

IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 421 of 2009

DEVELOPMENT FINANCE CORPORATION CLAIMANT

AND

WILLIAM KARL GEORGE HEUSNER DEFENDANT

Hearings

2010

5th May

2nd June

22nd June

Ms. Darlene Vernon for the Claimant.

Mr. Oswald Twist for the Defendant.

LEGALL J.

JUDGMENT

The Loan

1. The defendant on 23rd November, 1998 obtained a loan of \$25,000.00 from the claimant, a body corporate established under the provisions of the Development Finance Corporation Act, Chapter 226 of the

Laws of Belize. A letter from the claimant was sent to the defendant stating that the loan had been approved on certain terms and conditions, including providing security for the loan, by executing certain documents. On 23^d November, 1998 the defendant, as security for the loan, signed a mortgage deed creating a legal charge on property owned by him situate at lot 13 Hummingbird Highway, Cayo District, Belize comprising 2,500 square yards, more fully described in Minister's fiat Lease No. 702 of 1998 (hereinafter referred to as the land). On the said 23rd November, 1998 the defendant signed a promissory note, promising to repay to the claimant the \$25,000 plus interest at the rate of 13% per annum until the full amount owed was repaid.

2. The defendant was also the owner of certain chattels which were located at the land; and on 30th March 2000, on a request by the claimant for further security for the loan, the defendant assigned to the claimant by way of security for the said loan, a blue Yamaha generator, two solar batteries and three solar panels; (the chattels) by executing a Bill of Sale or Indenture dated the said 30th March, 2000.
3. The defendant agreed under the mortgage deed, the promissory note and the bill of sale to repay the amount of the loan and interest by one hundred and eight monthly installments of \$393.84 until the full debt was paid. In the event of default in paying the installments, the defendant agreed that the claimant under the mortgage deed had the authority to sell the chattels and land or any part thereof by public or private contract. Under the bill of sale the claimant could seize or

take possession of the chattels under the Bill of Sale Act Chapter 246 where there is default in the payment of the sum of money secured under the bill of sale.

Default on the Loan

4. The defendant defaulted in re-paying the loan specified in the mortgage deed, bill of sale and promissory note. The defendant had paid some installments; but he did not make any payments between the years 2000 and 2006. The claimant by letters dated 17th April, 2000 and 8th March, 2001 demanded payment of the loan. The letter of 17th April, 2000 said that if the defendant did not pay the moneys due at the expiration of three months from the date of the letter, the land would be sold. But the claimant got no response from the defendant.
5. By letter dated 15th August, 2001 the claimant informed the defendant that the land held as security for the loan would be auctioned at the next scheduled auction in his district. In June 2001, the claimant published in the newspapers, namely, the Belize Times, the Alliance Weekly and Amandala its intention to exercise its power of sale under the mortgage deed. Between the 12th December, 2001 to August 2006, the property was put up for sale on about eight auction sales, but was not sold. But on 18th October, 2006 the land was sold by private sale for the price of \$10,000.
6. As a result of the default of the defendant in repaying the loan, the solar panels were also sold to one John Pinelo for the price of

\$1,320.00 which was the highest and best offer made. The claimant states that the solar panels were advertised on one occasion only, and that there were other bids for the panels, apart from the bid by John Pinelo. The claimant also stated that no pictures of the solar panels were shown in the advertisements, and that no offer was made for the generator. The claimant deducted these amounts received from the sale of the land and solar panels from the amount owing on the mortgage, bill of sale and the promissory note and brought a claim against the defendant for the remaining principal balance of \$14,008.21 and interest on that amount of \$16,546.53 making a total of \$30,554.74. The claimant also claimed other fees totaling \$8,971.24, making a total of \$39,525.98.

The Counterclaim

7. The defendant counterclaimed against the claimant for \$85,474.02. This amount is arrived at by adding the amount of \$105,000.00 as the value of the land, to \$20,000.00 for the chattels, making a total of \$125,000.00; and then deducting the amount of \$39,525.98 claimed by the claimant in the claim, thus leaving the balance of \$85,474.02.

