

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 580 of 2012

BETWEEN:
SAGICOR LIFE INC.

CLAIMANT

AND

IVOR ALLMAN

DEFENDANT

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearing: 2014 August 28th, 29th,
September 16th, 18th, 23rd,
October 3rd, 22nd,
December 12th**

Appearances:

Mrs. Jennifer King Attorney-at-Law for the Claimant
Mrs. Sally Comissiong Attorney-at-Law for the Defendant

DECISION

[1] On December 12th 2014, this Court orally informed the parties of the Order granted in this matter and promised a written decision, which follows hereunder.

Introduction

[2] There are two Applications with respect to which this Court is being called on to make a Ruling.

[3] The First was filed by the Claimant Sagicor Life Inc. on April 17th 2014 and is an Application that “The Court approves the sale by the Plaintiff of the Defendant’s property at No. 36 Pine Road, Belleville in the parish of Saint Michael for the sum of \$1,300,000.00”.

[4] The Second Application was filed on September 10th 2014 by the Defendant, seeking a postponement of the proposed sale by the Claimant to September 30th 2014, to enable the prospective purchasers of the Defendant to purchase the subject property for the sum of \$2.15 million.

[5] Both applications were supported by Affidavits.

[6] This Court considered it necessary (and practical) to deal with both applications at the same time.

The Background to this Matter

- [7] This matter has a long and tortuous history, beginning with the filing of a Fixed Date Claim Form by the Claimant in April 2012. This was essentially a mortgage action, *inter alia*, for the payment of the mortgage in the sum of \$652,213.75; (by the Defendant to the Claimant herein) or alternatively, possession and sale.
- [8] Between June 2012 and October 2013 this matter was heard by **Kentish J.** and me, during which time the Defendant was given several opportunities to make payments to the mortgagee (the Claimant herein) and/or to find a purchaser for the subject property.
- [9] On October 17th 2013, the Claimant was granted an order for possession of the mortgaged property, which was suspended until May 31st 2014.
- [10] The Defendant had liberty to apply in the event that he secured a willing and able purchaser, or alternatively was able to redeem the mortgage. There was no exercise of the liberty to apply.
- [11] In April 2014, as stated above, the Claimant sought the Court's approval of the proposed sale.

The Application to Approve the Proposed Sale and Affidavits in Support and Response

- [12] The Affidavit in Support of this Application by counsel Ms. Jennifer King reveals that in December 2013, the Claimant received an offer to purchase the subject property for the price of \$1,300,000. It also entered into a contract dated February 2014 for said sale.
- [13] The Agreement however provides that the sale is subject to the approval of the Court.
- [14] The Claimant/Mortgagee contracted a valuation prior to entering into this contract. For this purpose the Claimant used Doug's Realty.
- [15] The Claimant/Mortgagee also exhibited the Land Tax Demand Notice for 2013-2014 which gives an Improved Value of \$1,400,000.00.
- [16] The first valuer Doug's Realty, on February 25th 2013 produced a written valuation, exhibited to the Affidavit, which expressed a Market Value of \$1,750,000.00, and a Forced Sale Value of \$1,207,500.00. This valuation noted the poor and deteriorating condition of the first floor of the building.
- [17] Under cover of Affidavit dated May 23rd 2014, the Claimant exhibited another valuation by Doug's Realty Ltd dated March 20th 2014 with revised figures. In this more current valuation, a Market Value of \$1,719,000.00 and a Forced Sale Value of \$1,117,350.00 was placed on the subject property. This valuer, in this more current valuation, commented on the cracks on the ground floor of the building, water stains on the ceiling of the ground floor, electrical wires not properly connected, plumbing disconnected and evidence of termite infestation and leaks, all contributing to the "awful condition" of the first floor.
- [18] A second valuation was also exhibited in this Affidavit. It is the valuation of Mr. George Ramsay of George A Ramsay and Co. Ltd. who attributes lower values to the subject property: a Market Value of \$1,000,000.00 and a Forced Sale Value of \$800,000.00 and a Replacement Value of the building of \$500,000.00.
- [19] In said valuation, the valuer observed that the first floor of the subject building was not "in marketable condition", and that the poor market conditions have resulted in a general diminution in property value of between 15 and 20% within the last three years.

