

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2016/0108

BETWEEN:

THE BANK OF NOVA SCOTIA

Claimant

and

1. LINDA LOU-LIBURD
2. ROBERT LIBURD

Defendants

Appearances:

Mr. Garth Wilkin for the Claimant

Ms. Marsha Henderson and Ms. Brittney Jeffers for the First Defendant

Ms. Miselle O'Brien for the Second Defendant

2019: September 27

ORAL JUDGMENT

[1] **VENTOSE, J.:** The Parties entered into a loan agreement in 2009 whereby the Claimant was given a mortgage over the property for a loan to the Defendants of \$450,000.00. The monthly payment was \$3,627.80 to be paid over a period of 22 years. The Defendants defaulted on the loan and the Claimant exercised its power of sale on the property and informed the Defendants of this via letter dated 2 February 2012.

- [2] The Claimant advertised the property in February and March 2012 in three local newspapers and again in three local newspapers in May and June 2012. The Claimant listed the property in 2014 with a realtor, Ms. Brantley, who showed the property to approximately 10-12 persons during a period of approximately six months and she found a purchaser. The Claimant also placed an advertisement for the sale of the property on a notice board at its main branch.

The Valuation Reports

- [3] The Claimant obtained four valuation reports of the property: (1) 9 October 2011 with a market value of \$663,213.00; (2) 11 April 2012 with a forced sale value of \$580,311.00; (3) 22 March 2013 with a forced sale value of \$493,260.00; and (4) 9 October 2014 with a forced sale value of \$419,271.00. There was a reduction of approximately 15 percent of the value of the property for each successive valuation. The four valuation reports are remarkably similar and the second valuation report states that the property was offered by the Claimant but offers were lower than expected and as a result, the Claimant requested a new valuation. The third valuation report states that the property was offered for sale but offers were lower than expected which resulted in the property being offered at a lower value and this is repeated in the fourth valuation report. The second, third, and fourth valuation reports make reference to the previous valuation. There is no information in any of the valuation reports to explain the remarkable consistency of the 15% reduction in the forced sale values of the property over the time period.
- [4] In the first valuation report, it is stated that the main building “appears to be in generally good repair and was well kept”. This is repeated in the second and third valuation reports. In the fourth valuation report it is stated that the main building “appears to be generally in good repair and was well kept when occupied”. The second, third and fourth valuation reports provide no basis for the reduction in value of the property over the 3-year period from October 2011 to October 2014. There was no analysis of market conditions or otherwise that would explain the reduction in value during the three-year period. The valuations conducted in 2013 and 2014 do not state that the property was in a deplorable condition; in fact, they

state clearly that the property “appears to be generally in good repair and was well kept”. I accept that evidence. However, I fail to appreciate the basis on which, if that is accepted, the reductions in the value of the property were based.

The Second Defendant’s Letter

- [5] The Second Defendant wrote to the Claimant in 2014 indicating that both Defendants would accept \$305,000.00 for the property and they wished for the property to be sold as it was rapidly deteriorating and did not wish it to go to zero. The First Defendant states in evidence that she does not agree with this statement and that the evidence of Mr. Warner, the collections officer who dealt with the matter, is that he was not in communication with the First Defendant. I agree that the First Defendant was not in agreement with the sale at that price. I therefore attach no weight to this letter in relation to the First Defendant.

The Sale of the Property

- [6] The Claimant sold the property on 2 June 2015 for \$341,121.00. From that amount, 12% stamp duty, and 5% realtor commission were deducted. The difference of \$283,000.00 was applied to the principal balance of the loan, leaving the principal of \$141,013.06 owing. Interest and other fees were also added to that amount.

