

BARBADOS.
[Unreported]

IN THE SUPREME COURT OF JUDICATURE HIGH COURT
CIVIL JURISDICTION No. 503 of 2001

BETWEEN

DESMOND GRAY FIELD

Plaintiff

AND

BRITISH-AMERICAN INSURANCE COMPANY
(BARBADOS) LIMITED

Defendant

Before the Honourable Madam Justice Margaret Reifer, Judge of the High Court (Acting)

2002: February 4, 5, 6 and 8.

March 6.

Appearances:

Mr. Erskine Hinds in association with Mrs. Vanessa Kodilinye for the Plaintiff
Mr. Patterson Cheltenham, Q.C., in association with Mr. Edmund Hinkson
and Mr. Alrick Scott for the Defendant.

DECISION/JUDGMENT

Desmond Gray Field (hereinafter referred to as the Plaintiff) was the owner from 1987 to sometime in 1999 of the property known as "Coleston" situate at Top Rock in the parish of Christ Church. Pursuant to the acquisition of the said property, the Plaintiff by Deed of Charge dated the 4th August 1987 mortgaged the said "Coleston" to the Defendant British-American Insurance Company (B'ados) Limited in the sum of \$105,000. Subsequently, by Deed of Charge dated the 6th September, 1990 the Plaintiff mortgaged the same property to the Barbados Development Bank by way of second charge in the sum of \$150,000. This said mortgage was transferred by the Barbados Development Bank on the 21st day of April 1997 to a company named CRL Limited.

On 11th December 1997 the Defendant made application to the High Court and on that said date obtained an Order of the Court to sell the subject property by private treaty or public auction.

By agreement dated the 11th September 1999 the Defendant, in the purported exercise of its power of sale as mortgagee, agreed to sell and one Sarah Amlot (the purchaser) agreed to purchase, the said "Coleston" for the sum of \$250,000. This sale was completed on or about September 27th 1999 and the property conveyed to the said Sarah Amlot and one John George.

The Plaintiff's claim is (i) that the Defendant failed in its duty "of care to take reasonable precautions to obtain the best price or the true market value of the property and (ii) to act in good faith and have regard to the interests of the Plaintiff. The Plaintiff further alleges that the best price obtainable and/or the true market value of the property on the relevant date was the sum of \$485,000. In other words, the Plaintiff alleges that the Defendant acted negligently in selling the subject property at an undervalue, the Particulars of Negligence and Failure to Act in the Interests of the Plaintiff being a set out at paragraph 6 of the Plaintiff's Statement of Claim as follows: -

- "(a) failing to obtain a true and proper open market valuation of the said property;
- (b) failing to act in good faith and without reckless disregard for the Plaintiff's interests;
- © failing to take reasonable care to obtain the true market value of the said property at the time of sale;
- (d) failing to advertise the said property for sale in the daily newspapers or any other appropriate publication so as to expose the property to prospective purchasers;
- (e) failing to take steps to obtain proper tenders
- (f) failing to consult a real estate agent as to the best obtainable price after an agent had an opportunity to explore the market".

The Plaintiff alleges loss and damages together with interest and costs in the sum of \$220, 874.49, particulars of which are set out in the said Statement of Claim.

The Defendant denies that it failed to take reasonable precautions or that it failed to act in good faith and with proper regard for the interests of the Plaintiff. The Defendant contends that the proper price and/or true market value of the property at the time of the sale was \$250,000. Additionally the Defendant contends that the property was sold at the price of \$250,000 with the consent and knowledge of the Defendant who is now 'estopped' from claiming that the property was sold at an undervalue.

The Law

Statute law, namely the Property Act Cap 236 provides general guidance as to the mortgagee's duty in exercising its power of sale, but common law and equitable principles are most relevant in the circumstances.

The relevant statutory provisions are to be found in the Property Act Cap. 236. Section 110 (1) which states as follows:-

"A mortgagee, where the mortgage is made by deed, has the following powers, to the like extent as if they had been in terms conferred by the mortgage deed but not farther

- (a) 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, evidence of title or other matters as the mortgagee thinks fit, with power to vary any contract for sale, to buy in at an auction or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby "

Section 113 (1) states as follows:

"It is the duty of a mortgagee, in the exercise after the commencement of this Act of his statutory or express power of sale, to act in good faith and have regard to the interests of the mortgagor".

I have reviewed the authorities on point and have found the case of Cuckmere Brick Co. Ltd. v Mutual Finance Ltd. (1971) 2 ALLER 633 (credited by most authorities as having clarified and settled the law) as providing the most succinct definition and/or explanation of the relevant common law and equitable principles. This case provides authority for the proposition that in addition to the duty to act in good faith, the mortgagee is under a duty to obtain the true market value of the property at the moment of sale. Salmon LJ at page 433 summarizes the law thus:

"...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 release 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 these 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, conflicts with these 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 of the mortgagor".

He further states at page 646:

"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".

