IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 1652/2003

BETWEEN	**CORNWALL AGENCIES LIMITED**	**CLAIMANT**
AND	**BANK OF NOVA SCOTIA JA. LTD**	**1st DEFENDANT**
AND	**AMALGAMATED DISTRIBUTORS LTD**	**2nd DEFENDANT**

R. Codlin instructed by Raphael Codlin & Co. for Claimant

J. Vassell Q. C. and C. Bailey instructed by Dunn Cox for 1st Defendant

R. Braham and S. Hanson instructed by Livingston, Alexander & Levy for 2nd Defendant

Heard: February 19, 20, 22, 23, 26, 27; April 11, 12; June 19, 20, 2007; January 24, 2008

Beswick J

1. Cornwall Agencies (Cornwall), the claimant, in this suit seeks redress against the Bank of Nova Scotia (BNS), the 1st defendant, and Amalgamated (Distributors) Limited (Amalgamated), the 2nd defendant for negligence, fraud, conspiracy, loss and damage arising from circumstances where BNS sold Cornwall's property to Amalgamated, purportedly under the powers of a mortgage. Cornwall alleges that the defendants conspired together and fraudulently sold the premises at a price which was too low, thereby causing Cornwall to suffer loss.

2. Cornwall had obtained a mortgage from BNS using its premises at 437 Spanish Town Road as security. Cornwall failed to pay the debt promptly and BNS sold the property seeking to recover the sums due.

3. Amalgamated bought the property. However, at the time of the sale, Amalgamated was a tenant of Cornwall and shared occupation of the premises with Cornwall. Cornwall was unaware that Amalgamated had purchased the property and had thereby become its landlord until Amalgamated gave Cornwall notice to vacate the premises. Cornwall which had occupied the premises for 15 years was required to move in 11 days.

4. Cornwall experienced great difficulty in trying to meet this deadline as it was a supplier and agent for heavy-duty construction equipment and also distributed and stocked steel.

5. Cornwall became suspicious of the bona fides of the sale transaction because the sale price was below valuations which had been done and because the transaction seemed to have been done so secretly, with Cornwall's tenant.

6. Cornwall therefore filed this suit against BNS and Amalgamated and in its amended claim form claims:

1. The sum of $35,638,546.00 being loss on inventory, rental income and redundancy payments.
2. The sum of $70,000,000.00 being the difference between the sale price and the true market value of the property at the time of sale.
3. Interest on the said sums at a commercial rate of 27%.

4. Rescission of the contract of sale between the defendant and Amalgamated Distributors Limited, in the alternative the difference between the sale price and the true market value of the property at the time of sale.

5. Damages for negligence and fraud.

6. Costs and attorney's costs.

7. Any outstanding amounts owed to the 1st defendant by the claimant as a result of the 1st defendant's negligence, fraud and/or or otherwise.

8. Such further and other relief as the Court deems fit.

7. BNS by letter dated 15th November 1999, had demanded from Cornwall payment of $24,602,019.03 representing amounts it said were due as at 4th November 1999 on a promissory note, and loans and interest. A mortgage secured these loans.

8. The Bank claimed to have served that Demand Notice on Cornwall by registered mail addressed to 437 Spanish Town Road, the address of Cornwall. However, Ms. Nicole Pierce, Managing Director and major shareholder of Cornwall, did not remember receiving the Notice. The company did not receive mail at the address, but rather, at a post office box. However, the mortgage document indicates that Cornwall's address is 437 Spanish Town Road. In any event Cornwall certainly would have been aware that monies were outstanding. The evidence is undisputed that Cornwall paid over $8 million yearly in interest and charges to BNS, nonetheless, Ms. Pierce, was unsure of the exact amount the company owed BNS at the time of sale and is therefore unable to say if the amount claimed is correct.

9. Not only was Cornwall indebted to BNS but the company had also taken a loan from Citibank and failed to repay that loan. Citibank appointed a receiver who had full control of the company and who was trying to sell its assets to recover on that debt. The Receiver was aware that BNS was seeking to sell the property and was in fact working with BNS to try to sell the property. Indeed, BNS authorised the holding of an auction to sell the property.

