

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 111/2000

**BEFORE: THE HON MR JUSTICE BINGHAM, J.A.
THE HON MR JUSTICE PANTON, J.A.
THE HON MR JUSTICE SMITH, J.A.**

BETWEEN:	INTERNATIONAL TRUST AND MERCHANT BANK LTD	DEFENDANT/APPELLANT
AND	GILBERT GARDINER	PLAINTIFF/RESPONDENT

**Andrea Walters instructed by Andrea Walters & Associates for
appellant**

**Marvalyn Taylor-Wright instructed by Taylor, Wright & Co. for
respondent**

April 22, 23, 24, 25, 2002 & March 30, 2004

BINGHAM, J.A:

- 1.** This appeal raises issues as to the manner in which the mortgagee exercises its powers of sale in respect of registered property subject to a mortgage. Being registered property, the Registration of Titles Act applies.
- 2.** The facts are for the most part not in dispute, that is, as they relate to the history of the matter leading up to the sale of the property by a real estate agency acting for and on behalf of the defendant/appellant. The crucial issues on which the hearing below were fought and on which this appeal turned relate to the circumstances which were attendant on the sale of the mortgaged

property and in particular was concerned with what actually took place on the occasion when the sale was effected.

3. The Facts

In summary, the facts leading up to the subsequent foreclosure and sale of the property more properly described as a duplex dwelling house situated at Nos: 13 and 13A Princess Alice Drive, St Andrew, and registered at Volume 1005 Folio 190 of the Register Book of Titles were as follows.

The plaintiff/respondent (hereinafter referred to as the respondent) a retired plumber, borrowed a total of \$800,000.00 from the defendant/appellant, a Merchant Bank (hereinafter referred to as the appellant). The money was borrowed on two occasions, the first loan was for \$400,000.00 received in December 1993. An additional amount of \$400,000.00 was borrowed in April 1994. The loans were secured by a legal mortgage over the respondent's premises at Princess Alice Drive, Hermitage in Saint Andrew.

4. The repayment of the loans fell into arrears almost immediately as the fishing venture for which it was borrowed failed. The Bank's ("the appellant's") attorney following default for the statutory period as set out in the Mortgage Deed, sent a letter of demand dated September 6, 1994 to the respondent. On October 21, 1994, the respondent was sent a Notice of Sale and on November 23, 1994, the appellant submitted the premises to C.D. Alexander Realty Company Limited, for sale by Public Auction.

5. C.D. Alexander Realty Co. Ltd. advertised the property for sale on December 14, 21, and 22, 1994 and on December 22, 1994 the first attempt to auction the premises was made. This was unsuccessful although the advertisements succeeded in attracting some twelve persons to the auction, none was able to present a bid to come up to the reserve price of \$2,000,000.00. In his own words the respondent who was present at the auction said in speaking of the persons who came:

... "they never looked prosperous. There were biddings from a few persons but when it reached \$1,000,000.00 the bidding stopped".
(Page 6 of the Notes of Evidence in the Record of Appeal).

6. This state of affairs of an apparent disinterest in the mortgaged premises continued to affect the efforts of both the Bank and the respondent over the succeeding months in various attempts to dispose of the property by way of a private treaty. All these efforts however, came to naught. For the respondent's part he made several attempts to find a purchaser without success. In his words:

... "about six persons made serious enquiries about the property ... nobody made a deposit on the property". (Page 6 of the Notes of Evidence)

"Up to February 1996," (the date of the second auction), "I never got anyone to buy the property. People came and looked but never came back".

7. The marked lack of interest following the failed attempt at the first auction and thereafter over the ensuing twelve months resulted in the appellant being

forced to reduce the reserve price to \$1,800,000.00. The property was again placed with C.D. Alexander Realty Company Ltd. for auction on February 1, 1996 at 10:30 a.m. at their auction room.

8. The advertisement in the Daily Gleaner of Thursday, February 1, 1996 which forms part of the Record of Appeal (Exhibit 3) reads:

"Today! Today! C.D. Alexander Auctions for Sale by Public Auction Thursday, February 1, 1996 at 10:30 a.m. at our offices UNDER POWERS OF SALE CONTAINED IN A MORTGAGE NOS: 13 & 13a PRINCESS ALICE DRIVE, HERMITAGE, ST ANDREW. All that parcel of land part of Copeland Corner, situated on Mona Road in the parish of St Andrew being the lot numbered SEVENTEEN on the plan.

