

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1976/D134

BETWEEN

MOSES E. DRECKETT

PLAINTIFF

AND

RAPID VULCANIZING LTD.

DEFENDANT

Heard: March 15, 16, 1982, March 24, 1983

Miss Dorothy Lightbourne for Plaintiff

Michael Hylton for Defendant

Coram: Wolfe J.

In this action the Plaintiff sought to recover damages from the Defendant as set out in his statement of claim bearing the date 29th November 1976. The particulars of the statement of claim are set out hereunder:

- "1. The Plaintiff was at all material times a Mechanic and along with Naomi Dobney was registered as a joint proprietor of premises Lot 170 Waltham Farm now known as 6 Tangerine Road in the parish of Saint Andrew.
2. By an agreement made between the Plaintiff and the said Naomi Dobney and Rapid Vulcanizing Limited a Company with its registered office at No. 64 Harbour Street, in the parish of Kingston dated 24th September, 1964 the Plaintiff and the said Naomi Dobney borrowed the sum of \$6,400.00 on security of the said premises.
3. The Plaintiff fell into arrears of the principal and interest in respect of the said mortgage and on or about 2nd December, 1970, the Defendant sold the said premises at public auction for the said sum of \$6,400.00 by virtue of the powers of sale which the Defendant had under the said mortgage.
4. That immediately prior to the sale the said premises had a market value of \$14,000 as a dwelling house thereof of 20 squares was valued at \$12,000 and the land of 5,000 square feet was valued \$2,000.
5. The Defendant put up the premises for auction without any reserve price thereon and without obtaining any valuation in respect of the said premises and exercised its power of sale and sold the said premises for an amount only sufficient to cover the Plaintiff's indebtedness to the Defendant.

6. The Defendant acted negligently and/or improperly in exercising its power of sale.

PARTICULARS

- (a) Failing to ascertain what was the then current market value of the said premises;
 - (b) Failing to fix a reserve price in respect of the said auction sale;
 - (c) Selling for a price only sufficient to cover the Plaintiff's indebtedness to the Defendant when it knew or ought to have known that the premises had a market value far in excess of the sum due and owing by the Plaintiff;
 - (d) Selling at a gross undervalue.
7. By reason of the matters aforesaid the Plaintiff has sustained loss and damage.

PARTICULARS OF LOSS

Market value of premises	\$14,000.00
Less: sum owing to the Defendant	<u>6,400.00</u>
	<u>7,600.00</u>

AND THE PLAINTIFF claims the said sum of \$7,600.00 together with interest at the rate of 12% per annum from the 2nd December, 1970 until payment or Judgment."

The Defendant in response to the claim filed the following defence as set out herein.

- "1. The Defendant admits paragraph 1 of the Statement of Claim.
- 2. The Defendant admits that on the 24th September, 1964 the Plaintiff executed a Mortgage for the amount stated in paragraph 2 of the Statement of Claim. The Defendant will at the trial of this action produce the said Mortgage for its full terms and effect.
- 3. Paragraph 3 of the Statement of Claim is admitted.
- 4. Paragraph 4 of the Statement of Claim are denied.
- 5. The Defendant denies that it acted negligently and or improperly in the exercise of its power of sale and denies each and every one of the particulars of negligence alleged.
- 6. In the premises the Defendant denies that the Plaintiff is entitled to the relief sought or any relief."

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In Reply the Plaintiff joined issue with the Defendant on the defence save and in so far as the same consisted of admissions.

The evidence adduced disclosed that the Plaintiff and his mother Naomi Dobney were the registered owners of premises Lot 170 Waltham Farm now known as 6 Tangerine Road in the parish of Saint Andrew. These premises were purchased in 1962 for the sum of £900.00 or \$1,800.00.

By Agreement between the joint proprietors of the said premises and Rapid Vulcanizing Ltd. it was agreed that the Defendant would erect a house on the land to the value of £3,200.0.0 or \$6,400.00. This amount included the cost of supplying materials and labour.

In accordance with the agreement the house was duly erected and on the 24th September 1964 the joint proprietors entered into a mortgage arrangement with the Defendant company to secure the amount of \$6,400.00.

Time elapsed and the Plaintiff fell into arrears with the payment of instalments and it is conceded that the Defendant quite properly exercised the power of sale contained in the Mortgaged Deed. The premises were sold by Public Auction on the December 2, 1970 to one David Pennant a Real Estate Broker for the sum of \$6,400.00. The Transfer to Pennant was effected on January 13, 1971. On the 29th day of October 1971 Pennant sold the said premises at price of \$14,400.00.