- [20] Photographs of the exterior and interior of the building were exhibited by both valuers.
- [21] The Report of George Ramsay & Co provided comparative sales data for properties in the area. In his oral evidence, he told the Court that it was within his knowledge that the asking prices for the properties referenced in this comparative data, have been reduced. For example, one property first listed at \$2.5 million was now listed at \$1.6 million after a number of reductions in price. This property had been offered to 75 persons of whom only 6 showed an interest and viewed the property, and no offers had been received at the date of the hearing. In addition, no interest had been shown in seeing the property since March 2014. Other examples, showing the same trend, were given.
- [22] The Defendant filed an answering Affidavit challenging the above valuations on May 23rd 2014 and exhibiting the Report of structural engineer Bentley Norville (this Report spoke solely to the condition of the building), and HF Toppin and Associates Ltd chartered Quantity Surveyors, who valued the same property at \$2,950,000.00.
- [23] The Defendant deposes at paragraph 14 of this Affidavit that he had several interested prospective purchasers at \$2.15 million (none exhibited), and a recent offer of \$2.5 million, a copy of which said offer was exhibited therewith. This will be addressed later in this ruling.

The Oral Evidence and Cross-examination

- [24] The Claimant called two expert witnesses to speak to the current market value of the subject property.
- [25] First called was Mr. George Ramsay, who gave his credentials for expert testimony being, *inter alia*, 27 years in the business of conducting valuations, and an impressive client list in Barbados and throughout the Eastern Caribbean. In his evidence-in-chief, he explained in great detail his methods in conducting a valuation, and most importantly, the factors taken into account by him in arriving at a Market Value.
- [26] This evidence was in the opinion of the Court particularly relevant. In response to counsel's query as to whether it is usual to have a Replacement Value that is way in excess of the Market Value he responded as follows:
- “It is possible and it often happens in a market like the one we are currently in. Between 2009 and 2013 there has been approximately a 30% drop in recorded sales. As a result there has been a decline in market values which in some cases mirror a decline in sales. We have seen as much as 40% in some properties. But the Building Cost/Replacement Cost has not necessarily followed that. So the cost of replacing a building could be somewhat more significant than Market Value. Although construction costs have fallen they have not fallen significantly.”
- [27] Mr. Ramsay also told the Court that in the present market conditions many properties were being sold at their Forced Price Value or the owners were forced to reduce their asking price between 10 and 30%. The present market conditions have been harder on commercial properties than on residential. This reduced demand has been as a result of businesses closing and/ downsizing. From his personal observations there are very few persons in the market for commercial properties, and those who are, negotiate harshly. He stands firmly by his valuation as the market continues to decline, and he opines that

- until there is a significant recovery in the economy and businesses start up again, properties will remain on the market and owners will have to negotiate.
- [28] Specifically as it relates to the Belleville area, he told this Court that this area is not in high demand as it once was, as can be seen from the significant number of For Sale and For Rent signs visible in the area.
- [29] In cross-examination, he declined to make any assessment of the structural integrity of the building as his expertise is in determining Market Value and he made a market assessment and nothing more.
- [30] The Claimant's second witness was Mr. Dacosta Douglas of Doug's Realty who, after laying the basis for his expert testimony (being *inter alia*, 27 years experience), gave evidence of similar import and effect as Mr. George Ramsay. In his oral evidence he spoke of the poor condition of the building, especially the first floor, where he saw evidence of termite infestation in the access stairway and elsewhere, poor electrical wiring, leaks and staining of the ceilings and walls. The ground floor in his opinion was the most valuable part of the building. His method was, Replacement Cost devalued by 35% because of the poor condition of the building. He depreciated the Market Value by 20 to 30% to determine the Forced Sale Value. It was made known in his oral evidence that the valuation of 2014 was the last of three (3) valuations carried out by him.
- [31] He also spoke to the current state of the market and expressed the view that "in this present market, it would take a considerable time to sell a property." He told the Court that vendors are dropping their prices to attract buyers and still persons are not buying. In his opinion, sales are the exception rather than the norm. Persons are even dropping their asking price below the forced sale value just to get the property off the market. He told the Court that in this market everybody is looking for a bargain.
- [32] Quantity Surveyor Harold Toppin gave evidence for the Defence and was accepted as an expert witness. He has been a practicing Quantity Surveyor since the 1970s. In the course of his business he carries out valuations. As a Quantity Surveyor his work is to prepare costings; that is, for example, how much it will cost to build a house. He was asked to and produced a Report on the subject property dated May 23rd 2014. This is the Report earlier referenced in which the property was valued at \$2.950 million. His method of determining Market Value was a "simple mathematical addition of the value of the structure and the value of the land". In conducting this mathematical exercise he used a building cost of \$500 (which he admitted was on the high side in cross-examination) and a price per square foot of the land at \$75 (It is noted that Mr. Ramsay used \$50). He expressed the opinion that the building was in good condition although some work still had to be done on it. Work was in progress when he visited the building. In cross-examination he maintained that he saw no evidence of rising damp or termite infestation. This witness was not a good one.
- [33] Witness Bentley Norville next gave evidence for the Defence.
- [34] He is a Civil engineer practicing his profession continuously since 1980. His area of specialty is old buildings especially those constructed of coral stone. He prepared a Report dated May 2014 with 10 photos attached, which speaks to the condition of the building, although this Report does observe that his "survey was mainly confined to the ground floor level". He saw no evidence of termite infestation and all the cracks that he saw were minor and can be repaired; and in his professional opinion none of them were of any significant structural nature. He stated further that "the general condition of the