Cuckmere settled the law in that it established the 'good faith' standard and the 'duty of care' standard as being the measure of the nature and extent of the mortgagee's duty in the exercise of the power of sale. Prior to Cuckmere the case law developed two different standards of the care to be applied and contributed to much uncertainty in the law on this issue.

These authorities provide only general guidelines and ultimately the conduct of a mortgagee must be judged in the context of its particular circumstances.

The Facts

Now to the facts. It cannot, and has not been denied that the Defendant Mortgagee has vested in it a 'power of sale' exercisable on default by the mortgagor Desmond Gray Field. It is clear from the evidence that at the time of sale, and in fact, for many years prior thereto, the Plaintiff was in arrears of his mortgage payments. The Plaintiff's evidence, confirmed by that of the Defendant's accountant Mr. Toppin is that, at the time of sale he was about three (3) years or thirty six (36) months in arrears. The issue therefore is not the right to exercise the said power of sale but the manner of its exercise.

The Plaintiff's case turns on two main arguments:-

- (1) Firstly, that in 1999 the mortgaged property was valued at \$485,000 and;
- (2) Secondly, that in failing to advertise the property in the newspapers that the Defendants "failed to act in good faith or to take reasonable precautions or care to obtain the best price or true market value of the Plaintiff's property and did not have regard to the Plaintiff's interests as required by law.

It is the opinion of this Court that there is evidence beyond the civil standard of proof, namely on the balance of probabilities, which establishes the market value of this property at the time of sale. The evidence shows that this property was first valued for the Mortgagee/Defendant in 1986 by Ronald Stoute & Sons, when it was said to have a value of \$225,000 and it's condition found to be fair. "At that time it was twenty-seven (27) years old and it was becoming tired and in need of routine maintenance".

(Evidence of Mr. Francis Stoute.)

In May 1994 at the instruction of the Mortgagee Mr. Francis Stoute of Ronald Stoute and Sons again valued this property at \$260,000 with a 'forced sale' value of \$230,000. In his evidence Mr. Stoute speaks of finding that the property had deteriorated and was no longer in fair condition.

In December 1994 it was valued by Mr. Lionel Barrow of Property Sales Ltd. on behalf of the Second Mortgagee pursuant to the second mortgage earlier mentioned, in the sum of \$325,000 and Mr. Barrow states therein:

"found substantial deterioration in the property in 1994..... What I saw was a property that was being neglected".

Mr. Barrow's evidence was that in his opinion a valuation report has a life of one year.

In March 1998 Mr. Stephen Wiltshire of Felicity Ltd., applying three methods of valuation valued this property at \$350,000. The evidence is that Mr. Wiltshire was retained by the Mortgagee/Defendant to prepare this valuation for the purpose of guiding the Defendant company as to whether it should set up a loss reserve. He gave graphic evidence as to the poor state of the property, and on the assumption that the deterioration then seen (March 1998) had continued unabated through two rainy seasons to August 1999, he opined that the 'market value' of the property would have been between \$275,000 and \$280,000 and the forced sale value between \$260,000 and \$265,000.

In March 1999, the Mortgagee out of an abundance of caution decided to update the earlier report of Mr. Wiltshire and once again secured the services of Mr. Francis Stoute who valued the property, using market and forced sale methods, at \$225,000. Mr. Stoute found the difference between what he saw in 1998 and what he saw in 1999 to be quite substantial and was of the opinion that "... there was little that could be salvaged except the walls".

The above-mentioned persons were all tendered and accepted by the Court as expert witnesses and in reviewing their evidence and reports I adopt the words of Salmon LJ in the Cuckmere case as follows:

"The valuation of a plot of land depends on the knowledge, experience, expertise and ability of the valuer. 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"

The above-mentioned state and value of the premises is corroborated by the evidence of Sarah Amlot the purchaser who gave evidence as to the condition of the property in 1999 as follows :-

"The property was very run down when I purchased it... Almost derelict. The ceilings were coming down in some of the rooms, the floorboards in some of the upstairs apartments were very dodgy. There was a lot of termite damage especially around the door frames, the roof leaked in several areas. The downstairs apartments were getting water through from plumbing upstairs..... The basic exterior walls seemed to be sound. Everything else needed to be ripped out and start all over again".

The Plaintiff's evidence in cross-examination was to the effect that he depended on income from the property to carry out his on-going work of renovation and repair. In the years leading up to the sale he was getting little money from his tenants. The only income he was receiving from the tenants was \$1,300.00 per month from a Ms. Trotman and Mr. John George. At the time of sale he was receiving \$700.00 from tenant Ms. Trotman. All other tenants had refused to pay. His financial state was so dire, that the Plaintiff admits that in the last year and a half to two years leading up to the sale, he had to borrow money in order to eat. Clearly, the Plaintiff's financial woes did not allow him to halt the tide of deterioration enveloping the property or to pay his various mortgages. The significance of this can be seen in the words of the Plaintiff "I could only work when I had money in my hand to work with" ... and unfortunately in the latter years he had little or none. It is significant and consistent that in his Report of 1998 Mr. Stephen Wiltshire assessed depreciation of the property in an amount of 50%.