The Plaintiff contends that the sale by the Defendant to Pennant by way of Public Auction was at a price well below the Market value and in so doing the Defendant acted negligently and/or improperly in exercising its power of sale.

Particulars of negligence and or impropriety as alleged in the statement of claim are as follows:

- (a) Failing to ascertain what was the then current market value of the said premises.
- (b) Failing to fix a reserve price in respect of the said auction sale.

(c) Selling for a price only sufficient to cover the Plaintiff's indebtedness to the Defendant when it knew or ought to have known that the premises had a market value far in excess of the sum due and owing by the Plaintiff.

(d) Selling at a gross undervalue.

At the close of the case for the Plaintiff, Mr. Hylton for the Defendant electing to stand on his submission submitted that the Plaintiff had failed to establish a case for the Defendant to answer.

The Defendant submitted as follows:

1. That the law relating to the Powers of Sale of a mortgagee is as set out in Section 106 of the Registration of Titles Act and set out hereunder:

"If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

2. That there was no pleading or evidence which suggested that the Auctioneer, the agent of the Defendant, acted improperly in the conduct of the sale.

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3. That the mortgagee's duty consisted of not acting in bad faith and doing what is reasonable to secure the market price which duty did not extend to obtaining a valuation or setting a reserve price before the sale.
4. That on the evidence adduced there was no evidence of negligence and further there was no evidence from which a court could find that the sale was at an undervalue.
5. That even if such a finding were possible on the evidence, the fact of undervalue is not per se evidence of negligence.

Miss Lightbourne for the Plaintiff in response to the submissions made on behalf of the Defendant contended as follows:

1. That the Defendant/Mortgagee was in a special relationship visa vi the Plaintiff in that the Defendant had been responsible for erecting the building and consequently would have been aware of what would have been a fair price.
2. That in order to obtain the best price a valuation was necessary prior to the sale.
3. The fact that sale was by auction did not necessarily show that Defendant was acting in good faith to ensure a fair price .
4. That the evidence adduced by the Plaintiff indicated that Defendant did not act reasonably in all the circumstances. Sale price ought to be bear some reasonable relationship to the true market value of the property. Subsequent sale price provided evidence of the true market value of the property.

Having thus summarised the submissions on behalf of the Plaintiff and Defendant, it seems most appropriate that the issue or issues for resolution be identified at this stage.

I take the view that on the pleadings, the evidence adduced and the legal submissions the following are the issues to be resolved.

1. Is a mortgagee exercising a power of sale under a duty to ensure that the best price is obtained?
2. Is the mortgagee under a duty to obtain a valuation of the mortgaged premises before offering it for sale?
3. Is the failure to obtain a valuation prior to the sale a negligent exercise of the Mortgagee's Power of Sale?

Re Mortgagees duty when exercising Power of Sale.

In attempting to ascertain the duty of the mortgagee it is of importance to decide the nature of the relationship between Mortgagor and Mortgagee because it is from the relationship that the duty owed by the one to the other arises.

In Colson v Williams L.J. 1889 Volume 58 Page 539 at page 540 Kekewich J stated:

"A mortgagee is not a trustee of his power of sale for the mortgagor".

The fact that the mortgagee is not trustee visa vi the mortgagor does not mean that he can exercise his power of sale without due regards to the rights of the mortgagor.

Kekewich J. in Colson v Williams supra said:

"Where a mortgagee under ordinary circumstances thinks it necessary - and, as long as he is not prohibited by the terms of his contract, he is the sole judge of what is necessary - to realize his security, he can do so without hesitation. If there is a notice to be given he must give it; if some conditions are to be observed they must be observed; but as regards the time when he shall realize his security he is the sole arbiter, and no one can interfere with him. He may even do it from a bad motive, as was pointed out by the Master of the Rolls (Sir George Jessel) in the case of Nash v Eade. The Court has nothing to do with the motives of a mortgagee. If he, from whatever motive, deems it right to realize his security, although he may be guilty of spite, although he may even look forward with complaisance or satisfaction to the ruin of his debtor, still, if he chooses to exercise his power, he can do so; but whether he acts from good or bad motive, whether

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he acts merely as a man of business deserving to realize his security, or whether he acts from some other or any of the reasons which may influence the human mind, he is equally bound to remember that there is the equity of redemption behind him, and that being so, he cannot do that which would otherwise be possible, and in many circumstances easy. A mortgagee to whom is owed a sum of money on security of land cannot offer the land to a purchaser merely for that which would cover his principal, interest and costs, independently of the value of the property. If there is a margin which can be reasonably obtained he must remember that there is the mortgagor or possibly a second mortgagee claiming through him or possibly other persons having charges who are entitled to be considered. But so long as he exercises the power fairly in that view, so long as he does that which he fairly can to realize a fair price, he is, in my judgment entirely free".
(emphasis supplied)

In Cuckmere Brick Co. Ltd. and another v Mutual Finance Ltd.