10. In the circumstances of this indebtedness, BNS would certainly have the right to seek to recover outstanding monies by way of a sale of the property and I accept that the Demand Notice on Cornwall was properly served at the address stated.

11. One of the issues to be determined therefore is whether the sale price of $26 million was reasonable.

The Sale Price

12. The property at Spanish Town Road was located in what Ms. Pierce regarded as an industrial area, and had five titles comprising land and building. She testified that Cornwall purchased the premises for $3.7 million in 1987 although at that time it had been valued for $5.37 million. Since the purchase, she has modified the internal space of the structures to accommodate the company's needs and has repaired substantial damage caused to its roofing by Hurricane Gilbert. The changes do not seem to be major.

13. In determining whether or not the sale price was reasonable, the value of the premises and the circumstances of the sale are critical.

14. **(a)** ***Valuations***

Three valuation reports were done which directly concern this sale as shown below:

Date	Fair Market Value	Forced Sale Value	Valuators
1997, Jan. 29	$134,094,000.00	$107,275,200.00	Langford & Brown
2000, May 22	$134,240,000.00	$102,792,000.00	Langford & Brown
2001, Mar. 15	$ 40,000,000.00 to 45,000,000.00	$ 31,500,000.00	Allison Pitter

There is a vast difference between the valuations of Langford & Brown and that of Allison Pitter.

15. The first valuation by Langford & Brown was done at the request of Cornwall. It was Mr. Brown of that firm who prepared the valuation report on the premises. Mr. Brown has since died and Mr. Gordon Langford, a Valuation Surveyor and part of the firm of Langford & Brown, has given his opinion on Mr. Brown's valuation as well as on the valuation of Mr. Steer, the other valuator who valued the property on behalf of Allison Pitter.

16. Mr. Langford had not been able to enter the premises but he knew the premises and had examined the site plans and had done valuations of several properties in the vicinity within the previous four years. He testified that he did not in fact need to visit the premises because the valuations being called into question had been done five years before, so that a visit so long after would not have assisted in any event. Further, he was only doing a critique, not a new valuation. He had, however, not located the late Mr. Brown's note as to how he calculated the valuation figure but using standard valuation methods, he agreed with Mr. Brown's amount.

17. Mr. Langford testified that the property was a specialist property in a light industrial area and in determining the accurate valuation, he for his part, would consider

all methods of valuation to provide a crosscheck. He himself would value the property for over $100 million, which accorded with Mr. Brown's valuations.

18. Although Mr. Brown's valuation in 2000 accorded with a calculation using the Replacement Cost of the premises' method of valuation, Mr. Langford's evidence is that that was just a coincidence, in his opinion all methods of valuation had in fact been used.

19. He testified that it is important to know the purpose for the valuation. Mr. Brown, his colleague, had done the valuation in 2000 at the request of Dunn Cox, a firm of attorneys-at-law, to establish the market value whereas Mr. Steer the other valuator, later did the valuation for the Loan Recovery Unit of the Bank in a foreclosure situation. However, he agreed that there had been a letter from Dunn Cox which would have caused Mr. Brown to deduce that the valuation was being done with a sale being contemplated. Mr. Langford's view was that the premises were sold at the bottom of the market.

20. He acknowledged that there were several depressed areas in the vicinity of the premises, but he believed that businesses in the area had learned how to live in harmony with these communities, so that the value of the premises was not affected by the surroundings.

21. Mr. Connel Steer, a Chartered Valuation Surveyor testified that he is a Member and Fellow of the Royal Institute of Chartered Surveyors, the body in England that certifies surveyors. As a Fellow of that body he is more qualified than a Member. Mr. Langford is a Member.

22. Mr. Steer was asked to do an open market valuation on behalf of BNS and he did that without reference to any rental being paid at the premises. He took measurements

of the entire plant save and except for two buildings which he determined to be derelict and past economic life.