Part of HERMITAGE as comprised in Certificate of Title registered as Volume 1005 Folio 190 with a dwelling house thereon.

The C.D. Alexander Realty Company Ltd.
168 Harbour Street, Kingston, Jamaica."

9. A few observations need to be made before continuing the review of the evidence adduced at the hearing below. It is important to note that while the property was advertised for sale by public auction and referred to as Nos: "13 and 13A Princess Alice Drive", apart from referring to the Volume and Folio numbers of the Registered Title, and a description of what was comprised thereon as being "a single dwelling house", no reference was made as to what Nos. 13 and 13A Princess Alice Drive consisted of. Being a proposed sale by way of a public auction a proper description of the property to be sold was essential as this was what would cause in potential bidders an arousal of interest and thus

to attend the sale. No evidence was adduced as to the kind of advertisement designed when the property was put on the auction block in December 1994.

10. In view of the advertisement, (Exhibit 3), one can only infer that a similar advertisement was used on that occasion. Having regard to the poor response from the twelve persons who came to the December 1994 auction, there was an even greater need for a fuller description of the property in order to attract a better type of clientele. When the property was again advertised for sale on February 1, 1996, of even greater importance and significance is what transpired on the day of the auction.

The Respondent's Account

11. On the day of the sale, the respondent said that he was in possession of two cheques totalling \$420,000.00, and \$200,000.00 in cash, for a down payment on the property in the event of his bidding being successful. He was taken to the auction room at Harbour Street by his son intending to participate in the auction and to bid for the property on behalf of his two grandsons who were interested in acquiring the premises as a home for their respective families. He got to the auction room by 9:30 a.m. and saw two persons present, a gentleman and a lady, who were seated side by side at one end of the table. The lady whom he assumed to be the auctioneer enquired from him whether he was there for the auction of the Princess Alice Drive property and he said: "Yes". She handed him a form to fill in. He filled in the section which required his name and sat down at the other end of the table. The lady and the gentleman were

conversing in low tones so that he was unable to hear what was being said. After a while the man got up and said that he would soon return. The lady then started to gather her papers preparing as if to leave the room. The man left the room around 9:55 a.m.

12. The respondent said to the lady: "It looks like the auction late?" She made no response and he then told her that, "he was the owner of the property" and she replied that the place was sold. He enquired as to whom it was sold and she said: "To the man that just gone through the door". On enquiring how much it was sold for, the respondent was told \$1,900,000.00. The respondent then told her there was no bidding and that that was not even a quarter of the value of the property. The auctioneer (the lady) told him that if he did not agree with it, he should go and see the Bank.

13. On leaving the auction room the respondent went and spoke to a loans officer at the Bank, a Mr Sloley. When he related what had taken place at the auction, he was told by the loans manager:

"Well that is what you owe us, if you are not satisfied
you can get your lawyer".

He consulted an attorney-at-law and later in the same month had a valuation done on the property by Robert Taylor a commissioned valuator. His report fixed the market price of the property at \$4,500,000.00. A writ was then filed against the Bank (appellant) claiming damages for negligence in the conduct of the sale.

14. There was no issue as to what transpired prior to the events at C.D. Alexander's auction room on February 1, 1996. It is common ground that all

efforts both by the respondent and the appellant to dispose of the property both at the December 1994 auction and subsequently by way of private treaty all met with failure. This was what led to the reduction in the reserve price from \$2,000,000.00 to \$1,800,000.00 and to the property being re-advertised for sale by Public Auction on February 1, 1996. The crucial issues of fact and the matter on which the case turned was as to the circumstances in which the sale on the morning of February 1, 1996, at the auction room of C.D. Alexander Realty Company Ltd. at 16 Harbour Street, Kingston was effected.

The Appellant's Account

15. According to Mrs Norma Breakenridge, the then Managing Director of the Company having the Carriage of Sale on that morning, there were three auctions scheduled for that day. The auction in respect of the Princess Alice Drive property was advertised for 10:30 a.m.

