[2016] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 11/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**CORNWALL AGENCIES LIMITED**	**APPELLANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**AMALGAMATED (DISTRIBUTORS) LIMITED**	**2ND RESPONDENT**

Miss Annaliesa Lindsay and Miss Peta-Gaye Manderson instructed by John Graham & Co for the appellant

John Vassell QC and Courtney Bailey instructed by DunnCox for the 1st respondent

2nd respondent absent and unrepresented

3, 4 October 2012 and 28 October 2016

PANTON P

[1] In these appellate proceedings, the main complaint is that the learned judge demonstrated a misunderstanding of certain principles relevant to a mortgagee's exercise of a power of sale under a mortgage.

[2] Cornwall Agencies Ltd (Cornwall) sued the Bank of Nova Scotia Jamaica Ltd (the bank) and Amalgamated Distributors Ltd (Amalgamated) for conspiracy, negligence, fraud and "loss and damage arising" from the bank's exercise of "purported powers of sale contained in a mortgage". At the conclusion of the trial, Beswick J entered judgment in favour of Cornwall against the bank; and in favour of Amalgamated against Cornwall.

[3] The matter is on appeal because neither Cornwall nor the bank is happy with the judgment. Cornwall filed notice of appeal, and the bank filed a counter-notice of appeal.

The claim

[4] Cornwall was a wholesale distributor based on property it owned at 437 Spanish Town Road, St Andrew. This property is comprised of five separate titles which were used to secure Cornwall's indebtedness to the bank to the tune of approximately $25,000,000.00. It is the bank's sale of the property to Amalgamated, which was a tenant of Cornwall, that gave rise to the suit as Cornwall maintains that the sale price was well below the market value.

[5] In its rather prolix amended claim and particulars of claim, Cornwall sought damages for conspiracy, negligence and fraud. In addition, it sought from the bank and Amalgamated a total sum of $105,638,546.00 plus interest at a commercial rate of 27%. Cornwall also sought rescission of the contract of sale between the bank and Amalgamated; alternatively, it sought an award of the difference between the sale price and the true market value of the property at the time of the sale.

[6] The claim that the property was sold at an under-value arises from the fact that there were clear differences noted among the various valuations that were done. Valuations were done by David DeLisser & Associates Ltd on 18 June 1987 and 10 September 1993. The former valuation was for $5,367,000.00 whereas the latter was for $26,753,900.00 with a forced sale value of $20,065,400.00. On 29 January 1997, Langford & Brown, chartered surveyors, indicated that the fair market value of the property was $134,094,000.00 with a forced sale value of $107,275,200.00. There was yet another valuation done by Langford & Brown on 22 May 2000, and at that time the figure arrived at was $134,240,000.00.

[7] An auction was conducted on 1 June 2000 by C D Alexander Company Ltd. At the auction, there were two bids of $10,000,000.00 and $12,000,000.00 for the property. Seeing that these bids were below the expectation of the auctioneer, neither bid was accepted, and the auction was closed.

[8] On 15 March 2001, Allison, Pitter & Co, chartered surveyors, at the request of the bank, valued the property at $40,000,000.00 to $45,000,000.00, with a forced sale value of $31,500,000.00.

[9] The property was eventually sold by the bank to Amalgamated for $26,000,000.00, and the net proceeds amounted to $21,755,333.18. According to the particulars of claim, Cornwall at that time had an outstanding balance of $14,294,875.91 for the bank.

[10] Cornwall claimed that the bank and Amalgamated managed to formulate a conspiracy through the interactions between the officers of both parties. Cornwall alleged that the bank did not attempt to reconcile the various valuations, and, after the auction, the bank failed "to carry out proper investigations and employ proper marketing strategy" which would have enabled a sale of the property "for a fair market value consonant with the valuation [by Langford & Brown] of the 22nd of May 2000". The sale to Amalgamated, according to Cornwall, was done with intent to injure Cornwall – hence the sale price of "a mere $26M, even below the forced sale value placed on the property for $31M in relation to the valuation obtained after the auction was held" (para 51 of the amended particulars).