The Defendants' evidence is that, after themselves viewing the physical deterioration of the property, they took the reports of Mr. Wiltshire and Mr. Stoute into account in setting a reserve price of \$250,000. They placed Notices for Sale on the premises and let it be known by word of mouth that the property was for sale. They received several inquiries and six (6) written offers. The defendants negotiated with the eventual purchaser Sarah Amlot, (whose starting offer was \$225,000), until an offer of \$250,000 was made and accepted.

There is no evidence supportive of the Plaintiff's allegation that in 1999 this property was worth \$485,000 and the burden of so proving by the Plaintiff is not discharged. The Plaintiff proffers his opinion based only on a replacement cost referred to in the valuation report of Mr. Lionel Barrow in 1994.

It is my finding that having determined to exercise its power of sale, the Defendants took reasonable care (the duty in law) to obtain the true market value of the property. There is clear evidence of a consistent approach at all times since 1994 to be aware of the mortgage value and forced sale values of the property. At all times the Defendant responsibly engaged the services of reputable and competent valuers in this community namely, Ronald Stoute & Sons and Felicity Ltd. There were entitled to and relied on the opinion of competent valuers.

In the Trinidad Court of Appeal case of Derrick v Trinidad Asphalt Holdings Ltd., found at (1979) 33WIR 273, the appellant alleged that the purported sale of her property under the exercise of a power of sale under a mortgage was not binding on her because the property had been sold at an under-value and privately. The Court of Appeal upheld the trial judge's finding stating thus (per Corbin JA):

"The judge was also justified in finding that the first respondent had accepted the advice of a competent real estate agent and that as he had obtained a reasonable price for the property, there was no question of a sale below value".

I accordingly find in this case that the Plaintiffs took reasonable care to establish and to obtain the true market value of the property and relied on the advice of competent real estate agents to do so. Cairns LJ in the Cuckmere case defined acting in good faith as 'not willfully or recklessly sacrificing the interests of the mortgagee. There is no evidence of lack of good faith or a reckless disregard for the plaintiffs interests.

Counsel for the Plaintiff Mr. Hinds has made much of the fact that the Defendants failed to advertise the said property in the local daily newspapers or any other appropriate publication so as to expose the property to prospective purchasers. He argues that the right to sell by private treaty does not relieve the Defendants of the responsibility to publicly advertise the property for sale. He argued strongly that market value can only be determined if the property was "exposed for sale in the open market". He states that inherent in the term 'market value' is the element of exposure.

His argument in effect provides that 'market value' or rather 'open market value' (as coined by Mr. Hinds) cannot be obtained by securing the valuations/ opinions of competent valuers but can only be obtained by advertising the property widely and determining the best price obtainable, be it higher or lower than the price advanced by competent valuers.

I cannot accept this argument. The test, on the authorities, is to establish whether reasonable precautions have been taken to establish the true market value.

The following point is made in the text the 'Mortgagee's Power of Sale by C E Croft at page 74:

"If the sale is made in good faith for a fair price the mortgagee may sell by private contract although the sale has not been advertised: Davey v Durrant (1857) 1 De G and J 535..... Of course, a mortgagee selling by private contract especially if the sale has not been advertised, runs a greater risk of the sale being challenged by the mortgagor, or other persons interested in the equity of redemption, on the ground of breach of duty. For this reason, most mortgagees prefer to sell by public auction. If the sale is by private contract it would be desirable for the mortgagee to first obtain one or more, depending on the circumstances, estimates of the value of the mortgage property from competent estate agents".

Similarly, in exploring the limits of the 'good faith' and 'duty of care' rules Cousins in the text The Law of Mortgages (2nd edition) at page 295 states:

"... now that the law has been clarified in that any mortgagee is required to act not only in good faith but also with reasonable care, how far does this duty extend? Having regard to the earlier cases, it appears that the mortgagee is under no duty to advertise the security, nor is he bound to sell it by auction: Davey v Durrant above; Bank of Cyprus (London) Ltd. v Gill [1980] 2 Lloyd's Rep.51"

Selling without advertising may, in certain circumstances, be unreasonable and is a matter for the judgement of the mortgagee, but every case must turn on its own facts. In the evidence before this court and in the context of what was done by this mortgagee in the exercise of his power of sale, I find that reasonable precautions were taken by the Mortgagee and in the words of Salmon LJ in the Cuckmere case, the mortgagee herein was not on the 'wrong side' of the line.

In conclusion therefore, in addressing the two main points of the Plaintiff's claim I find firstly, that the Plaintiff has failed to discharge his burden of proving that the subject property was valued at \$485,000 in 1999. I am satisfied on looking at the facts broadly that \$250,000 was a reasonable price. Secondly, the failure of the defendant to advertise this property in the newspapers did not amount in the context of this case to a "failure to take reasonable precautions or care to obtain the best price or true market value.

The plaintiff's case fails and accordingly I grant judgment for the defendants with costs fit for two counsel to be agreed or taxed.

Margaret Reifer

Judge of the High Court (Ag.)