23. Mr. Steer's report shows that the methods used for his valuation were the Investment Approach and the Direct Comparison Approach. His uncontradicted evidence is that the Investment Approach is used where ownership of a property and occupation are separated. For example where a tenant is occupying the property and persons wish to invest capital and get a return on it, the valuator utilises the Investment Approach to valuation. The value there depends on the rental which a person would be prepared to pay and the return which an investor would require.

24. In this case he used comparable rentals from industrial properties on the waterfront and on Norman Road where properties were similar to Cornwall's property and which were rented by reputable institutions in an open market situation.

25. He would not rely entirely on the rental actually being paid by Amalgamated as it would not be conclusive of open market rental because parties enter into rental agreements for various reasons.

26. The second method used by Mr. Steer in that 2001 valuation was the Direct Capital Comparison Approach. His uncontradicted evidence is that in this approach the valuer estimates the price that a vendor would seek and which a purchaser would pay. He therefore, considered properties which had been recently available in the market place and compared them.

Using these approaches, Mr. Steer valued the property in 2001 at $40 - $45 million as a fair market value.

27. The Forced Sale Value he testified is always subject to the market forces of demand and supply and he put that value at $31.5 million in 2001. When he was requested to do the assessment he was shown no other valuations nor did he enquire if there were others, but later, at the request of the lawyer he was given Langford & Brown's reports to explain the disparity between those valuations and his valuation.

28. The marginal difference between the Langford & Brown's valuation in 1997 of $134,094,000.00 and in 2000 of $134,240,000.00 Mr. Steer could not explain. He concluded, however, that the disparity between the valuations by himself and by Langford & Brown was due to Langford & Brown relying on what Mr. Steer considered to be an inappropriate method of valuation of the property.

29. According to Mr. Steer, the method used by Langford & Brown was the Replacement Cost Method which would be appropriate only for properties which do not change hands such as churches and which are not put for sale on the Open Market on a regular basis.

30. The Replacement Cost Approach was spurned by Mr. Steer since he felt it shows the cost of replacing the buildings together with the cost of the land which was in fact not a value of the premises but rather was the cost of buildings plus lands.

31. The late Mr. Brown, who had done the valuation for Langford & Brown, had been Mr. Steer's boss when Mr. Steer was new to the profession. However, Mr. Steer thought that the profession had advanced beyond Mr. Brown's training and that that accounted for the use of the inappropriate approach. Mr. Brown had had many years of experience but did not have formal qualification in land surveying.

32. Mr. Steer was unable to opine as to Mr. Langford's competence though Mr. Langford's evidence is that his company does about 700 valuations yearly and that he is a Member of the Royal Institute of Chartered Surveyors with years of experience.

33. Meanwhile, Mr. Langford viewed as wrong, Mr. Steer's decision to use a comparative rental and pro rate it over the other buildings on the premises. He felt this would lead to an inaccurate result as some of the buildings were dilapidated or were open warehouses and could not be fairly compared.

34. Mr. Steer's failure to use the actual amount being paid for rent led to what Mr. Langford regarded as a gross inadequacy and eventually an incorrect valuation.

The valuators therefore have widely diverging views of the value of the premises.

35. (b) *Circumstances of the sale*

The auction was advertised and it was held in June 2000. Mr. Marcos Dabdoub, Managing Director of Amalgamated, the purchaser, gave evidence that he was first aware of the property at 437 Spanish Town Road when it was advertised in **The Daily Gleaner** newspaper for auction. He attended the auction at C. D. Alexander, auctioneers, on behalf of Amalgamated, to purchase the property if possible. Tank Weld bid $10 million, Mr. Dabdoub's brother on behalf of Tools Hardware bid $12 million and he himself did not participate in making an offer although he thought the premises were worth about $20 million. He gave no reason for his failure to participate.

36. The property was not sold as the reserve price was not met. The evidence is that where the Bank has an auction to sell mortgaged property and it is not sold because the reserve price is not met, the Bank would list it with prominent real estate brokers for

private sale and the Bank itself would try to sell it. There is, however, no evidence of further efforts to advertise in the newspapers or to hold other auctions.