16. At the time for which the auction was scheduled only a gentleman, one Mr Bissnott and herself were present in the auction room. After the auction was announced and while reading the Particulars of Sale, the respondent came in. At this stage, she stopped reading and enquired from him whether he was there for the auction of the Princess Alice Drive property and he said: "Yes". She gave him a form to fill in and return to her which he did. He then went and sat at the opposite end of the table. When he returned the form only his name was filled in. He was then asked whether or not he was interested in taking part in the auction, and he said: "No". The bidding was by way of written bids on forms

provided. Mr Bisnott made a first bid of \$1,500,000.00. She then made an auctioneer's bid. Mr Bisnott made another bid which was still below the reserve price. She then made a second auctioneer's bid. Mr Bisnott then made a third bid which exceeded the reserve price. At that stage the bidding stopped. There being no other bids, the property was marked down to Mr Bisnott, the sale price being \$1,900,000.00.

17. The Particulars and Conditions of Sale had been read out while the respondent was present in the auction room and before the forms were collected from the respondent and Mr Bisnott. It was after her inquiry from the respondent and his negative response that the bidding sheet was passed out to Mr Bisnott, after which the bidding commenced.

18. The manner in which the bidding was conducted raised an important issue of law at the hearing below and was also rehearsed before us. Although the Conditions of Sale allow for written bids to be resorted to, the right of an auctioneer to bid can only be done if such a right is expressly reserved in the conditions of the sale. Sale of Land Auction Act 1867; S.4. In this case, it was conceded by learned counsel for the appellant that the auctioneer had no such right reserved to her. As the first and second bids made by Mr Bisnott were both below the reserve price, the auctioneer's duty at that stage was to have called off the auction and withdraw the property from the sale. While not affecting the validity of the sale to Mr Bisnott, the manner in which the auction was conducted would result in the sale being treated in law as one effected by way of a private

treaty and not by way of a public auction. In such circumstances, the mortgagee was under a duty to have carried out a current valuation of the property in order to ensure that in exercising its power of sale, the price at which the property was sold was the best price reasonably obtainable.

19. In the exercise of its power of sale, this power is given to the mortgagee the better to enable it to realize its security held in respect of the mortgaged property. This power of sale however, also has to be exercised with the mortgagor's interest in mind. This does not mean that the mortgagee in exercising its power of sale, is required to postpone the sale of the mortgaged premises indefinitely while waiting for the right occasion to obtain the best possible price in the market. What it means in effect is that while attempting to obtain a reasonable price the mortgagee in exercise of the power of sale may be held accountable to the mortgagor if he acts negligently or recklessly and disposes of the property at what clearly amounts to a gross under value.

20. This last statement is given greater currency when one considers the mortgagee's duty in exercising the power of sale in respect of the mortgaged property where the sale is by way of a private treaty as against where it occurs by way of a public auction.

21. Given the situation the purported sale was advertised to be a sale by way of a public auction. When one considers what took place at the auction room of C.D. Alexander Realty Company Ltd. on February 1, 1996 where the auctioneer proceeded to conduct the auction, arrogating to herself a power to make bids in

an effort to increase the sale price to meet the reserve price for such a right was not reserved in the Particulars of Sale, this meant, that, while the sale was not aborted, the exercise she carried out amounted to a sale by way of a private treaty. This would necessitate that all the necessary pre-conditions attendant on such sales had to be satisfied and more particularly the following:

1. A current market valuation of the mortgaged property.
2. A proper advertisement of the mortgaged property with a view to attracting potential purchasers.
3. A sale of the property so carried out as to obtain the market value of the property or failing this the best price reasonably obtainable for the property.

22. It is common ground that the price for which the property was sold fell well below what could be regarded as satisfying any of the above categories.

Given these facts in finding for the plaintiff/respondent the learned trial judge said at p. 22 of the record:

"The plaintiff in this suit is claiming that as a result of the negligence of the defendant and its agents he lost the sum of \$2.6m because they grossly under valued his duplex house property in exercising their power of sale. That this occurred because they failed to obtain a valuation of the property, they failed to properly advertise the extent of the property they failed to try to obtain the best price, that the property was sold by private treaty rather than by public auction".

23. The learned judge referred to the judgment of this Court of Appeal in ***Moses Dreckett v Rapid Vulcanizing Co. Limited*** [1988] 25 J.L.R. 130 at page 646 where the Court concluded 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."

Continuing the learned trial judge then said:

"In the instant case, the only description given of the property in the advertisement was that it was a lot "with a dwelling house thereon." They failed to specifically state that it was a duplex house on two lots of land with a land area of 6,020 square feet. The larger lot 13A had the larger side of the house and contained 4 bedrooms, 2 inside bathrooms, dining room, drawing room, kitchen, helper's quarters and an outside bathroom. The smaller side had same as the other except that it had only 3 bedrooms and an inside bathroom. Dwelling houses in this area rarely have more than 3 or 4 bedrooms. There is a vast difference between a 4 bedroom house with 2 bathrooms and a 7 bedroom house with 3 bathrooms. It can fairly be said that the mortgagee omitted these facts in their advertisement so that it failed to attract prospective purchasers. There is no dispute that at the time of the sale the mortgagee had no current market valuation. A valuation report by Magnet Real Estate Agency in October 1993, suggested a value of \$2.5m. A valuation done on 12th February 1996, less than two weeks after the sale, put the value of the property at \$4.05m. This is way below a half of current value. An attempt by Miss Sandra Samuels to challenge this latest valuation failed miserably. In fact she made no valuation at all. On her evidence she sat in her car outside the premises for about half an hour awaiting the plaintiff and left without going on the property. She had no idea of the condition of the building internally. However, based on her observation of the premises and her expert opinion, my valuation would be half of the 1996 valuation. She agreed that in the 1993-1996 period there was an upward movement in real estate value in the Hermitage area. Save that Miss Samuels saw the 1993 valuation report, she certainly was in no position to give a credible valuation".

Of Mrs Norma Breakenridge who was the Managing Director of the Real Estate Agency and the Auctioneer on the day of the auction, the learned judge had this to say:

"Mrs Breakenridge the auctioneer had over 21 years in the business. She claims that in bidding, she made two auctioneer's bids to do so she admitted that such a right would be specifically stated in the particulars and conditions of sale. No attempt was made to show her authority for doing so. This surely is an irregularity without an explanation".

24. This admission would have been crucial to the finding of the judge that the exercise conducted by the auctioneer on the morning in question amounted to a sale by way of a private treaty and not one by way of a public auction. Given the fact that there would have been no authority for the auctioneer to make bids to ensure that the eventual sale price satisfied the reserve price, the evidence indicated that the bidding commenced at \$1.5M. In response the auctioneer made a bid then the purchaser made a second bid which was still below the reserve price, followed by a second bid by the auctioneer and a final bid of \$1.9M by the purchaser. It was this last bid that satisfied the reserve price. The two unauthorized bids by the auctioneer clearly breached the conditions of the sale and would have rendered the auction void. It is significant that in accepting the evidence of the respondent as credible the learned judge said:

"From the very beginning of this issue the plaintiff had been claiming that there was no bidding and

alleging that there was collusion between the auctioneer and Mr Bisnott (the purchaser)".

25. There is further support for the finding of the sale being by private treaty rather than by public auction when one looks at the original defence filed in response to the Statement of Claim in this regard.

Paragraph 5 of the Statement of Claim alleged that:

"5. On or about the 1st day of February 1996, the defendant in exercise of the Powers of Sale vested in it by the mortgage agreement sold the said premises by private treaty to purchasers whose names are presently unknown for the sum of One Million Nine Hundred Thousand Dollars (\$1,900,000.00)".
(Emphasis supplied)

The response of the defendant in the original defence at paragraph 1, was to the effect that:

"1. Paragraphs 1, 2, 3, 4 and 5 of the Statement of Claim are admitted".

This defence was filed on 29th May 1996, in response to the Statement of Claim filed from as far back as March 1996, and was still in effect when the pleadings were closed on the hearing of the Summons for Directions. This remained the stance taken by the appellant when the hearing commenced on June 11, 1999. It was not until after the adjourned hearing of the matter continued on 5th October, 1999 that an application was made by counsel for the appellant seeking to amend the defence to plead that the premises were sold by public auction.

26. The history of the matter as it relates to the Statement of Claim and the appellants' response thereto, the amended defence being made some three years and five months after the Statement of Claim was filed, prompted the learned judge to remark that the appellant was "changing horses in midstream". This would no doubt have materially influenced the learned judge's acceptance of the respondent's account as to what occurred at the auction room of C.D. Alexander Realty Company Ltd. on the morning of February 1, 1996.

The Submissions

27. Learned counsel for the appellant raised some sixteen (16) grounds of complaint in the challenge to the judgment in this matter.

The gravamen of counsel's complaint was directed at the finding of the learned trial judge that the sale of the mortgaged property was effected by way of collusion between the auctioneer and the agent Bisnott who acted on behalf of the eventual purchasers. In his judgment at page 26 the learned judge had expressed himself in the following manner:

"I accept the plaintiff as a witness of truth. I accept his evidence that no bidding took place in public that morning in relation to the Princess Alice Drive residence. That through collusion between the auctioneer and the purchaser the property was sold privately. I reject the defendant's amended defence and on a balance of probability find that the defendant failed to adequately advertise the property failed to obtain a true market value and failed to try to obtain the best price". (Emphasis supplied)

28. These findings by the learned trial judge were arrived at based upon his assessment of the evidence relating to what had taken place on the day of the

sale at the auction room of C.D. Alexander Realty Company Ltd. on Harbour Street. The evidence of the plaintiff (respondent) which the judge accepted was to this effect (pp 11-12 of the Notes of Evidence):

"When I went in I looked around I saw only two persons, a man and a woman. They sat close to one another around a table and she at the head of the table and he to the side. The lady asked if I was here for the auction I told her yes and she handed me a paper she offered me seat at the other end of the table and I went and sat there. Paper had name, bid, address. I wrote only my name on it. I was not late for the auction – Did not arrive after 10:30 a.m. Both man and woman were talking quietly. I could not hear what they were saying. I thought they were the persons conducting the auction. At five minutes to 10:00 the man got up and said he would be back in ½ hour, he's going to the bank and he left through the door.

The lady started packing up her files. I said to her it seems nobody is coming to sale – but it is still early – she said "but it is sold". I asked "to whom" and she replied "that man who go through the door there".

(Emphasis supplied)

29. Learned counsel for the appellant submitted that the judge's finding of collusion was arrived at based upon the auctioneer having made auctioneer bids. The right of the auctioneer to do so is not expressly excluded by Statute. Counsel however, has not sought to state what would be the legal position where an auctioneer acts in such a manner although no such right is expressly reserved in the Particulars and Conditions of Sale.

30. In this regard the distinction between the Particulars and Conditions of Sale is of importance. *Bateman's Law of Auctions* 11th Edition by David Naply at page 34, section II entitled "*Particulars of Sale and Plans*" states:

"The distinction between particulars and conditions has been stated as follows: "The proper office of the particulars is to describe the subject matter of the contract, that of the conditions to state the terms on which it is sold." (Emphasis supplied)

The learned editor points to the need for extreme care and skill in the drawing of particulars when these are being drafted and to the following:

"If the subject of the sale is land i.e. "any interest in messuages, land, tenements or hereditaments of whatever tenure" the particulars, of the conditions (usually the latter) must state:

- (a) Whether such land will be sold without reserve
 - or (b) subject to a reserve price
 - or (c) whether a right to bid is reserved
- (Emphasis supplied)

31. It is common ground that this sale was subject to a reserve price and that there was no right reserved for anyone to bid on behalf of the mortgagor (respondent) nor that there was any such right expressly reserved to the auctioneer to make bids at the sale.

It follows that the findings of the learned trial judge can be supported on two grounds:

1. In relation to collusion his acceptance of the respondent's account of the events relating to the conduct of the sale.
2. The admitted absence of any right being reserved to the auctioneer to make bids.

32. While the finding of collusion may have been arrived at in absence of any such pleading being canvassed in the Statement of Claim, that relating to the learned judge's ultimate finding of a sale by private treaty and not by way of a public auction can be supported in the light of the absence of any power residing in the auctioneer to have made bids, which had the effect of resulting in the reserve price being reached. The result of the sale being one made by way of a private treaty is also supported by the admission at paragraph 5 in the original defence which pleading stood from the outset of the matter until amended over three years later when the adjourned hearing of the action continued. This meant that there was a duty placed on the appellants to show that in effecting the sale of the mortgaged property they had satisfied all the necessary pre-conditions relating to such sale. In this regard resort may now be made to an examination of the Law touching on the subject matter.

The Law

33. In this case the learned trial judge apart from his findings of fact in accepting the respondent as a truthful and credible witness, also made several other crucial findings as a matter of law. He found that in advertising the mortgaged property for sale at the auction on February 1, 1996 the appellants in stating merely that the property was "a duplex dwelling house" without describing what the two dwellings comprised of, that this was a material mis-description of the property which failed thereby to attract potential bidders to the auction sale.

34. In *Cuckmere Brick Co. Ltd. & Another v Mutual Finance Ltd* [1971] 2 W.L.R. 1207; [1971] Ch. 949; [1971] 2 All E.R. 633 (CA) the auctioneer misdescribed the property which was up for auction. In the Particulars of Sale or the Advertisements of Sale there was an omission of the fact that planning permission had been given for the erection of flats on the mortgaged property. The result of the omission was alleged to be that the sale failed to attract bidders who would have been interested in building flats with the result that the land was subsequently sold for less than its true value.

Counsel for the parties relied on two lines of authorities. *Salmon L.J.* referred to this and at p. 643 (G-H) ([1971] 2 All E.R.) he said:

"It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it. ... The proposition that the mortgagee owes both duties in my judgment, represents the true view of the law".

(Emphasis supplied)

The other two members of the Court of Appeal Cross L.J. and Cairns L.J., were also in agreement on the question as to whether the mortgagee owed a duty to take reasonable care to obtain a proper price for the mortgaged property. Cross L.J. first stated the law applicable to the mortgagee's duty to

the mortgagor when acting in the exercise of his power of sale. He said (p. 646 (H-I), and 647(a):

"A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property, but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power. Some points are clear. On the one hand, the mortgagee, when the power has arisen, can 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. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at." (Emphasis supplied)

Cairns L.J. having stated the issues arising for consideration in the appeal and the state of the authorities said (at p. 653 C-D):

"I find it impossible satisfactorily to reconcile the authorities, but I think the balance of authority is in favour of a duty of care. That there is such a duty was certainly the view of Kekewich J and of the Court of Appeal in ***Tomlin v Luce*** (1888) 41 Ch D 573 also of the Judicial Committee of the Privy Council in ***McHugh v Union Bank of Canada*** [1913] AC 299. It also appears to have been the view of Lindley LJ at the time of the judgment in ***Farrar v Farrars Ltd.*** (1888) 40 Ch D 395."

The learned Lord Justice of Appeal referred to statements made by the judge of first instance in ***Kennedy v de Trafford*** [1896] 1 Ch 762 and to that made by

Lindley L.J. and Lord Herschell in the Court of Appeal and the House of Lords in the same case. He then went on to say (at p 653 G):

"I therefore consider that *Tomlin v Luce* 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."

36. The above dicta when considered and applied to the findings of fact of the learned trial judge in the instant case can be related to the following:

- (a) the manner in which the property was described in the advertisement.
- (b) The evidence of the respondent as to the conduct of the sale on the morning in question.
- (c) The admission in the original defence at paragraph 5, that the sale was made by way of a private treaty.

This was what led irresistibly to the conclusion by the learned judge that:

"I reject the amended defence and on a balance of probability find that the defendant failed to adequately advertise the property, failed to obtain a true market value and failed to try to obtain the best price. That as a result of the defendant's negligence the plaintiff suffered damages, that is the difference between the valuation price of \$4.5M and the sum the property was sold for \$1.9M"

Conclusion

37. In the light of the evidence of the respondent which the learned judge accepted as a credible narrative of what took place on the morning of February 1, 1996, at the auction room, this provided a proper basis for the conclusion reached by the Court below on the Claim in Negligence.

There being no serious challenge made by the defence as to the evidence adduced by the respondent as to the true market value of the property of \$4.5M the loss suffered by the respondent when the sale price of \$1.9M is taken into account would amount to \$2.6M.

I would accordingly dismiss the appeal, affirm the judgment entered below and order the costs of the appeal to the respondent such costs to be agreed or taxed.

PANTON, J.A:

I agree that the appeal should be dismissed.

SMITH, J.A:

I too agree.