The Legal Authorities

- [7] The cases cited by Counsel for the parties during closing submissions essentially state that there must be a current valuation and the property must have been adequately advertised. The bank must ensure that it had taken all reasonable precautions to ensure that it received a fair price for the property being sold. The statements in **Cuckmere Brick Co. Ltd v Mutual Finance Ltd** [1971] Ch 949 relate to a sale by auction and do not apply here. The correct position as stated in **Tis Kwon Lam v Wong Chit Sen and others** [1983] 3 All ER 55 is that:

The mortgagee, ... had to show that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as

to the method of sale, the steps which out reasonably to be taken to make the sale a success and the amount of the reserve. The mortgagee was not bound to postpone the sale in the hope of obtaining a better price.

...

Where the mortgagor fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable, the Court will, as a general rule, set aside the sale and restore the borrower the equity of redemption of which he had been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee to secure the best price if it will be inequitable as between the borrower and purchaser for the sale to be set aside.

- [8] The Claimant had to ensure that it obtained a proper valuation of the property based on prevailing market conditions which should serve as a benchmark for deciding the sale price. If the Claimant wished to reduce the sale price, it had to first ensure that it advertised the property extensively and that it took all reasonable steps to get the best price. The automatic reductions of 15% of the valuation of the property in circumstances where the valuation reports did not indicate what, if anything, had changed, except that the property was not sold in the previous year, suggest that the valuation was not a proper valuation.
- [9] I agree with Counsel for the First Defendant that the ability to get the property sold is one factor to be considered in conducting a property valuation but cannot be decisive to justify the automatic reductions in the value of the property by 15% in each successive year from 2012-2014.

What Banks and Financial Institutions need to do

- [10] If the Claimant or any bank or financial institution wishes to sell any such property at a price significantly lower than the market value, it should approach to court via application to sanction any such sale providing evidence of the efforts that it had taken to date to secure the sale of the property. The mortgagors would have an opportunity to object or agree to the reduction with the court making the final determination based on the evidence before it. This way the bank or financial institution is protected against any argument that it acted unlawfully in selling the property for a particular price which is far below market value. More importantly,

the mortgagor would have the security of knowing that the bank or financial institution could not unilaterally sell the property without the sanction of the court.

The Condition of the Property

- [11] Both Ms. Brantley and Mr. Warner state in evidence that the property was vandalized, was in a deplorable condition, that the kitchen cupboards were rotten and doors on the cupboards were coming off when it was viewed by them in 2014. Ms. Brantley stated in evidence that she took photos but did not put them on the website because of the deplorable condition of the property. However, she did not tender into evidence any of these photos. Similarly, Mr. Warner could not corroborate his evidence that the property was in a deplorable condition.
- [12] The valuations done in 2013 and 2014, on which the Claimant relied for the sale of the property, state clearly that the building “appears to be in generally good repair and was well kept”. This is the evidence of the Claimant found in the valuation reports and I accept it. It is, therefore, not necessary for me to consider the First Defendant’s argument that the Claimant breached any duty to get a best price because of the condition of the property over which it had control when it was given the keys by the First Claimant in 2011.

Findings and Conclusion

- [13] Based on the evidence before the court, I am satisfied that the second, third and fourth valuations were flawed, and that in all the circumstances the Claimant did not secure the best possible price for the property. The Claimant had a duty to exercise reasonable care only to sell the property at a price close to or at the market value. The Claimant failed to get the best price for the property because: (1) it relied on flawed valuations; (2) the valuations seemed geared to justifying a reduction in the sale price; (3) the property was not marketed or advertised sufficiently widely and broadly; (4) there were no advertisements in the local papers in the period from 8 June 2012 to the period immediately before the sale of the property on 2 June 2015, a period of 3 years; and (5) the advertisement in the notice board of the bank was not sufficient in the circumstances. The Claimant

therefore acted unlawfully in selling the property for \$341,121.00 in 2015. However, it would be inequitable for the court to set aside the sale.

Disposition

[14] For the reasons explained above, I make the following orders

- 1) The claim is hereby dismissed, and judgment is entered in favour of the Defendants.
- 2) Prescribed costs in accordance with CPR 65.5 to be paid by the Claimant to the Defendants within 14 days of today's date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar