COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL LAW DIVISION

19997/CLE/gen/629

Between

LAWRENCE McKINNNEY

Plaintiff

AND

BAHAMAS DEVELOPMENT BANK

First Defendant

AND

ROOSEVELT BUTLER

Second Defendant

AND

KIM ROLLE

Third Defendant

Before:	**Hon. Justice Claire Hepburn**
Appearances:	**Ian Winder (with Philip McKenzie) for the Plaintiff**
	Raynard Rigby for the Second Defendant
	Tara Rolle (with Jason Romer) for the Third Defendant
Hearing:	**11, 12 and 13 September 2012**

J U D G M E N T

Hepburn J

The Claim

This action has a long history. By Specially Indorsed Writ of Summons filed 3 July 1997, the Plaintiff commenced this action against the Defendants seeking various reliefs. After changing attorneys several times and filing various court documents, the Plaintiff on the first day of the trial sought and obtained leave of the court to file a Re-Re-Amended Statement of Claim and Reply to Amended Defence of The First Defendant which had been filed on 12 September 2012.

2. This action arises out of two separate commercial arrangements. The first, and perhaps, foremost is the sale by the First Defendant (the Bank) to the Second Defendant ("Butterfield") and the Third Defendant ("Rolle") (together "the Defendants") of two lots situate in Oakes Airport Subdivision ("the property" or "the mortgaged property"), which had been mortgaged by the Plaintiff to the Bank by mortgage dated 1 February 1991 ("the mortgage") and a Further Charge dated 28 February 1991 ("the further charge") (together "the mortgages"). The sale by the Bank was purportedly pursuant to the power of sale contained in Clause 6(10) of the mortgage.

3. It was a term of the mortgage that the Plaintiff would repay the loan together with interest thereon secured by the mortgage by way of a combined monthly payment of $2,050.00. The further charge and interest thereon was to be repaid by a combined monthly payment of $590.51. The total monthly repayment was, then, $2,640.51.

4. The second transaction was a rental agreement between the Plaintiff and the Defendants whereby the Plaintiff agreed to rent the mortgaged property and the contents therein to Defendants at a monthly rent of $2,500.00. Initially, the Defendants were to pay the monthly rent directly to the Plaintiff. After the Plaintiff

relocated to Acklins Island, the Defendants agreed that they would deposit the monthly rent directly to the Plaintiff's mortgage account at the Bank, which they did until 17 July 1995[1], that is to say, after they entered into an agreement with the Bank to purchase the mortgaged property for the sum of $220,000.00. The sale of the mortgaged property to the Defendants was not completed until May 1996 some 10 months after the Defendants had paid rent to the Plaintiff.

5. By his Re-Re- Amended Statement of Claim the Plaintiff seeks the following relief:

A. Against the first Defendant:

(1) **An inquiry whether the moneys produced by the sale of the said premises mortgaged property was fair and proper price**

(2) **The amount being the value of the said premises less any amount due to the First Defendant**

(3) **An account of the monies paid by the Plaintiff and the amount due to the mortgage;**

(4) **Damages**

(5) **Further or other relief**

(6) **Costs**

B. Against the Second and Third Defendant:

(1) **Damages for breach of agreement**

(2) **Damages for wrongful conversion of the Plaintiff's equipment or alternatively damages for wrongful use of the said equipment and any damage, diminution or loss resulting thereto;**

(3) **Compensation for the amount of money and time spend on repairs requested by them;**

(4) **Damages**

(5) **Further and other relief**

(6) **Costs**

C. Against the First Second and Third Defendants:

(1) **Damages**

(2) **Further or other relief;**

(3) **Costs**

6. In the Re-Re- Amended Statement of Claim the Plaintiff alleges that that the Defendants did not pay the monthly rental payments to his mortgage account as was agreed between them.

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[1] The Defendants denied that they agreed to deposit the monthly rents to the Plaintiff's mortgage account but their evidence was that they in fact did so.

7. He also alleged that the property was conveyed to the Defendants at an under value of $222,000.00 when, on his valuation, the property was valued at not less than $750,000.00.

8. The Plaintiff also (i) claims that the price at which the property was sold was far below market value, and (ii) disputes the amount which the Bank claims is owed on the mortgage by the Plaintiff.

9. By its Amended Defence, the Banks avers that by letters dated 12 May 1993, 26 July 1993, 20 April 1995, 12 May 1995, 2 July 1996, 10 January 1997 and 6 April, 1998 "the Plaintiff was duly notified of his default under the Deed of Mortgage and the terms of the Loan".

10. The Bank also avers that "its power of sale was validly exercised in all the prevailing circumstances" and denies that "it wrongfully sold the said premises and that it sold the said premises for a price less than its market value". The Bank also contended that it duly accounted to the Plaintiff as to the proceeds of the sale and the resulting amounts due and owing on the mortgage by way of the letters hereinbefore mentioned at paragraph 9 hereof.

11. In his reply to the Amended Defence of the Bank the Plaintiff reiterated that he did not receive notification of a default in his mortgage as contended by the Bank.

12. In the Amended Defence of the Defendants it was denied that that the Plaintiff at anytime inquired of them as to whether the rent was paid to the office of the Bank.

13. They also aver that they could not have informed the Plaintiff of arrears as they had no knowledge of the status or terms of the mortgage. (Paragraph 5 Amended Defence)

The Background

14. By an Indenture of Mortgage dated 1 February 1999 ("the mortgage"), the Plaintiff granted and conveyed to the Bank a portion of lot number 2 and a portion of A and B of lot number 1 in block 14 in the northwestern section of Oakes Airport Subdivision in the western district of the island of New Providence (herein after together referred to as "the mortgaged property"). A full description of the mortgaged property is set out in paragraph 1 of the Re-Re-Amended Statement of Claim.

15. It was a term of the mortgage (as set out in Part-Two of the mortgage) that:

> **"The Borrower shall repay to the Lender the principal sum of One Hundred and Twenty Eight Thousand Dollars ($128,000.00) with interest at the rate of Eleven and one half per cent (11 ½) per annum by One Hundred and Twenty (120) consecutive monthly installments each of Two Thousand and Fifty Dollars ($2,050.00) representing repayment of principal, interest and Insurance thereon at the rate aforesaid with monthly rests the first of such installments to be paid on the 6th day of March next and each subsequent installments to be paid on the 6th day of each succeeding month until the full amount of principal and interest due hereunder has been paid and satisfied."**

16. Clause 6(10) of the mortgage provides:

> **"Section 22 of the Statute or the equivalent provision of any subsequent amending or consolidating Act shall not apply to this security but the statutory power of the said shall be as between the Lender and a Purchaser from the Lender be exercisable at any time after the execution of this security provided that the Lender shall not exercise the said power of sale until the payment of the moneys hereby secured have been demanded and the Borrower has defaulted for One (1) month in paying the same."**

17. Clause 7(1)(a) of the mortgage provides that:

> **"The full amount of the Principal and outstanding and all arrears of interest hereunder shall forthwith become due and payable and all a mortgagee's powers of sale foreclosure action possession and appointment of a receiver ... and remedies of a mortgage shall henceforth be or become available to the Lender in enforcing its security hereunder in the event any of the following contingencies coming to pass:-**
>
> **(a) Any installment of Principal and interest or any part thereof shall remain unpaid for thirty (30) days after the same shall have become due (whether formally demanded or not);"**

18. The Plaintiff claims that he had made arrangements for the second Defendant and third Defendant who were his tenants to pay rent to the Bank, which would count as the mortgage payment.

19. The Bank claims that the Plaintiff defaulted on regular payments and the Bank exercised its power of sale and sold the premises to the second Defendant and third Defendant at a price of $220,000.00.

The Plaintiff's claim

20. At the trial the Plaintiff withdrew the allegations of fraud and collusion and also the claim to set aside the sale. In his opening speech, Mr Winder stated that the Plaintiff's claim concerned the exercise of the Bank's power of sale against the mortgaged property whereby the Bank sold the mortgaged property to the second Defendant and the third Defendant, who at the time of the sale and purchase were tenants of the Plaintiff making monthly payment to the Bank on behalf of the Plaintiff.

21. The Bank exercised its power of sale and sold the mortgaged property to the Defendants without first having made a formal demand for the outstanding mortgage payments, or giving the Plaintiff notice of the sale. He stated that whilst the Bank contends that it made demand for payment of the arrears on 12 May 1995, the only notice served on the Plaintiff was the notice that the Bank had taken possession of the mortgaged property on 5 October 1995. Mr Winder stated that the Bank did not produce to the court an affidavit of service or even a copy service sheet to prove service.

22. In his opening statement, Mr Winder summarised the remaining complaints of the Plaintiff as follows:

(i) By virtue of Clause 6.10 of the mortgage, a formal demand for outstanding mortgage payments was a pre-condition to the exercise of the power of sale. Winder stated that even if the 12 May letter had been served on the Plaintiff, the plaintiff would have been given only 19 days within which to

redeem the mortgage. Furthermore, he stated, the evidence will show that the Bank exercised its power of sale before the expiration of the 19 days, and that on 29 May that the Bank accepted the offer of the second Defendant and the third Defendant to purchase the mortgaged property.

(ii) The Bank failed to take steps to secure the best price and the sale was at an under value. Mr. Winder stated that the Bank did not advertise the sale of the mortgaged property or take any other step to obtain the best price and that the Bank did obtain an appraisal or seek professional assistance from a real estate agent to determine the value of the property.

(iii) The Bank agreed with the plaintiff not to exercise its power of sale in consideration of the mortgage payments to be made directly to the Bank by the second Defendant and the third Defendant.

The evidence

The evidence for the Plaintiff

23. The Plaintiff called two witnesses, himself and Ernest Moss, who described himself as a long time friend of the Plaintiff.

24. The evidence in chief was by witness statements.

The Plaintiff - Lawrence McKinney

25. The Plaintiff stated that sometime in the early 1990's (i) he rented the mortgaged premises to the second Defendant and third Defendant at a monthly rental of $2,500.00, (although he could not recall the monthly mortgage payments and had to refresh his memory from the documents). He stated that the Bank agreed to receive the rent from his tenants and apply the same to his mortgage account. He further stated that the Bank also agreed to inform him should there be any default in payments. The Plaintiff confirmed this evidence in cross examination. His viva voce evidence was that he and Andrew Sandford ("Sandford") discussed the arrangement by telephone and Sandford told him that he would be at the mortgaged property each

month to collect the rent from the Defendants. The Plaintiff further stated that on 5 October 1995, he received letter dated 12 July 1995 from the Bank advising that due to arrears in the loan account and that the Bank had accepted an offer to purchase the mortgaged premises. The Plaintiff also stated that he never received any letters from the Bank advising that his account was in arrears or that the Bank intended to exercise its power of sale over the mortgaged premises.

26. The Plaintiff's evidence in that regard never changed in his cross examination and re-examination at the trial. He insisted that he had informed the Bank of his move to Acklins in 1991 or 1992 and that he did not recall receiving any letters from the Bank in Acklins or at any of his other business places in New Providence. He maintained his evidence that Sandford agreed to let him know of any delinquency. He admitted that he was in default in 1993 and that the amount of default stated in the Bank's letter of 12 May 1993 could be correct but he insisted he never received that letter, nor the letter of 26 July 1993 to P.O. Box N 3606

27. The Plaintiff stated that the mortgaged premises was sold without the Bank giving him the opportunity to either bring his account current or to secure a higher offer to purchase. He thought the mortgaged property was valued at about $750,000.00 but he did not have the building appraised by a professional real estate appraiser.

The Plaintiff's witness - Mr Ernest Moss

28. Mr Moss stated in his witness statement filed 3 May 2010 that he accompanied the Plaintiff to a meeting with Butterfield on 5 May 1995 at which Butterfield agreed to make rental payments of $2,500.00 monthly due to the Plaintiff directly to the Bank. He also stated that during that same meeting the Plaintiff telephoned Sandford and informed him of the arrangement which he and Butterfield had made that Butterfield would pay directly to the Bank the monthly payment of the rental payments of

$2,500.00 and that Sanford would be the person responsible for collecting the payments.

29. Moss stated that Sanford also confirmed that should any delinquency or default in payment occur he would advise the Plaintiff. Moss did not say how it was that he could hear Sanford's side of the telephone conversation – e.g. that the Plaintiff had activated the speaker phone during his conversation with Mr Sandford.

30. In his viva voce evidence, however, Moss admitted in cross examination that he only witnessed the handwritten agreement, that he did not know the nature of the document, that the conversation between the Plaintiff and Butterfield did not take up much time, that he did not recall the conversation between the Plaintiff and Butterfield, that while he was at the meeting, he heard the Plaintiff's side of a telephone call, that the speaker system was not activated and he did not know who was on the other side of the telephone conversation, he could not hear or identify the person to whom the Plaintiff was speaking and that he did not know Mr Sanford. Obviously then, his evidence in chief concerning the alleged telephone conversation between the Plaintiff and Sandford has been discredited and is of little probative value.

31. Moss stated that the arrangement between the Plaintiff and Butterfield was reduced to writing and that he signed the written agreement. At the trial he identified his signature on the agreement (at Tab 21 of the Agreed Bundle).

The evidence for the Bank

John Archer - The former manager of delinquency control & collections at the Bank

32. By his witness statement, John Archer ("Archer") stated that the Bank's loan detail report dated 13 April 1995 (at Tab 6 of his witness statement) revealed that the

Plaintiff was in arrears of the loan in the principal amount of $7,896.65 and interest in arrears of $9,232.28 totaling $17,128.93.

33. Mr. Archer further stated in his witness statement that as a result of the Plaintiff's default on the loan, the Bank exercised its power of sale pursuant to the mortgage and that the sale was concluded on the 20 February 1996.

34. Archer stated that by way of letter dated 6 April 1998, the Plaintiff was duly advised by the Bank that the loan balance stood at $58,437.12 and that the bank was advertising the other property situated at Oakes Field. (See paragraph12 and Tab 14 of his witness statement). The letter dated 6 April 1998 concerned the Plaintiff's home in Oakes Field and notified the Plaintiff that the account was seriously in arrears. Archer also stated that a final notice dated 10 January 1997 was sent to the Plaintiff. (Tab14 – Witness Statement of John Archer). That letter informed the Plaintiff that he was in arrears to the tune of $56,694.01 and that he had until 24 January 1997 to bring the account current.

35. In cross examination, Archer testified that he was responsible for advertising the mortgage property for sale and accepting bids. He informed that the sale of the property was advertised, but he could not produce a copy of the advertisement. The best he could do was to produce and invoice from the Nassau Guardian which did not specifically identify the advertisement. That is unfortunate as not only must the Bank prove that the property was advertised for sale, but also the contents of the advertisement, as that could influence the sum prospective purchases would bid on the property. An advertisement which simply identifies the property for sale would not attract as high an offer as would advertisement which describes the structure on the property, if any.

36. Archer confirmed in cross examination that many letters were written to the Plaintiff concerning the status of his loan which was in default. However he could not

say if any of them was actually delivered to the Plaintiff. Archer testified that he did not know that the Plaintiff had move to Acklins but he agreed that the Bank had in its files an Acklins address for the Plaintiff.

37. Mr. Archer claims that the Bank properly and diligently discharged its duties in relation to the Plaintiff in accordance with the mortgage and received numerous bids and accepted one of those bids. Archer stated that the sale of the mortgaged property was not done secretly. He stated that at no time during his dealings with the Plaintiff's matter did he, the Bank or any officer under his supervision agree to accept or to collect any rental income for and on behalf of the Plaintiff from any tenant to offset the agreed monthly payments (para18 of Mr Archer's witness statement) and he stated that it is not the policy of the Bank to make such arrangements "as it alters the primary duty of the borrower/customer to make the agreed monthly payments under the loan facility".

Christopher Armaly – Real Estate Broker

38. The Witness Statement of Christopher Armaly, a licensed real estate broker verifies that the property was valued at the price it was sold at in 1995. He appraised the mortgaged property, not the time of the sale, but years later on 22 March 2010, using the retrospective approach.

The evidence of Andrew Standford

39. Andrew Standford's ("Standford") evidence in chief was that based on Bank reports, he could confirm that the Plaintiff was aware of the status of his accounts and knew of the steps the Bank was taking, had taken and the advances that were due and owing to the Bank's order. (Paragraph 7 Witness Statement – Andrew Stanford)

40. He stated that from his conversations with the Plaintiff it would appear that the Plaintiff always acknowledged that he was in default of his mortgage payments.

41. Standford further stated that at no time did he agree to collect any rents on behalf of the Plaintiff and further stated that to do such was not the policy of the Bank.

The evidence for the Second Defendant the Third Defendant

The Second Defendant - Roosevelt Butterfield

42. In Butterfield's Witness Statement he stated that there was a strong inference that the Plaintiff knew that his mortgage was in arrears, as the Plaintiff approached him just two weeks prior to the Bank approaching him (Butterfield) to inquire whether he wished to purchase the mortgaged property for what he felt was an inflated price of $750,000.00 and that he declined the offer. **(Paragraph 7. Butterfield Witness Statement).** He and Rolle then put a counter offer to the Bank in the amount of $180,000.00 which the Bank rejected the offer. Their second bid of $220,000.00 was accepted by the Bank. He testified that the Bank gave him no information as the value of the mortgaged property. Butterfield stated that it was highly unlikely that the Bank would have accepted a bid from himself and Rolle if they were delinquent in paying the rent which they paid directly to the Plaintiff's mortgage account at the Bank

43. Butterfield stated that at no time did he or Kim Rolle, his business partner breach the agreement between themselves and the Plaintiff.

44. Butterfield testified that once their offer accepted by the Bank he stopped paying rent to the Plaintiff. However, Rolle made two further payments of rent on 20 June 1995 and 17 June 1995. He testified that he had no communication with the Plaintiff concerning the purchase of the property.

45. As to contents of the building, his evidence was that at the time of sale the equipment was generally in a state of disrepair or infested with vermin and not fit for any purpose, so he and Rolle got rid of them.

The third Defendant – Kim Rolle

46. In her witness statement Rolle stated that she had no knowledge of the arrears nor of the status or terms of the Plaintiff's mortgage.

47. She stated that she personally made the payments to the Plaintiff and sometimes made payments directly to the Bank after being directed to do so.

48. She stated that she believed it was due to the regularity of their rent payments to the Plaintiff's mortgage account that the Bank approached her and Butterfield about purchasing the mortgaged property. Her evidence was that an officer of the Bank approached her and Butterfield to invite them to make a bid on the mortgaged property.

49. She stated that she and Butterfield made an initial offer in the amount of $180,000.00 which was rejected. They made a subsequent bid for $220,000.00 which was approved. **(Paragraph 6 Kim Rolle – Witness statement)**

Submissions

50. The Plaintiff's case is that at the date of the sale of the mortgaged property to Defendants the Bank's power of sale had not yet arisen as the Bank failed to serve a demand notice on the Plaintiff in accordance with Clause 6(10) of the mortgage. The Bank's case is that the Plaintiff always knew that he was in default of his mortgage payments as he knew that the monthly rent was insufficient to cover the full mortgage payment. Further, the Bank submits that when read together the net effect of the demand letters dated 12 May 1993, 26 July 1993, 20 April 1995, 12 May 1995, 2 July 1996, 10 January 1997 and 6 April 1998 is that the Plaintiff was in default of the of the terms of the mortgage and that he was duly notified of his default. He was not.

51. The Bank had a duty not serve a demand notice on the Plaintiff in accordance with Clause 6(8) of the mortgage, which provided that:

> **"... a demand for payment or any other demand under the security may be made by notice in writing by the managing director or any officer of the lender and any such notice given to or served upon the borrower shall be deemed to be sufficiently given to and served upon the borrower if addressed to the borrower and left or sent by registered post to registered office or any address as shall from time to time be notified by the borrower to the lender and any such notice posted as aforesaid shall be deemed to be given on the 5th day following the posting thereof."**

(My emphasis.)

52. That meant that the Bank had to serve the Plaintiff personally or at the last known address of the Plaintiff. The Plaintiff's evidence was that he moved to Acklins in 1991 or 1992, and although Archer testified that he did not know that the Plaintiff had moved to Acklins but he agreed that the Bank had in its files an Acklins address for the Plaintiff. How would the Bank have come to have an Acklins address for the Plaintiff in its file? On the balance of probabilities, the Bank would not have had the Plaintiff's address unless the Plaintiff had given his address to them. Having observed the Plaintiff, Archer and Sandford in the witness box and considering the answers they gave to questions put to them, on balance, I am satisfied that the Plaintiff notified the Bank of his relocation to Acklins and his contact address there.

53. The Bank was not particularly careful in addressing its various demand letters to the Plaintiff. Some of the letters were to the Plaintiff at Nassau, N. P. Bahamas, others to him at Malcolm Road, P. O. Box N 3603 Nassau, Bahamas. But that was not the most important aspect of the demand letters on which the Bank relies at paragraph 7 of the Amended Defence. What is most important is that each letter demanded payment of a difference sum of money and none of them gave the Plaintiff the required 30 days' notice. The letter of 12 May 1993 demanded payment by 26 May 1993. The letter of 26 July 1993 merely informed the Plaintiff that the property would be advertised for sale due to the delinquent position of the account. The letter of 20 April 1995 demanded payment by 4 May 1995. The letter of 12 May 1995 demanded payment by 31 May 1995 and then

the property was sold before the expiration of the notice period. In the result, no one demand letter satisfied the requirements of Clause 6(10). Mr Rigby attempted to string together all of the demand letters and to make one proper demand letter out of the lot. That is not permissible. In the result, I find that the Bank did not make a proper demand for payment of the outstanding balance. Hence, the power of sale had not arisen at the time of the sale of the property.

54. Further, the Bank did not satisfactorily prove service of the "demand" letters such as they were. The letters were to be personally served, in which case the person who personally served the demand letters on the Plaintiff, ought to have given evidence of service. There was no evidence to that effect. If the letters were sent by registered Post, the Bank ought to have produced the receipt issued by the Post Office.

55. Mr Rigby submits that the Plaintiff was aware that he was in default of his repayment obligations under the mortgage and that seems to be the evidence. He seems to suggest that the fact that the Plaintiff knew that he was in default lessened the duty of the Bank to serve proper notice on the Plaintiff. (Of course, Mr Rigby's case is that the combined effect of the letters referred to in paragraph 7 of the Bank's Amended Defence is that due notice was served on the Plaintiff.) I fear there is a misunderstanding of the true purpose of serving notice on a mortgagor.

56. The issue is not whether or not he knew he was in default of the mortgage, but whether or not he was given sufficient time in which to redeem the mortgage. The cornerstone of a mortgage is the mortgagor's right to redeem. In the instant case, the Plaintiff and the Bank agreed that the Plaintiff would have 30 days after demand for payment has been made in which to redeem the mortgage. Section 22 of the Conveyancing and Law of Property Act provides that the mortgagee's power of sale shall not be exercisable until demand has been made and the mortgagor has made default in repaying the mortgage for certain defined periods

of time. However, by section 21 of the CPLA the parties may vary the statutory period in any manner. In this case, by Clause 6(10) the parties agreed that section 22 of the CPLA shall be varied and that "the statutory power of the said shall be as between the Lender and a Purchaser from the Lender be exercisable at any time after the execution of this security provided that the Lender shall not exercise the said power of sale until the payment of the moneys hereby secured have been demanded and the Borrower has defaulted for One (1) month in paying the same". (My emphasis.)

57. None of the demand letters on which the Bank relies gave the Plaintiff one month to pay off the outstanding balance, and that is where the Bank went wrong. That is why at the time at which the Bank purported to exercise its power of sale, the power of sale had not arisen.

58. Another question for determination is whether the Bank took reasonable precautions to obtain true market value of the mortgaged property at the date which it decided to sell the mortgaged property. (See **Cuckmere Brick Co. Ltd. V Mutual Finance Ltd.** [1971] 2 All ER 633.) Mr Rigby carefully reviewed the authorities on the question and emphasised that the Bank is not a trustee for the mortgagor as regards the exercise of the power of sale. And I agree. The learned editors of Halsbury's Laws of England Volume 77 (to which Mr Rigby refers at paragraph 51 of The First Defendant's Closing Submissions) a "mortgagee owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price". Lord Justice Salmon in **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949 at 965 held that the mortgagee is under a duty "to take reasonable care to obtain what I call the true market value at the date of the sale".

59. The Bank's evidence was that the property was advertised for sale in ***The Nassau Guardian***, but it did not produce a copy of even one such notice. It is

important for the court to have sight of the actual advertisement to determine whether it sufficiently described the mortgaged property so that bidders would have a clear understanding of the extent of the development on the property. How is the court to determine whether or not the Bank breached its duty to obtain true market value at the date of the sale in the absence of evidence as to the contents of the advertisement in *The Nassau Guardian*? The offers to purchase exhibited at Tab 15 of Archer's Witness Statement are all in respect to a single family dwelling house, and not the commercial property which is the subject matter of this action, so they are of little probative value in arriving at a determination whether the Bank took reasonable care to obtain the true market value at the date of the sale.

60. The only other evidence of the steps taken by the Bank to obtain the true market value of the mortgaged property is that the Bank approached the Defendants and requested them to put in a bid for the property. Butterfield and Rolle gave evidence that the Bank initially approached them to purchase the property for $750,000.00, which is the valuation the Plaintiff placed on the property. The declined to do so. Why did the Bank first approach the Defendants with an offer of $750,000.00? The outstanding balance was far less than that amount. The Defendants' counter offer was in the amount of $180,000.00 and then $220,000.00, which was accepted by the Bank. That approach by the Bank does fall outside the category of reasonable steps to obtain the true market value of the property.

61. The Bank's evidence as to the exercise of its duty to obtain true market value at the date of the sale does not come up to proof.

62. A finding that the power of sale was not properly exercised, however, does not impeach the title of the purchasers. Section 23(2) of the Conveyancing and Law of Property Act provides:

> **"Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have tis remedy in damages against the person exercising the power."**

63. I also note that there is a conflict between clause 6(10) and clause 7(1)(a) of the mortgage. The former providing that the Bank's power of sale shall not be exercisable until payment of the mortgage moneys had been demanded and the Plaintiff as defaulted for one month in paying the same. The mortgage is the Bank's document and to the extent that clauses 6(10) and 7(1)(a) are in conflict they must be construed in favor of the Plaintiff. The effect is that the Bank's power of sale did not become exercisable until the Plaintiff had made default for one month in paying the same.

True Market Value

64. As to the fair market value of the property sold. It was the evidence of Mr. John Archer that there was no appraisal done at the time the bids were accepted by the Bank.

65. The 1991 appraisal by Mr. Ferguson put a value of $350,000.00 on the property. The 2010 retrospective appraisal by Mr. Christopher Armaly valued the property at $260,800. However the latter appraisal was retrospective while the 1991 appraisal was current at that date. The Bank did not commission an appraisal of the property.

66. Counsel for the Bank urged the court to adopt the Armaly report. Counsel for the Plaintiff urged that the court to adopt the Ferguson report, alternatively to use the median of the two appraisals, alternatively to adopt the Plaintiff's appraisal. The Plaintiff did not show how he arrived at his valuation of $750,000.00 and that figure is rejected. Mr Ferguson was deceased at the date of the trial and the Armaly report is retrospective, which Mr Armaly said was an accepted method of valuation. I am satisfied that the fairest approach would be to take the median of the Ferguson report

and the Armaly report for a figure of $305,400.00. The land was sold for $220,000.00. I accept that the appropriate measure of the loss occasioned to the Plaintiff as a result of the improper exercise of the power of sale is the difference between the value of the property and the actual sale price or $85,400.00 and the Bank must pay that sum to the Plaintiff.