[11] Cornwall alleged fraud in that the sale of the property, it says, was done without its knowledge, and it was "never given an opportunity to seek another purchaser who would have paid much more for the property than was alleged [sic] paid by Amalgamated" (paras 62 and 63 of the amended particulars).

Defence

[12] Predictably, the bank and Amalgamated denied negligence, conspiracy and fraud on their part. In substance, they maintained that the transaction was wholly above board, and the valuations relied on by Cornwall were "manifestly inaccurate and misleading" (para 6 of the bank's further amended defence). Cornwall was heavily indebted to the bank and had steered clear of all attempts to negotiate or effect a settlement of the debt, making it necessary for the bank to exercise its right of sale under the mortgage. The price that was obtained for the property was "the best price

that could have been obtained in all the circumstances" (para 9 of the further amended defence). The price was determined by the depressed state of the real estate market at the time, and the fact that Cornwall's business was in receivership. The bank contends that it took serious steps to get the best price. Those steps included the listing of the property with several realtors "who were unable to sell it over a period of a year" (para 17a of the further amended defence).

The evidence

[13] The evidence presented before the learned trial judge included the witness statement of Ms Nicole Pierce who said that Cornwall was incorporated decades ago and was managed by her father. She stated that in 1995, Cornwall leased a portion of the property to Amalgamated which carried on the business of wholesale distributors. Cornwall was in a business relationship with the bank, and that resulted in the bank's officers coming to Cornwall's premises annually for inspection purposes. On one of those visits, either in 1998 or 1999 (see paras 8 and 10 of her statement), she introduced the bank's officers to employees of Amalgamated. It is as a result of this introduction and the subsequent sale of the property to Amalgamated that she asserts that there has been a conspiracy between the bank and Amalgamated. She gave details of Cornwall's indebtedness, the various valuations, and the holding of the auction.

[14] Ms Pierce stated that the property was sold in July 2001 but Amalgamated continued to pay rent up to December 2001, without disclosing that there had been a sale. According to her, Cornwall was not given an opportunity "to seek another

purchaser who would have paid much more for the property" than was paid by Amalgamated.

[15] In her oral evidence, Ms Pierce said she was the managing director and major shareholder of Cornwall. She was "Joint Managing Director in 1986 when [her] father died and full Managing Director after 1996". She "became actively engaged full-time with [the] company in 1989". Cornwall "was steel stockists and distributors – supplier and agents for heavy duty construction equipment".

[16] The premises were acquired in 1987 at a price of $3,700,000.00. There were five main buildings thereon. Hurricane Gilbert damaged the premises but they were restored thereafter. When shown some photographs by learned Queen's Counsel, Mr Vassell, she agreed that they were an accurate representation of the premises in March 2001. She accepted that there were "three dilapidated buildings since 1987".

[17] Miss Pierce agreed that Cornwall borrowed money and gave mortgages as security. She also agreed that Cornwall was in arrears, and that demand had been served on Cornwall but the demand had not been satisfied. She said that she believed that they made payment in late 1999 but that would not have liquidated the debt. In keeping with the terms of the agreement entered into by Cornwall, she said that a receiver was appointed when Cornwall failed to liquidate the debt. She was of the view that the inability to pay the debt was not due to a downturn in the construction industry; rather, it was due to high interest rates and the "collapse of banks as clients had lost overdrafts and could not pay receivables".

[18] The land, she said, was charged in favour of the bank. However, she expressed surprise that the bank was still trying to find purchasers after the failed auction. She admitted that Cornwall was not prevented from seeking a purchaser for the property.

[19] Mr Gordon Langford was the other witness who was called on behalf of Cornwall to give oral evidence. He said that he was a valuations surveyor, having qualified as such in 1978 in England. He is a member of the Royal Institution of Chartered Surveyors. His father Mr Cecil Langford, a former Commissioner of Lands, was a member of the firm Langford & Brown that did the valuations referred to earlier. This witness challenged the valuation done by Mr Connel Steer of Allison & Pitter, while supporting those done by Langford & Brown. It has to be noted that Mr Gordon Langford never visited the premises in question and, expectedly, never prepared a valuation in this matter. Instead, he prepared a report which he described as a critique which does not give an opinion of value but "[o]ne may make inference from [it]", he said (pages 32 and 36 of the notes of evidence).