37. The evidence is that the offers which BNS was receiving were in the $20 million bracket, far different from the Langford & Brown's valuation figures of over $100 million. BNS therefore decided to itself determine if the valuation should be lower and therefore commissioned the report by Allison Pitter which they received in March 2001, roughly nine months after the auction. After that report, BNS advisers in Canada started to question the competence of Langford & Brown, as Allison Pitter's valuation was about 300% less than that of Langford & Brown's. The evidence is that nonetheless, there was no directive given by the BNS head office to prevent BNS from retaining Langford & Brown's services, or indeed to halt reliance on their valuations.

38. Sometime after the auction, Mr. Dabdoub of Amalgamated, had had discussion with two persons from BNS and it was Mr. Dalbert Williams, an officer of BNS, who in June 2001 had actually contacted Mr. Dabdoub to find out if Amalgamated were still interested in purchasing the property. It is interesting to note that there is no evidence of Mr. Dabdoub having expressed any interest in purchasing the property whilst he was at the auction. Amalgamated wrote to BNS offering to purchase the property for $26 million. This was on June 13, 2001, about one year after the auction.

39. The Jamaican BNS sought approval from the Canadian BNS to sell the property. After four BNS officers signed off on the recommendation that it be sold to Amalgamated, the Canadian advisers returned the Agreement for Sale to Mr. Maurice Chin, General Manager of the Jamaican Loan Recovery Unit, for signing. Mr. Chin's evidence is that it was only after he read the Agreement for Sale that he knew who the

purchasers were and their address. Prior to that he was unaware of the fact that the intended purchaser was the tenant of the owner.

40. Amalgamated applied for a mortgage loan from National Commercial Bank (NCB) to buy the premises after BNS had accepted their offer to purchase. Mr. Dabdoub of Amalgamated explained that he requested an extension of time from BNS to complete the transaction because NCB had indicated that the mortgage for the premises would not have been ready by the time specified in the Agreement for Sale.

41. According to Mr. Dabdoub, NCB required a valuation from him before granting the mortgage. In order to avoid the expense of procuring a valuation Mr. Dabdoub obtained from BNS the valuation previously done by Allison Pitter and forwarded it to NCB.

42. He viewed it as his business to buy the property for the lowest amount which would be accepted and in so doing he did not pay attention to the valuation of the actual property but preferred to rely on purchase prices of other equivalent properties sold at the time of the sale.

43. Mr. Dabdoub testified that before purchasing the premises at 437 Spanish Town Road he was aware of prices paid by his brother for two other premises in the vicinity and he visited them. One of the premises was located at 258 Spanish Town Road and was comprised of 4 ½ acres of land, the same approximate acreage of Cornwall, and one hundred thousand sq. ft. of building, four to five times more building area than Cornwall. In 2000 the purchase price was $30 million. The other property at 279 Spanish Town Road was four acres of land and twenty-six thousand sq. ft. of building. The price paid for that in 2000 was $23 million. The properties had substantial buildings fully enclosed

with walls as opposed to the Cornwall property which mostly had sheds, according to him. However, he did not know how those premises were paid for nor if any mortgage was involved.

44. Based on these properties and the building and land space of Cornwall he concluded that $20 million was the appropriate value of the property but he offered $26 million because Amalgamated was a tenant of Cornwall and if someone else were successful in purchasing the property it would have been inconvenient for Amalgamated to vacate the premises.

Was the Sale Price reasonable?

45. I recognise that valuations among valuers must vary. However, where, as here, the difference is in the region of over 300%, this must speak to fundamental differences in approach.

46. According to Mr. Langford, reasonable valuers may differ because valuation is not an exact science, but they should not differ by more than 5% though the difference can go to 15-20% between valuers and still be tolerable. I prefer to rely on the valuation of Mr. Steer for many reasons.

47. Firstly, he explained with precision, the various methods of valuation that are used and I accept that where, as in these circumstances, the premises are being valued for the best sale price, then the appropriate methods of valuation would be the Investment and the Direct Capital Comparison Approaches.

48. I am loathe to place reliance on the valuations of Langford & Brown as there is no evidence to support the basis for the figures submitted. Mr. Langford sought valiantly to justify the figures of his erstwhile colleague, but in the final analysis, he was left to

conjecture, as Mr. Brown had left no note to explain his figures, and Mr. Langford had not done the valuation again himself. He had not even visited the premises, but had used the report to assist him and had driven past the premises and looked.

