

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

Antigua and Barbuda

Claim No: ANUHCV 2017/ 0041

BETWEEN:

GERALD BARNES

Claimant

And

CIBC FIRST CARIBBEAN INTERNATIONAL BANK

Defendant

APPEARANCES:

Justin L Simon Q.C of counsel for the claimant

Clement Bird of counsel for the defendant

2019: December 5

RULING

1. **ACTIE J:** The claimant defaulted in the repayment of a mortgage loan which he obtained from the defendant. On April 20, 2015, the defendant served a “notice to pay off” demanding the claimant to make a full payment of his indebtedness in the sum of \$1,060,912.34 together with interest accrued from March 24, 2015. The claimant failed to comply resulting in the bank exercising its power of sale under the mortgage.
2. The property was sold by public auction for \$1,051,000.00 based on a valuation report obtained by the bank in 2016. The valuation surveyor, Mr Wayne Martin, recommended a forced sale price of \$1,000,000.00 using an “Income Capitalization Approach”. An amount significantly lower than the “Cost Approach Value” methodology used by Mr Martin in a valuation that he prepared for the claimant in 2009.

3. The claimant filed a claim seeking (i) an injunction prohibiting the defendant from effecting the sale;(ii) a declaration that the first named defendant in the exercise of its power of sale failed to act in good faith and failed to have due regard to the interest of the claimant (iii) a declaration that the valuation of the said property obtained by the first defendant failed to provide a proper or accurate income capitalisation value for the sale of the property by public auction (iv) a declaration that the first defendant acted in breach of its duty to the claimant by colluding whether by itself or its agents with the 2nd defendant in its sale of the property by public auction (v) a declaration that the public auction held on 10.1.2017 was void null and of no effect or in the alternative (vi) damages for breach of duty for the failure of the first named defendant to have regard of the interest of the claimant in exercising its statutory powers of sale.
4. At the trial, the claimant discontinued reliefs number (i), iv (v). The claimant's main contention is that the defendant failed to act in good faith when it exercised its power of sale. The claimant alleges that the bank abdicated its statutory responsibility having failed to have due regard to the claimant's interest when it authorized the auction sale at a low "forced sale" value when compared to the market value of the property given in previous valuations.
5. The bank filed a defence denying the claim and counterclaimed against the claimant for all income derived from the property since the sale by public auction. The bank asserts that it acted in accordance with its statutory duties and relied on the expertise of a reputable valuator and auctioneer, which it had no reason to question.

The Law

6. **The Registered Land Act** Cap. 374 section 75(1) provides

“(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. Salmon LJ in **Cuckmere Brick Co Ltd and another v Mutual Finance Ltd**¹ states that “the mortgagee must have regard to the mortgagor’s interests and must take reasonable precaution to obtain a price for the mortgaged property which reflects its true market value”.
8. The claimant’s main contention is the disparity in forced market value in the valuation used by the bank to conduct the auction when compared to the previous market values, including a valuation prepared by Mr Martin in 2009. The claimant refers to another valuation by one Lewis in 2013 giving the property a market value of \$2.2 Million using a “Market Value Cost” approach as opposed to the \$1.1 Million “Income Capitalization Approach” methodology used by Mr Martin for the purpose of the auction.

Analysis

9. The bank, in exercising its power of sale, owes a duty of care to a debtor and is required to obtain the true market value or if this is not attainable, the best price reasonably available of the mortgaged property. The duty of the bank is not to get the best price but the true market value at the time of the sale acting in good faith.
10. The market value of property is usually informed by valuations reports from qualified valuation surveyors. Various recognised approaches and methodologies are used in arriving at the open market value of a property.
11. Lord Salmon in **Cuckmere Brick Co**⁷, states 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”.
12. The Court of Appeal decision in **Caribbean Banking Corporation v Alpheus Jacobs**², provides much guidance in the issues arising in the case at bar. According to the facts, the bank loaned \$3,309,000 to Jacobs who executed a promissory note in the bank’s favour and charged three properties to the bank: The properties were together given a value at \$4,708,554.00 by Jacobs’s architect at the time of the loan. Jacobs defaulted on the loan payments and the bank issued a demand for the loan which Jacobs was unable to meet. The

¹ [1971] Ch D. 949, 966 C and 969 G

² HCVAP 2004/010 delivered on 6th October 2008

bank then exercised its power of sale in relation to the three properties, engaging a different valuer, who valued the properties at \$2,705,859.00 less than Jacobs's valuer. The bank brought proceedings claiming the balance of the debt. Jacobs counter claimed stating 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 two valuations.