[20] Mr Langford accepted that C D Alexander Company Limited were "reputable valuers and auctioneers", and "amongst the leaders in the market" as "respected realtors" (page 42 of the notes of evidence). He expressed the view that the response to the auction was "indicative of response to auctions in general". He conceded that the market was depressed, but was of the view that the bank "need not have been in such a hurry to sell" (page 43 of the notes of evidence). When asked if he regarded Allison & Pitter as competent and experienced valuers, his response was that they "get a lot of government work". Under cross-examination by Mr Braham for Amalgamated, he said

that he was aware of the "financial breakdown in 1995", and that persons who had borrowed money faced astronomical interest rates which resulted in an inability to pay. These persons were forced to place their properties on the market thereby "assisting (in) depressing the market". This, he said, was the position between 1996 and 2000.

[21] It is difficult to see how Mr Langford's evidence could have assisted Cornwall in proving the case it had set out in its pleadings before the learned judge.

[22] Mr Marcos Dabdoub, in his witness statement, said that he was a director of Amalgamated and was present at the auction as a result of an advertisement that he saw in the Daily Gleaner concerning the proposed sale of the premises by public auction. There were representatives of two other companies present at the auction. Bids were made by those companies. The property was not sold. He noted that the bids were below the reserve price. He was subsequently contacted by an officer of the bank who inquired whether Amalgamated was still interested in purchasing the property. After consulting with Amalgamated's board of directors, he wrote to the bank offering to purchase the property for $26,000,000.00 . The bank's attorneys subsequently sent an agreement for sale to Amalgamated. The sale was completed in or about December 2001, he said.

[23] Mr Dabdoub stated that prior to the sale, neither he nor Amalgamated was aware of the valuations done at the request of the bank. Further, he said, there would have been no need for Cornwall to arrange introductions between Amalgamated and the bank as the two entities were aware of each other. He denied the existence of a

conspiracy or any fraudulent transaction on the part of either the bank or Amalgamated in their dealings.

[24] Mr Maurice Chin, manager of the bank's loan recovery unit, gave evidence that he had worked for the bank for over 40 years, prior to his retirement. However, he was recalled from retirement to assist in setting up the loan recovery unit in 1997. The bank's general manager forwarded to him the offer to purchase in this matter for a recommendation to be made. He made the recommendation to the bank's "Toronto adviser". The recommendation had to receive the sanction of three general managers before the advice is given by Toronto to the bank's head office in Jamaica. Upon receipt of that advice, the bank's attorneys in Jamaica were instructed to prepare the agreement for sale. Mr Chin said that the Langford & Brown valuation "seemed suspect" as it was far in excess of the offers that they were receiving for the property. The advisers in Toronto even questioned the competence of Langford & Brown. In addition, he said, the real estate market was depressed.

[25] Mr Chin mentioned that a receiver had been put in place in respect of Cornwall's affairs by another creditor. It seemed to him, Mr Chin, that Cornwall had "literally abandoned the debt". The receiver was aware of what the bank was doing and, in fact, said Mr Chin, the receiver and the bank "were working together to try and sell the property". The receivership ended before the signing of the agreement for sale of the property to Amalgamated. It ended in July 2001 when there were no other assets that they could have disposed of. The bank, he said, had tried for over a year to sell the property.

[26] In evidence before the learned judge, Mr Chin said that a completion date was specified in the agreement for sale but it was not met by the parties. Amalgamated, he said, had defaulted. An extension was requested and the bank granted it. The extension was for a period of three months. During the extended period, he said that no interest was paid by Amalgamated.

[27] The most significant evidence for the consideration of the learned judge came from Mr Connel Steer, a chartered valuation surveyor and Fellow of the Royal Institution of Chartered Surveyors. In 2007, he had had 24 years' experience in the field of Land Economy and Valuation Surveying. His qualifications include second class honours MRAC (Estate management) from the Royal Agricultural College, Cirencester, England, and second class honours, Diploma in Agriculture from the Jamaica School of Agriculture.