49. Further, I acknowledge the years of experience of Mr. Brown, but at the same time, I prefer to rely on the years of experience of Mr. Steer as buttressed by academic qualification. I therefore view Mr. Steer's valuations of values between $31.5 and $45 million as being the more accurate ones.

50. Mr. Langford's uncontradicted evidence which I accept as true had been that in the 1990's, the Government took over financial institutions which were collapsing, and many properties were being put on the market because of insolvency. The influx depressed the market between 1996 and 2000. The Sale Agreement was in 2001, so too was the Steer valuation. This means that the assessment was done in approximately the same climate as the Agreement for Sale.

51. I now therefore consider if the appropriate valuation is 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.

52. The transfer date was January 2, 2002. Seven months had elapsed between the initial formal agreement and the completion of the sale. Clearly, there was no rush or pressure to complete the sale, elements which one would expect in a forced sale situation.

53. At no time during this seven-month period did the Bank notify the owners, Cornwall, that it was in the process of selling the property. Nor did the Bank tell Cornwall that they may have to leave the premises quickly. This silence I view as part of the approach of the Bank to keep Cornwall unaware of the sale until the last moment.

54. The Bank had no duty to inform Cornwall of the pending sale, but the silence spoke loudly as to whether or not the sale was being treated by the Bank as forced. BNS' actions were not those of a creditor urgently pursuing a sale. BNS conducted the sale in a leisurely manner with no indication to the mortgagor, during the sale, that an urgent sale was in progress. I therefore regard the fair market value as being the correct valuation to be used rather than the forced sale value.

55. BNS listed the property with realtors from May 18, 2000 up to July 2001. The premises were suitable for certain types of business and it is my view that merely listing the property with respected realtors might not be sufficient advertisement. There is no evidence 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 BNS was considering accepting Amalgamated's offer.

56. This failure to advertise, at a time proximate to accepting the offer from Amalgamated, was, in my view, an indication that there was no genuine effort made to obtain the best price possible at the time.

57. Mr. Vassell Q.C., for BNS contended that the market value figures in the valuation report reflected the expert opinion of the surveyor who had been called on behalf of BNS as its witness and was not in fact the market value. The real test was what the market would actually pay for the property. He argued that BNS' duty, as a mortgagee was to act in good faith and to take reasonable precautions to obtain the true market value of the property at the time of its sale.

58. The public auction had been advertised thrice before it was held. Further, BNS listed it for sale by private treaty with realtors and the market was depressed. He said

that there was no evidence that there existed a better price in the market at the time of the sale. He continued that the highest offer received for the property after the auction failed was that of $26 million by Amalgamated and that that figure should therefore be accepted by the Court as the market value of the property at the time of the sale.

59. Mr. Vassell urged that BNS further exhibited an interest in obtaining the best price by commissioning another valuation report when the reports of Langford & Brown failed to reflect the types of offer which were actually being received by BNS. Consequently, he urged the Court to regard $26 million as being the true market value of the property as BNS had taken several steps to obtain the best possible price over a protracted period of time and that was the price which it received.

60. The evidence of Mr. Chin of BNS is that there was no advertisement after the transaction reached the Loan Recovery Unit in early February 2001. However, according to him, looking at the last valuation, the Bank thought that the reserve price of $31.5 million would be reasonable as a forced sale value.

61. The Agreement for Sale was dated July 5, 2001 and showed purchase price of $26 million. There is uncontradicted evidence that in a report dated September 10, 1993, Mr. DeLisser, a valuator, valued the premises at $26,753,900.00 with a forced sale value of $20,065,400.00. BNS was thus in 2001 accepting a sale price which was considered reasonable in 1993.

62. Amalgamated failed to meet the date set in the Agreement for Sale for completion. The Bank granted Amalgamated an extension of about three months and then a further extension. Indeed, there was a short period for which no interest was paid. Mr.

Chin's evidence was that the Bank took the mortgagor's interest into account in granting the extension but he did not specify how that interest was considered.

