers besides the Superville offer that were available before the auction. Mrs. Gibbs did inform the bank of several offers and the bank does concede that it was so informed. However there is no evidence that any of these offers were credible or conclusive. It is therefore not surprising that the Gibbs did not focus on those offers at the trial or in the closing arguments. In respect of the offers after the auction, there was some suggestion that the bank did not notify the Gibbs that the auction had taken place or of the "outcome of the auction". There is no general rule that, the mortgagee has a duty to inform the mortgagor of the proposed sale of the property although notice may be relevant in appropriate circumstances¹⁷. There is nothing on the evidence to suggest that the circumstances dictated that BNS had such an obligation to the Gibbs. Rather it appears that the Gibbs were aware of the several dates for the sale of the property. After the auction, BNS informed the Gibbs of the sale by way of letter dated 10th October 2007 in response to Mrs. Gibbs' letter of 16th August 2007. I observe that Mrs. Gibbs also wrote to the bank on 10th September 2007 repeating her complaint about the advice given by Mr. Lyons and indicating an offer from Dean Collins and one made by the law firm of Grant, Joseph and Co on behalf of one of its clients. By that time the property had been sold at auction. While I have found that BNS was not in breach of any obligation to inform the Gibbs of the outcome of the sale, I would commend to mortgagees that they inform the mortgagor more promptly about the results of a sale. Indeed expeditious communication may be warranted based on the fact that the mortgagee holds any excess of the sums received under the sale on trust for the mortgagor or any person entitled to receive the same.

¹⁷ The Australia and New Zealand Banking Group Limited v Bangadilly Pastoral Co. Pty Limited and others 139 CLR 195

[25] In respect of the Collins and other offers indicated to BNS by Mrs. Gibbs after the property was sold at auction, although this position was not maintained at trial, Mrs. Gibbs observed in her witness statement that all times she was “*in touch with the Defendant with offers in excess of the price obtained by the Defendant.*” The answer to this complaint is adequately considered in Crossman J’s admonishment in **Lord Waring** to the effect¹⁸ -

After a contract has been entered into, however, it is, in my judgment, perfectly clear ... that the mortgagee ... can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside.

[26] See also **Property & Bloodstock Ltd v Emerton Bush and another**¹⁹ for the view that the entry by a mortgagee into an unconditional contract for the sale of the mortgaged property bars the mortgagor’s right of redemption so long as the contract subsists. This means that the complaint that the Gibbs provided BNS with information about possible or even credible offers to buy the mortgaged property after it was sold at auction is not sufficient to demonstrate that BNS held any duties to the Gibbs in respect of the conduct of the sale and for that matter, were in breach of any such duties. Fisher and Lightwood explain that²⁰ –

once a binding contract for sale has been made, the mortgagee is bound to complete that sale even though a higher offer is made. Such an offer can put the mortgagee in a difficult position, because, if it is a serious and realistic one, it may give rise to an argument that the mortgagee has not obtained the best price reasonably obtainable. However, there is nothing the mortgagee can do about this, unless he can properly get out of the contract and the offer is still open.

¹⁸ [1935] Ch 310 at pages 318 -319

¹⁹ [1968] Ch. 94

²⁰ Supra, note 12

Conclusion

[27] I conclude that the Gibbs have not proven that BNS failed to act in good faith or that it failed to act reasonably in obtaining the best price or true market value of the mortgaged property. The claim is therefore dismissed with costs to BNS in the sum of \$750.00. I thank both counsel and parties for their assistance in this matter.

Raulston L.A Glasgow
High Court Judge

By the Court

Registrar