13. Carrington JA (ag) allowing the counter-appeal in part outlined the statutory obligations of a chargee when exercising its power of sale under a mortgage and said:

[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.

14. At Paragraph 14, Carrington JA stated

" 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 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. The Court of Appeal decision is on all fours with the main issue arising in these proceedings. The genesis of the claimant's argument is that Mr Martin, the valuation surveyor, did not act prudently in arriving at the market value especially having regard to the previous valuation that he prepared in 2009 and the valuation of Mr Lewis in 2013. The claimant is of the view that the disparity and the low valuation given by Mr Martin's in 2016 caused him significant loss.
16. Mr. Martin, in cross examination admits the disparity in the valuations but states that different methods were used in arriving at the value in his two valuations. Mr Martin said that first valuation was conducted using the "Market Value approach" which gave the property a higher value than the "Income Capitalization Approach" used for the auction sale.
17. Mr Martin was of the view that "Income Capitalization Approach" was the preferred method having regard that the building was an apartment building generating rental income. He further stated that many issues such as inefficiencies of building, external obsolescence, market location, poor management of the building, economic indicators could affect the value of the property at the time of the valuation.
18. What is apparent is that each valuation was conducted using the various approved methodology. I accept Mr. Martin's evidence that the "Income Capitalization Approach" was the preferred methodology for income generating properties such as rental properties which include non-owner-occupied building, houses and duplex, apartment building, etc. The income from rent that an owner expects is also a part of the value of that property as the market and forced sale value of a rented property can be influenced by prevailing rental trend less expenses.
19. At the trial, the claimant by his own admission alluded to the fact that he experienced difficulty in renting all the units as he was only able to rent out a few of the units. He states further that the low rental income received had to be used for the maintenance and upkeep of the building.
20. The fact that the two valuations differed significantly or were at great disparity did not make the valuations erroneous. As was indicated in **Cuckmere**, a valuation not an exact science. What is required is for the bank to act reasonably in obtaining the best market value at the time of sale. The onus is on the claimant to prove the breach of duty of the bank.⁶

21. The Court of Appeal in **Caribbean Banking Corporation v Alpheus Jacobs** places an onerous burden on the claimant to prove that the bank through its agents acted with negligent disregard to its interest rights when exercising its power of sale.

22. In my view the claimant has not discharged that burden. I accept the defendant's evidence that it relied on the valuation from a reputable valuator and allowed the auction to be conducted by an experienced auctioneer. The claimant has not provided any evidence to establish that the defendant influenced the valuation made by Mr Martin in support of the auction. Accordingly, I dismiss the claimant's claim with prescribed costs to the defendant pursuant to CPR 65.5

The Defendant's Counter-claim

23. The defendant counter-claims against the claimant for the proceeds of rent which the claimant received after the defendant exercised its power of sale.

24. The claimant admits that he remained in occupation and rented some of the units after the public auction held in January 2017. The claimant states that he had two tenants and received rents from those tenants who moved out in February 2018. The claimant admits that he returned the keys to the defendant in July 2018 but cannot remember how much rent he collected. He asserts that he undertook maintenance and repairs of the building with the rent money collected.

25. The defendant has proved its case against the claimant and accordingly judgment is entered in favor of the defendant on the counter claim. It is for the claimant to prove the amount collected from the date of the sale and to pay to the defendant all rents received after the auction sale. Accordingly, the claimant shall file and serve the defendant an affidavit with supporting evidence to prove the amount received from the rental of the units and expenditure after the auction sale, unless the parties agree on a sum within twenty-one (21) days of today's date. The defendant is awarded prescribed costs on the counter claim pursuant to CPR 65.5.

Order

26. In summary, the claimant's claim stands dismissed with prescribed costs to the defendant pursuant to CPR 65.5.

27. Judgement is entered in favor of the defendant on the counter claim with prescribed costs pursuant to CPR 65.5.

28. The claimant shall provide the defendant with an accounting of "monies had and received" subsequent to the defendant's exercise of its power of sale in January 2017 and shall pay the defendant the said sum, unless a sum is agreed within 21 days of today's date.

**AGNES ACTIE
HIGH COURT JUDGE**

BY THE COURT

REGISTRAR