Questions of Negligence

8. The defendant contends that the claimant either intentionally or due to negligence sold the chattels and land at a gross undervalue by selling the land for \$10,000.00, although the land since June 2001, on the evidence of Eduardo Torres, a witness for the claimant, that the property at that time was offered for about \$60,000 to \$70,000. The defendant admitted that the building on the land was vandalized and

parts stolen and that a fire occurred at the building in 2006. But the vandalism, theft and fire according to the defendant did not result in such a drastic reduction of the price of the property.

9. The chattels, according to the defendant could have been sold for \$20,000 – the generator \$10,000 and the panels \$8,000.00 and batteries \$2,000.00. The defendant contended that either intentionally or by negligence the panels were grossly undersold for \$1,320.00 and the generator and batteries due to negligence were not sold. The defendant therefore counterclaimed also for the \$20,000.00.
10. By selling the land for \$10,000.00 and chattels for the \$1,320.00 the claimant, argued the defendant, who owed the defendant a duty to take reasonable precautions to obtain the true market value of the land and chattel, failed to do so by not telling the defendant that he could have sold the land and chattels himself; by not publishing, in addition to a literal description, a photograph of the property and chattels in the Gazette that they were for sale; by publishing in the newspaper only the photograph of the land, and not the buildings thereon, and by failure to properly advertise the sale of the land and chattels. It was also submitted that the claimant failed to fix a reserve price for the land and chattels.
11. It was also submitted that the claimant failed to employ a competent real estate agent to sell the land and also sold the said land and chattel at a gross undervalue. The defendant submitted that based on all of the above matters, the claimant was negligent, failed to take

reasonable precautions to obtain the true market value of the land and chattel, and did not act in good faith in relation to the selling of the land and chattels.

12. The evidence reveals that at around the time of the loan, a valuation was done on buildings on the land, and the buildings were valued at \$51,000. At that time, no valuation was done for the land. The claimant admitted that advertisements of the sale of the property were made in the Gazette, but photographs of the property were not published. Photographs were published in the newspapers, but these photographs showed the land only and not the buildings. The land was also advertised in the newspaper but only as a restaurant and bar. It was therefore submitted by the defendant that the claimant was negligent and acted in bad faith because the claimant failed to properly advertise the property and chattels which resulted in the property and chattels being sold at a gross undervalue.

13. Torres, a witness called by, and an employee of, the claimant testified that a reserve price was set for the sale of the land on eight occasions, but he said he did not know what the reserve price was. This witness could not recall and did not know several matters about the auction sale of the property. He did not know if a valuation was done for the land about three months prior to the sale of the land. He did not know the auctioneer who did the sale. He did not know if there were other bids for the land in addition to the successful bid of \$10,000.00.

14. But in relation to the chattels he knew that there was one other bid, to the one by John Pinelo who bought the solar panels for \$1,320.00. He also did not know if, at the time the land was sold, if any reserve price was set. He said the person who dealt with the sale of the property was the general manger of the claimant. On being asked his name, the witness said he could not recall. This witness Torres is the only witness called by the claimant to testify in relation to the sale of the land and chattels.

15. In support of the defendant submission of the value of the land, the defendant relied on the evidence of Owen Gentle a retired public officer who certified that he was a self employed valuator and real estate agent and worked for about twenty years as a Lands Inspector and Assistant Lands Officer in the Ministry of Natural Resources. He prepared a valuation report dated 17th November, 2009 for the property. According to the report the land alone, without the buildings, is valued by him at the price of \$105,000. Though the report is dated 17th November, 2009, the report states that the date of the valuation is 15th November, 2006. No application was made to deem this witness an expert, and the court therefore made no order deeming him an expert witness.

16. Under cross-examination, this witness admitted that he failed to state in his report, how he arrived at the value of \$105,000; the comparable prices for other properties in the same location, or what price per square foot of the land he took into consideration when he arrived at

his valuation. But he did say in re-examination that he looked at other properties, but did not state that in his report.