67. If I am wrong in adopting the median between the Ferguson Report and the Armaly report then I direct an inquiry and accounting into the value of the property at the date of the sale as commended the court in **Cuckmere Brick Co Ltd and Another Mutual Finance Ltd** CA [1971] where it was stated:

> **"In these circumstances I consider that the course which is fairest to both parties is that there should be an inquiry as to damages on the footing that the price at which the land could probably have been sold is at large. I would so direct."**

The claim against the Defendants

68. Butterfield and Rolle accepts that they rented the mortgaged property from the Plaintiff for $2,500.00 per month; that they ceased paying rent on July 17, 1995; that the sale was completed in May 1996, 10 months later; that they occupied the property for 10 months without paying rent to the Plaintiff. The sum of $25,000 is therefore due and owning by the Defendants to the Plaintiff and Judgment is entered against Butterfield and Rolle in that amount.

69. The Plaintiff alleges that during the time the Plaintiffs occupied the property his chattel property which were included in the rental agreement between Butterfield and Rolle within the premises was destroyed. Until the execution of the conveyance from the Bank to them, the Plaintiff was still the owner of the chattels in February 1996 the chattels belonged to him. Butterfield said they got rid of the chattels because they were vermin infested and of no worth. It would follow then that damages ought to be given for the destruction of his personal property, to which he still owned regardless of the state or condition of it.

70. The Plaintiff's evidence as to the items that were in the mortgaged property during Butterfield and Rolle's occupation as tenants of the Plaintiff are as follows:

i.) Table and chairs
ii.) Booths
iii.)Freezers, refrigerators, Walk-in freezers
iv.)Screens
v.) Carpets
vi.)Air conditioners
vii.) Deep fat fryers
viii.) Stoves, desks
ix.)Couches
x.) Automatic fire-extinguishers
xi.)Electric salad bars

71. Butterfield and Rolle did not dispute his evidence. The Plaintiff did not produced evidence of the value of the chattels other than his estimate.

72. There is also no evidence to support the claim that repairs were made to the mortgaged premises by the Plaintiff.

Conclusion

73. The Bank improperly exercised its power of sale when it sold the mortgaged property to the Defendants for the sum of $220,000.00. As a result of the improper exercise of the power of sale, the Plaintiff suffered a loss of $85,400.00 and I hereby order that the Bank pay to the Plaintiff the sum of $85,400.00. (I cannot say whether the Plaintiff is indebted to the Bank for any further sums and if he is how that might impact the amount the Plaintiff actually receives from the Bank.)

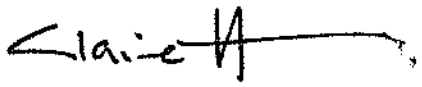
74. If I am wrong in adopting the median between the Ferguson Report and the Armaly report then I direct an inquiry and accounting into the value of the property at the date of the sale as commended the court in **Cuckmere Brick Co Ltd and Another v Mutual Finance Ltd** CA.

75. The court also finds that the Plaintiff is entitled to rent money in the amount of $25,000.00 for the period June 1995 to February 1996 and I hereby order that Butterfield and Rolle pay the said sum of $25,000.00 in respect of outstanding rent.

76. I also find that the second Defendant and the third Defendant are liable to the Plaintiff for the destruction of equipment which belonged to him which were in the premises. In that case, I order that damages be assessed.

77. As to costs, I order that the Bank pay the Plaintiff's costs with respect to the Plaintiff's claims against the Bank, And Butterfield and Rolle pay the Plaintiff's costs with respect to the Plaintiff's claims against them.

Dated 2 May 2014



Claire Hepburn

JUSTICE