[28] Mr Steer said that he did what he had been asked to do, that is, an open market valuation. He said that he did not inquire of other valuations of the premises as he is a professional. This has to be taken to mean that he relied on his own experience and judgment in arriving at a valuation. However, he was shown a total of three reports by the lawyers and was asked to analyse and critique two that were done by Langford & Brown. He disagreed with those reports. He was of the opinion that Langford & Brown grossly overvalued the property. The approach used by Langford & Brown was inappropriate, in his opinion. Mr Steer said that he knew Mr Brown quite well. In fact, Mr Brown was his boss when he (Mr Steer) was a youngster. However, he was of the

view that the profession had "advanced beyond their [Langford & Brown] training that is why they used inappropriate approach".

[29] In doing his valuation, Mr Steer said that he measured the entire plant, except for two buildings that "were derelict and passed economic life".

The judgment

Finding of no evidence of conspiracy or fraud

[30] Beswick J, found that there was no evidence from which she was prepared to infer that the bank and Amalgamated "were together agreeing to do injury to Cornwall". She dismissed the submissions of learned attorney-at-law Mr Codlin, on behalf of Cornwall, that Amalgamated in conjunction with the bank had failed to carry out proper investigations and employ proper marketing strategy which would have enabled the bank to sell the property for a fair market value as reflected in Langford & Brown's valuation of 22 May 2000. Amalgamated, she found, had no obligation to research the market to try to convince the bank to sell the property to it at a higher price. In the circumstances, she said, the claim for conspiracy against both entities failed. The learned judge also expressed the view that she was not aware of any legal duty resting on Amalgamated, as purchaser, to inform Cornwall, the registered proprietor, of the sale negotiations. There was no evidence, she said, to support the allegation that Amalgamated was seeking to disguise the sale; nor was there evidence that Amalgamated sought to prevent Cornwall from stopping the sale, or from seeking a purchaser at a higher price. In all the circumstances, she said, there was no evidence of fraud.

[31] Beswick J, after a brief review of the factual situation, concluded that in the circumstances of the indebtedness, the bank had "the right to seek to recover outstanding monies by way of a sale of the property". Consequent on the establishment of this right, she said it was necessary to determine whether the sale price was reasonable. In making that determination, she examined the valuations and the circumstances in relation to each. At the end of this examination, she said: "I prefer to rely on the valuation of Mr Steer for many reasons". These reasons included Mr Steer's years of experience "buttressed by academic qualification". She said that Mr Steer had "explained with precision, the various methods of valuation that are used", and that she was "loathe to place reliance on the valuations of Langford & Brown as there is no evidence to support the basis for the figures submitted". Furthermore, Mr Gordon Langford who gave evidence had not done the valuation himself, and had not even visited the premises.

[32] The learned judge then considered whether the appropriate valuation was "that of a fair market value or of a forced sale value in view of the fact that the valuation reports bear different values for each category". She said that the manner in which the transaction of sale was completed, the bank displayed no urgency and never informed Cornwall that an urgent sale was in progress. Consequently, she regarded "the fair market value as being the correct valuation to be used rather than the forced sale value".

[33] Beswick J noted that the bank had listed "the property with realtors from May 18, 2000 up to July 2001". She opined however that "merely listing the property with

respected realtors might not be sufficient advertisement". There was no evidence, she said, as to the extent of the effort by the realtors to actually advertise the premises after the auction and especially immediately prior to the time when the bank was considering accepting Amalgamated's offer. In the circumstances, she concluded that "[the] failure to advertise, at a time proximate to accepting the offer from Amalgamated, was … an indication that there was no genuine effort made to obtain the best price possible at the time".

[34] As noted earlier, Mr Maurice Chin said that the bank had waived payment of interest by Amalgamated after the latter had sought, and was granted, an extension of time to complete the sale. In this regard, the learned judge expressed the view that Cornwall's debt would have been reduced by the amount of interest waived. She concluded thus: "The responsibility for that waiver rests entirely on BNS".