17. In addition to the fact that this witness is not an expert witness, his failure to show in his report how he arrived at the figure of \$105,000.00, and his failure in his evidence to state any comparable price of other properties in the location, or what price per square foot of the land he considered, have created great doubts in my mind about the truthfulness of his evidence and his report with respect to the value of the land. In a case where an expert gives evidence which is disputed by the other side, a great deal depends on the impression made on the court by the witness. Some experts, by the way they give their evidence, inspire the judge with confidence. Other experts may fail to do so and create doubts in the mind of the court. I have seen Mr. Owen give his evidence. I am not impressed by his evidence and I have misgivings about his opinion that the value of the land is valued at \$105,000.00.
18. The burden is on the defendant to prove his counterclaim that the land is valued at \$105,000.00 and I am not satisfied, on a balance of probabilities, that he has done so.
19. Moreover, there is no evidence as to how the defendant arrived at the valuation of the chattels. I would have expected a price quotation or witness statement or receipt from the business place where these chattels were bought, to support the defendant's evidence of the \$20,000.00 value of the chattels. The burden is on the defendant to

prove counterclaim, and the above mentioned receipts and quotation would have been of assistance.

20. What are the legal obligations of a mortgagee to a mortgagor in relation to the exercise of a power of sale under a mortgage deed? A relevant authority to consider is *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. 1971 Ch. 949*. In this case a mortgagee bank lent in July 1961 to the plaintiff mortgagor the sum of £50,000 for the purpose of constructing flats at a certain site measuring 2.65 acres. The mortgagor put up property as security for the loan. The mortgagor agreed to repay the loan punctually at specific periods and to complete the construction of the flats satisfactorily within two years from the date of the loan, and not to carry out any development works at the site other than the building of flats.
21. Five years after the date of the loan, September 1966, no building had begun at the site. The defendant gave notice to the plaintiff requesting payment of the loan. The loan was not paid. The defendant in exercise of its power of sale under the mortgage deed, took possession of the site, and sold it at public auction for £44,000 in June 1968. The plaintiff brought an action against the defendant bank claiming that because of the defendant's failure to take reasonable precautions in relation to the sale, the site was sold for less than it would have fetched if the said precautions were taken.
22. The defendants, in the exercise of their power of sale, had advertised the sale. It was not mentioned in the advertisement that there was in

place planning permission to build flats, but only houses. Permission granted to build flats makes the land more valuable than permission to build houses. So it was contended that the omission in the advertisements by the defendant to mention that permission was granted to build flats at the site, resulted in the low price of \$44,000 for the site instead of a possible £6500 to \$75,000. The judge accepted that the low price of £44,000 was due to the omission in the advertisement that permission was obtained for the building of flats.

23. The judge at first instance agreed and held the defendant's conduct amounted to negligence. On appeal, it was held that the failure to advertise planning permission for flats amounted to a failure to take reasonable precautions to obtain a true market value of the site. The defendant, says the Court of Appeal, owed the plaintiff a duty to take reasonable precautions to obtain the true market value of the site and that it could find no ground in reversing the judge's decision that the defendant failed in that duty: see *Cuckmere Brick Co.* above at page 965.

24. The authorities seem also to establish that the mortgagee is under a legal obligation to take reasonable care to obtain the true market value of the property mortgaged at the date of the sale, and a mortgagee is answerable if the property is sold, at an undervalue because of a failure on the part of the mortgagee of due care and diligence: see *Cuckmere Brick Co. above, and National Bank of Australia v. United Hand in Hand and Bank of Hope Company 1879 4 AC 391.* It is the duty of the mortgagee when selling the mortgaged property to

behave, when conducting such sale, as a reasonable man would behave in the sale of his own property, “so that the mortgagor may receive credit for the fair value of the property sold”: see **McHugh v. Union Bank of Canada 1913 AC 299, at page 311** per Lord Moulton.

25. In *Cuckmere Brick Co.* above Salmon L.J. concluded:

“I accordingly conclude, both on principle 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.”

26. Another relevant question is whether mortgagees are answerable for any mistakes made by their auctioneers while conducting the sale. In *Tomlin v. Luce 1889 41 Chd 573* the Court of Appeal held that the “mortgagees are answerable for any loss which was occasioned by the blunder made by their auctioneers at the sale.” It seems to me that mortgagees, exercising the power of sale under a mortgage deed, have, unless the mortgagee is exempted by the terms of the mortgage deed, to account to the mortgagor for any loss incurred through their negligence or the negligence of their agents, which would include the auctioneers.

27. A mortgagee has the right to realize his security on a loan by turning the security, in case of default on the loan, into money when he likes; and there is nothing 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: see *Cuckmere Brick Co.* above at page 965. The mortgagees have to show that they have taken all reasonable steps to secure a purchaser at the best price, and that the price obtained was not at the time inadequate, though more might have been obtained by postponing the sale: see *Farrar v. Farrar Limited 1885 40 Chd 395*.
28. In *Tse Kwong Lam v. Wong Chit Sen 1983 1 W.L.R. 1349* where a mortgagee, having lent money to a mortgagor who defaulted on the loan, the mortgagee at a sale of the property put up for security for the loan, in effect bought the property at an auction sale for a company in which the mortgagee had an interest. The Privy Council held that although there was no fixed rule that a mortgagee could not sell mortgaged property to a company in which he had an interest, a mortgagee who failed to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable, and that his company bought at the best price, the court will, as a general rule, set aside the sale.
29. In *Farrar v. Farrar Ltd.* above, Lindley LJ said at p 410 that:

“Every mortgage confers upon the mortgagee the right to realize his security

and to find a purchaser if he can, and if in exercise of his power he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even though more might have been obtained for the property if the sale had been postponed.”

30. Returning back to the facts of this case, I do not think that it would have been reasonably foreseeable that the omissions in the advertisements would have resulted in a delayed sale, or a sale at a reduced price especially when it is considered that the address of the land was given in the advertisements, and interested parties could have gone to the address and viewed the land, a point made by learned counsel, Miss Vernon for the claimants. I think the claimant discharged its duty of care in relation to the advertisements of sale of the property and did take reasonable precautions by the said advertisements, to obtain the true market value of the land.
31. What is to be noted, is the failure of the claimant to obtain the services of a real estate agent with respect to the sale of the property, and also the low price of \$10,000 for which the property was sold, which low price may amount to evidence of fraud.
32. An experienced real estate agent is a facility which can be useful to persons who intend to sell land or property. The land in this matter was on the market for sale for about five years with several advertisements in the media. But I do not think, on a balance of

probabilities, that a real estate agent, on the facts of this case, would have been able to secure a better price. The burden is on the defendant to prove on a balance of probabilities, that the mortgagee breached the duty to take reasonable precaution to secure a proper price; and the defendant, in my view, has failed to discharge that burden.

33. I am of the view, on the facts of this case, that the claimant bank, after trying for years to sell the property, and after some disappointments and delays in getting it sold, was interested in selling the land for the best price available to it, at the time. It turned out that that price was \$10,000.00. The onus is on the defendant to prove his counterclaim that the claimant breached the duty to take reasonable precaution to secure a proper price, or committed a fraud, and, in my view, the defendant has failed to do so. The views of Salmon L.J. in *Cuckmere Brick Co.* above at page 965 ought to be considered:

“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 mortgagor 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 realize 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 interest which of course he could not do were he a trustee of the power of sale for the mortgagor.”

34. Moreover, the claimant and defendant signed a mortgage deed dated 23rd November, 1998 under which the mortgagee, lent to the mortgagor, the sum of \$25,000. Clause 4 (8) of the deed states:

“(8) It shall be lawful for the Mortgagee and every person for the time being entitled to receive and give a discharge for the principal monies interest and other monies hereby secured when the same has become due without any order of the Court to sell or concur with any other person in selling the mortgaged property or any part thereof and either together or in lots by public auction or by private contract subject to such conditions respecting title, evidence of title, or other matters as the mortgagee may think fit with power to vary any contract for sale and to buy in at any auction and to rescind any contract for sale, and resell without being answerable for any loss occasioned thereby.” (emphasis mine.)