building is very good considering the age and work on progress on the upper floor.” This witness did not speak to the value of the building.

- [35] That was the evidence of the parties on the first Application.
- [36] With respect to the second Application of the Defendant, counsel Mrs. Comissiong indicated that she was standing on her Affidavits (affidavit of Ivor Allman of September 10th 2014 and affidavit of Hugh Gilkes of same date), and advised that she would not be tendering her client for cross-examination. There was no objection to this by counsel for the Claimant and the matter proceeded.
- [37] The Affidavit of Ivor Allman spoke to purchasers identified as Mr. Hugh Gilkes *et ux*, who are prepared to purchase the property at \$2.15 million. The Affidavit of Hugh Gilkes spoke to the fact that he has entered into an agreement to purchase the subject property for \$2.15 million. The source of his funding is “the proceeds from my overseas investment which has matured” and which will be available from September 2014. What is notable about this affidavit evidence was the failure to exhibit the agreement deposed to and the failure to provide any evidence establishing that this intended purchaser is a willing and ‘able’ purchaser.
- [38] When this was drawn to the attention of the Defendant, a further affidavit was filed on September 30th 2014 exhibiting the said Agreement. This agreement evidences the payment of a nominal deposit of \$3000 on a purchase price of \$2,150,000.00.
- [39] Both parties filed Written Submissions.

The Law

- [40] The law in this matter is not in dispute. The accepted principle is that outlined in the case of **Cuckmere Brick Co Ltd and another v Mutual Finance Ltd [1971] 2 All ER 633**, (known to be the ‘*locus classicus*’ on this point), and followed by this Court in **Desmond Gray Field v British- American Insurance Company (Barbados) Limited (Unreported No. 503 of 2001 delivered on March 6th 2002)**.
- [41] **Cuckmere** establishes that at common law and in equity, 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. The principle to be applied is best espoused by **Salmon LJ** at page 643 as follows:
- “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. ... 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.”
- [42] Relevant statutory provisions can also be found at **sections 110(1) and 113(1) of the Property Act Cap. 236 of the Laws of Barbados**.
- [43] See also **Bell v Long (2008 All ER (D) 179 (Jun); Meah v G E Money Home Finance Ltd [2013] EWHC 20 (Ch) and Cousins on The Law of Mortgages 2nd ed cited by the Claimant and CE Craft on Mortgagees Power of Sale at p.74 and The Law of**

Real Property by Robert Megarry and H W R Wade (5th ed) at page 9 cited by the Defendant.

Disposal

- [44] I share the view (expressed by Mr. Ramsay) that real estate agents (especially in the current market) are better suited to assess Market Value than quantity surveyors, the main basis of whose assessment/calculation is Replacement Cost.
- [45] In addition, the Defendant's witness Mr. Toppin was not a good witness. He had extreme difficulty in recognizing his own photos and his description of the building was at odds with the photos shown. He stated firmly in giving his evidence that he knows nothing about market prices, only construction costs.
- [46] On the other hand the witnesses, Mr. Ramsay and Mr. Douglas, were good witnesses who ably defended their reports.
- [47] This Court finds that reasonable precautions have been taken to establish the true market value of the property and there is no evidence on the face of the record that the Claimant has acted in bad faith.
- [48] The application of the Defendant falls far below the standard that would persuade a Court to stop the proposed sale as no effort was made (despite the many opportunities provided by this Court) to satisfy this Court that the Defendant had secured an "able purchaser".
- [49] Accordingly, this application fails and the Court approves the sale by the Claimant of the Defendant's property at No. 36 Pine Road Belleville for the sum of \$1,300,000.00.

MARGARET A. REIFER
Judge of the High Court