The mortgagee's duty

[35] In dealing with the duty of a mortgagee, the learned judge referred to the cases **Dreckett v Rapid Vulcanizing Co Ltd** [1988] 25 JLR 130, **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949, and **International Trust and Merchant Bank Ltd v Gardiner** SCCA No 111/2000, delivered on 30 March 2004. She also relied on a passage at page 610 of Paget on the Law of Banking (11th ed.)

[36] Having considered the facts, she found that the bank had failed to take reasonable precaution to obtain the true market value of the property at the date on which it decided to sell. For this failure, she said that the bank "must be held

accountable". She was of the view that it was not a forced sale, the advertisement was inadequate, and the sale price was too low. Allison Pitter's fair market valuation of between $40,000,000.00 and $45,000,000.00 found favour with the learned judge. She said that she accepted "the lower figure of $40 million as the appropriate fair market value in view of the fact that the Bank did in fact make an earlier failed attempt to auction the premises a year before the sale and since some many months had passed since the Bank had acquired the right to sell, as mortgagee, and also since the mortgagor appeared to show little interest in making additional arrangements to discharge its obligation."

[37] The learned judge's reasoning on this aspect concluded thus:

> "It follows therefore that in my view, BNS, in failing in its duty as a mortgagee, accepted $26 million as the sale price, an amount which was at least $14 million less than it ought to have accepted and also waived the interest due."

Order

[38] On the basis of her findings, Beswick J ordered as follows:

1. Judgment in favour of Cornwall against the bank;
2. Damages in the sum of $14 million plus the interest waived, to be paid by the bank to Cornwall;
3. The Registrar is to assess the amount of interest waived, if the bank and Cornwall cannot agree on it;
4. The rate of interest on the damages is the average of all the rates of interest which was applied to the outstanding loans due at the date of the transfer;
5. The rate of interest is to be determined by the Registrar or agreed between the bank and Cornwall;
6. The interest is to be compounded in the same manner as set out in the bank's mortgage security document providing security for the loans;
7. Costs to Cornwall against the bank to be agreed or taxed;
8. Judgment in favour of Amalgamated against Cornwall; and

9. Costs to Amalgamated against Cornwall to be agreed or taxed.

Grounds of Appeal

[39] Cornwall is complaining that:

1. The learned judge "erred in her application of the principles governing the investment approach and the Direct Capital Comparison on which she relied in coming to a valuation of $40 M".
2. The learned judge erred in her interpretation of the evidence of the expert witnesses Mr Gordon Langford and Mr Connel Steer as their evidence (as well as the evidence of the rental being paid by the sitting tenant) would have led her to find the market value of the property to be $69,000,000.00 and the forced sale value would be $55,200,000.00.

[40] On the other hand, the bank is challenging the decision on the following bases:

1. The learned judge erred in finding that the sale was not a forced sale, and thereby relying on the market value of the property;
2. The learned judge erred in disregarding the evidence of Mr Connel Steer as to the fundamental test of the market value of a property;
3. The learned judge erred in her interpretation of the duty in law of a mortgagee under powers of sale;
4. The learned judge erred in awarding:
    a. interest on the damages awarded at a commercial rate, in the absence of any pleading to that effect;
    b. compound interest on the award; and
    c. interest on general damages to commence on the date of the transfer instead of the date of the commencement of the claim.
5. The learned judge erred in referring the various matters for assessment to the Registrar.

Submissions

[41] Miss Annaliesa Lindsay, on behalf of the appellant, submitted that Cornwall agreed with the learned judge so far as she found that the applicable value was the market value. However, Cornwall disagreed with the fact that Mr Steer's valuation, which was accepted by the judge, did not take into account the fact that the property was actually earning at the time of the sale. Had that been done, said Miss Lindsay, the market value would have been higher; and the damages would have been more than had been awarded. She submitted that the finding would have been $69,000,000.00 as the market value and $55,200,000,00 for a forced sale.