35. This clause of the mortgage deed seems to prevent the claimant bank, by agreement of the parties, from being answerable for any loss occasioned by the sale of the mortgage property. The defendant's counterclaim alleges that he suffered loss occasioned by the claimant's bank alleged negligence, and therefore the claimant is answerable. But by the above clause the defendant, it seems, agreed that the claimant's bank would not be answerable for any loss. The above clause goes on to state that where the funds from the sale prove insufficient to provide the sum due under the mortgage, the claimant bank, the mortgagee, shall have the right to bring an action for the debt against the mortgagor.
36. The evidence of the defendant shows that he defaulted in paying his monthly installments under the mortgage deed about a year after the mortgage. He admitted that he made no payments under the mortgage to the claimant between the years 2000 and 2006 when the property was sold. The claimant by letters dated 17th April, 2000 and 8th March, 2001 requested the defendant to pay amounts due under the mortgage. There was no response from the defendant and the claimant by letter dated 15th August, 2001 informed the defendant that the property would be sold by public auction. On 3rd June, 2001 the property was published in the newspaper and Gazette. And as shown above, there were eight attempts to sell the property by auction, before it was eventually sold in 2006. Moreover the defendant's own witness agreed that the longer a property remaining on the market it is likely that the value would be reduced. As I said above, I am not satisfied

that the claimant breached the duty to take reasonable precautions to secure a proper price for the land and chattel.

Fees

37. The claimant in the statement of case claimed escrow fees in the amount of \$1,049.00 up to March 2009. It is not clear to me how this amount was arrived at, bearing in mind the date of the signed document by the defendant and the monthly escrow payments stipulated therein. The claimant also claimed \$2,766.48 “being other fess (sic) due up to March 2009.” How the amount of these fees were arrived at and under which agreement were not disclosed in the evidence.
38. Moreover the claimant by virtue of promissory note dated 23rd November, 1998 claims attorney fees incurred by the claimant in the sum of \$5,155.56. According to the promissory note, the defendant agreed that where he defaulted in paying any installment of the loan, to pay to the claimant “all costs and expenses incurred by the claimant in seeking the balance unpaid.” There is no evidence that the amount of attorney fees claimed were incurred by the claimant. For the above reasons I refuse the claims for escrow fees, other fees, and attorney fees.
39. Moreover there is no evidence of what the claimant did with the generator. It was valued by the defendant at \$10,000. This value was not denied by the claimant and I find the claimant liable for the cost of the generator.

40. The claimant claims the sum of \$39,525.98. From this must be deducted escrow fees of \$1,049.20; other fees as stated in the claim of \$2,766.48, attorney fees of \$5,155.56 and the value of the generator \$10,000.00 making a total deduction of \$18,971.24. When this total is deducted from \$39,525.98, the amount of the claim, a balance of \$20,554.74 remains.

Conclusion

41. The claimant has proven that the defendant obtained a loan from it in the sum of \$25,000, and that he signed a mortgage deed, a bill of sale or Indenture and promissory note to this effect under which he pledged his property situate at lot 13 Hummingbird Highway, Cayo District and chattels as security for the loan. He defaulted in repaying the loan and his property and one piece of chattel were sold. I do not find in the circumstances of this case, and on a balance of probabilities, that the claimant was negligent, or breached the duty to take reasonable precautions to secure a proper price for the land and chattel sold.
42. The defendant failed, on a balance of probabilities, to prove his counterclaim, that the land was valued at \$105,000.00 and that the claimant failed to take reasonable precaution to get a proper price for the land and chattel. The claimant has failed to prove that the defendant is liable for escrow fees, other fees as stated in the claim and attorney fees. The claimant is liable for the cost of the generator in the sum of \$10,000.00.

43. I therefore make the following orders:

- (1). The defendant shall pay to the claimant the sum of \$20,554.74 being the amount owing to the claimant under mortgage deed dated 23rd November, 1993, bill of sale dated 30th March, 2000, and promissory note dated 23rd November, 1998.
- (2). The counterclaim is dismissed.
- (3). The defendant shall pay to the claimant interest on the said sum of \$20,554.74 at the rate of 6% per annum commencing from 14th May, 2009 until the sum is fully paid.
- (4). The defendant to pay costs to the claimant, to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
22nd June, 2010