[1971] 2 A.E.R. page 633 at page 646 Salmon L. J. expressed a similar view concerning the duty of the mortgagee.

"I accordingly conclude, both on principal 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".

(emphasis supplied).

The Learned Judge was careful to observe that in his view there was no real difference between the words "Proper Price", "Best Price" and "True market Value".

In the light of the decisions referred to above can it be said that the Defendant Company in the exercise of the right of sale took "reasonable precaution to obtain the true market value of the mortgaged property at the date of sale or alternatively did it exercise the power fairly".

It was conceded by the Plaintiff on the Pleadings that the Power of sale was properly exercised, what the Plaintiff contends however was that the manner in which the accrued right was effected was negligent and without regard on the part of the mortgagee to obtain the true market value.

The allegations of negligence and impropriety as pleaded by the Plaintiff are set out hereunder:

- (a) Failing to ascertain what was the then current market value of the said premises;
- (b) Failing to fix a reserve price in respect of the said auction sale;
- (c) Selling for a price only sufficient to cover the Plaintiff's indebtedness to the Defendant when it knew or ought to have known that the premises had a market value far in excess of the sum due and owing by the Plaintiff.
- (d) Selling at gross under value.

With reference to (a) above there is absolutely no evidence adduced in support of the allegation. In any event it is my considered opinion that the failure to ascertain the current market value of the mortgaged premises is not per se evidence of negligence. I am unable to accept that a prior valuation could in any way affect the price obtainable at a Public Auction sale. Bidders at a Public Auction do not make bids on the basis of prior valuations received by the person or persons exercising the right of sale. Prima Facie the object of sale by auction is to give the world at large an opportunity of making an offer at the sale with the hope that in so doing the "best price" or the "proper price" or the true market value of the property will be realized. In the absence of any allegation of fraud or negligence in supplying material information as to the mortgaged property or impropriety in the conduct of the sale from which it can be inferred that but for such misconduct a better price might have been realized the highest bid at an auction must of necessity be deemed to be the best price. It is worthy of note that the Plaintiff makes no specific allegation of impropriety on the part of the auctioneer, the agent of the mortgagee, who conducted the sale. The fulcrum of the Plaintiff's

argument is that the sale price of Six Thousand Four Hundred Dollars (\$6,400.00) was far less than the true market value or the best price, which is evidence of bad faith or negligence. In support of the proposition the Plaintiff relied upon the evidence of the several witnesses called and who testified as to what in their view would be the value of the mortgaged premises or comparable holdings on the date of the auction.

With all deference to the fact that three of these witnesses were persons experienced in the business of Real Estate and construction I was far from impressed as to the basis upon which they arrived at their valuation. It was quite clear from their demeanour in the witness box that their valuations were more imagined than real.

Another string in the Plaintiff's bow was the subsequent sale, by the purchaser of the auctioned property, in October 1971 to Carol McLaughlin at a price of Fourteen Thousand Four Hundred Dollars (\$14,400.00).

The sale price in October 1971 is in my view no true indication as to the true value of the mortgaged premises at the time of the auction. In any event the authorities cited earlier in this judgment clearly indicate that the duty on the mortgagee is to obtain the best price which is available at the time of sale.

A mortgagee with a power of sale is not bound to wait till a more advantageous sale can be effected.

See Davey v. Durrant

Smith v. Durrant

(1857) De G & J 535.

Finally the Plaintiff quite properly conceded that there was no obligation on the part of the mortgagee to set a reserve price prior to the sale. Even if this were so there was no evidence adduced by the Plaintiff to support the allegation that the Defendant had failed to fix a reserve price in respect of the said auction sale.

On the basis of the foregoing I hold that the Plaintiff has

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failed to discharge the burden which rests upon him namely to satisfy me that the Defendant acted negligently and or in bad faith in exercising the Power of Sale.

Accordingly there will be judgment for the Defendant with costs to be taxed if not agreed.