[42] Learned Queen's Counsel, Mr John Vassell, in reply, submitted that this argument ought not to be countenanced by the court at this stage. He said that Mr Steer having disclosed that he had used the direct capital comparison approach, there was no dispute made in this regard before the learned judge; nor was there any complaint about it in Cornwall's skeleton arguments. The judge, said Mr Vassell, was entitled to accept the evidence of valuation given by Mr Steer. In any event, he said, there was no evidence from any witness to support the figures that were now being put forward by Cornwall.

[43] As regards the determination by the judge that this was not a forced sale, Mr Vassell submitted that the exercise by a bank of its power of sale under a mortgage is conventionally understood to be a forced sale. The instant sale, he said, had been described by Mr Steer as a forced sale and it was taken for granted as such by all involved. The learned judge, said Mr Vassell, concluded otherwise, on her own motion.

[44] Given the history of the matter, Mr Vassell submitted that the bank acted reasonably, and took reasonable steps to obtain a proper price for the property. There was not shown to be any potential purchaser who would have offered more for the property, he said. He referred to several oft-cited cases which he said showed the duty of a mortgagee in this situation, and submitted that the bank acted in keeping with the relevant principles.

Determination of appeal

[45] The fundamental issue in this case is whether the bank acted properly in the exercise of its powers under the mortgage. That is the issue for determination on this appeal. The issues as to the appropriateness of the rates of interest awarded by the learned judge, and the role of the Registrar in the determination of the quantum of interest, are consequential issues which are of importance only if the bank is found to have breached its duty under the powers of sale in the mortgage.

[46] The principles that are to guide a mortgagee in a case such as this are expressed in the English Court of Appeal decision **Cuckmere Brick Co v Mutual Finance Ltd.** In that case, the plaintiffs had planning permission to erect 100 flats on land they owned. They charged the land to the defendants by way of legal mortgage with payment of £50,000 and other money. Later, they obtained planning permission to erect 35 houses. The defendants' statutory power of sale became exercisable. They went into possession and instructed auctioneers to sell. Preparations were made for the land to be sold by public auction, but the advertisements for the sale did not include any mention of the permission to erect flats, although it mentioned the permission to

erect houses. The plaintiffs pointed out this defect to the defendants and asked that the auction be postponed. The defendants did not accede to the request, but said that they undertook to instruct the auctioneer to mention the permission for the flats. The land was sold for £44,000. The plaintiffs alleged that the land was worth £75,000, and claimed from the defendants an account on the footing of willful default, and damages.

[47] The trial judge, Plowman J, held that the defendants had failed in their duty to the plaintiffs by not advertising the permission for the flats and in refusing to postpone the sale. At the request of the parties, he assessed the value of the property at £65,000, and ordered accounts and enquiries on the basis that the land should have been sold for that amount. On appeal, it was held that a mortgagee, when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price. On the evidence in the case, the judge was justified in finding that there had been a breach of that duty in not publishing the fact that there was planning permission to erect the flats, and in refusing to postpone the auction. However, the evidence before the judge did not justify the value that he had placed on the property. There had to be an inquiry to determine the plaintiffs' damages.

[48] The thinking in **Cuckmere** was applied in the Privy Council judgment in **Tse Kwong Lam v Wong Chit Sen** [1983] 3 All ER 54, and has been followed in our own courts in cases such as **Dreckett v Rapid Vulcanizing Co Ltd**, and **International Trust and Merchant Bank Ltd v Gardiner.**

[49] It is necessary to look at the reasons for judgment of the learned judges of appeal in **Cuckmere**. Salmon LJ said:

> "I will now turn to the law. 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 realise 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 those 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, conflict with those 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 for the mortgagor."
>
> (pages 965 F- 966 A]

[50] Salmon LJ went on to add (page 966 D-F):

> "Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the 'proper price', others to the 'best price'. Vaisey J in ***Reliance Permanent Building Society v Harwood-Stamper*** [1944] Ch. 362, 364, 365, seems to have attached great importance to the difference between these two

> descriptions of 'price'. My difficulty is that I cannot see any real difference between them. 'Proper price' is perhaps a little nebulous, and 'the best price" may suggest an exceptionally high price. That is why I prefer to call it "the true market value'."

[51] He concluded his reasoning on the matter thus:

> "I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions 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." (page 968H-969A)

[52] Cross LJ regarded as clear the power of the mortgagee to "sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it." In the opinion of Cross LJ, though, "the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at" [p 969G-H].

[53] Cairns LJ, after reviewing several 19th century cases, stated as follows:

> "I therefore consider that ***Tomlin v Luce*** (1889) 43 Ch.D. 191 is the stronger authority and I would hold that the present defendants had a duty to take reasonable care to obtain a proper price for the land in the interest of the mortgagors." (page 978 A)

[54] On the basis of the expressions of the learned judges of appeal there is little wonder that the headnote of the Law Reports version of the judgments does not give pride of place to the "true market value" statement contained in the judgment of Salmon LJ. Instead, it highlights the mortgagee's duty "to take reasonable care to obtain a proper price". This reflects the position taken by Cross and Cairns LJJ. I am of the view that the All England Law Reports version of what was held does not fully capture the difference in the approach of the majority (Cross and Cairns LJJ). My view is not of recent origin. An examination of the judgment of this court in **International Trust and Merchant Bank Ltd v Gardiner** (above) confirms this. Bingham JA delivered the judgment of the court, in which I concurred. Pages 18 to 20 state the true legal position as reflected in the views I have earlier expressed.

[55] Having considered the facts of the instant case and the relevant law, I find that I am not in agreement with the conclusion of the learned trial judge. The only acceptable evidence as to value came from Mr Steer. His report speaks of the Government's interest rate policy having had "a negative effect on investment and the economy in general and the real estate market in particular, especially with respect to commercial and industrial buildings". Market conditions, he said, favoured a buyer with strength of cash. It was in that climate that the auction was held. The result was disastrous. There were no takers. The auctioneer had no respectable or acceptable bid. The property was then listed with dealers. After approximately a year's wait, the bank sold the property to Cornwall's tenant, Amalgamated. The simple fact which cannot be ignored is that there

was no evidence of any other entity or individual that showed an interest in purchasing the property at a higher rate.

[56] The bank could not have been expected to wait into eternity to recoup its losses (or, some of its losses) from its transactions with Cornwall. The bank, if it could have done so, would have preferred to sell at a price that would have seen full recovery of the outstanding amounts owed by Cornwall. There is no evidence that Cornwall was even trying to get a buyer capable of paying the price that the learned judge felt the property should have been sold for. In the circumstances, there being no evidence of fraud or negligence, I am of the opinion that the learned judge erred in fixing liability on the bank.

[57] In view of the absence of any evidence to support that which Cornwall has advanced in its grounds of appeal, and bearing in mind the proper interpretation to be given to the **Cuckmere** case, Cornwall's appeal is without merit. So far as the bank's counter appeal is concerned, it ought to be allowed as the bank has not been shown to have breached any of the principles that guide a mortgagee exercising a power of sale.

[58] In the circumstances, I would dismiss Cornwall's appeal and allow the bank's counter appeal. I would order as follows:

i. Appeal by Cornwall dismissed;

ii. Counter appeal by the bank allowed;

iii. Judgment of Beswick J set aside;

iv. Judgment entered in favour of the bank and Amalgamated against Cornwall in respect of claim 2003 HCV 1652; and

v. Costs of the appeal and in the court below awarded to the bank against Cornwall.

[59] The delay in issuing this judgment, for which we tender our apology, is regretted.

PHILLIPS JA

[60] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. I have nothing useful to add.

MCINTOSH JA

[61] I concur.

PANTON P

ORDER

i. Appeal by Cornwall dismissed;

ii. Counter appeal by the bank allowed;

iii. Judgment of Beswick J set aside;

iv. Judgment entered in favour of the bank and Amalgamated against Cornwall in respect of claim 2003 HCV 1652; and

v. Costs of the appeal and in the court below awarded to the bank against Cornwall.