63. Mr. Vassell submitted that BNS was entitled to vary any contract of sale under its power of sale. He urged the Court to find that since Amalgamated had delays in obtaining the mortgage for the purchase, BNS acted reasonably in waiving a portion of the interest due under the Agreement for Sale. He submitted that in any event, Cornwall had not suffered any loss as a result of that waiver because even if the interest had not been waived the amount received would have been less than the debt owed by Cornwall to BNS and, as such, the interest would not have been received by Cornwall.

64. I entirely reject this argument. Clearly, any amounts which could be obtained as interest would have contributed to lessening the debt which is the whole purpose behind the sale. BNS allowed Amalgamated the privilege of not paying the correct amount for interest which amount would have reduced Cornwall's debt. However, Amalgamated is not responsible for BNS permitting the interest to be waived. The responsibility for that waiver rests entirely on BNS.

65. It is my view that BNS was making little or no effort at the time of the sale to ensure that Cornwall obtained the most reasonable sale price and the best terms of sale. The purchaser, Amalgamated, benefitted from a low price and low interest at the expense of Cornwall.

Duty of Mortgagee

66. Carberry J. A. in **Moses Dreckett v Rapid Vulcanizing Company Limited** (1988) 25 JLR 130 at 134 indicated that the authorities show that the:

> "Courts have alternated between showing concern for the mortgagor and a wish to protect him against a mortgagee who

> recklessly sells the mortgaged premises, concerned only to recover his mortgage debt; while on the other hand, the Courts have stated that the whole object of taking security for a loan is to enable the lender or mortgagee to recover his money on the borrower's default and that the object of the mortgage was to enable this to be done speedily and at the mortgagee's convenience."

At page 140 the learned Judge of Appeal concluded that:

> "[T]he **Cuckmere** case should be received and followed by the Courts in Jamaica."

67. In **Cuckmere Brick Co. Ltd., v Mutual Finance Ltd.**, [1971] Ch. 949 at 968, Salmon, L J said:

> "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."

68. Carberry J.A. in the **Dreckett** case sought to determine whether the mortgagee had discharged that duty by questioning whether or not the premises had been sold at an undervalue at the time of the sale. **Dreckett** underscored the need to closely examine the sale to determine if in all respects the mortgagee acts fairly towards the mortgagor and if he uses his best endeavours to obtain the true market value of the mortgaged property at the date on which he decides to sell.

69. More recently, Bingham J.A. in **International Trust and Merchant Bank Limited v Gilbert Gardiner** SCCA 111/2000 at page 9 said:

> "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 undervalue."

70. The learned authors of **Paget on the Law of Banking** 11th edition at page 610 recognised the importance of obtaining the best sale price and opined that:

> "The mortgagee exercising his power of sale has to take a certain care. This is a duty which has been imposed by the Courts faced with complaints by various parties about the way sales have been conducted. It is clear that it is not a fiduciary duty and that the mortgagee is perfectly entitled to look to its own interests but at the same time a balance has to be struck between the mortgagee's concern to recover the outstanding debt as soon as possible and the interests of the mortgagor in seeing that a full price is obtained."

71. Mr. Vassell submitted that Cornwall had failed to prove that BNS had acted in bad faith and/or failed to secure the best price at the time of sale. I disagree. It is my view that BNS, the mortgagee, failed in exercising its duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which it decided to sell. It must be held accountable.

72. The Bank which wielded power over disposal of real property of a delinquent customer ought to have approached the sale of the property with more caution. It boggles the mind that BNS, seeking to recover as much of a delinquent loan as possible, could simply accept without greater effort, an offer which is approximately half of the lowest fair market value as calculated by the valuator which it itself retained and which was $5.5 million less that the forced sale value of $31.5 million which BNS had regarded as being a reasonable amount.

73. I understand that the outstanding debt continued to rise mostly unabated and that some genuine effort would be necessary to identify purchasers. But in the face of the low offer, the Bank ought to have ensured that the property was advertised at the time of the agreement for sale in such varied publications as were available. It was not sufficient that some time earlier there had been an extended listing with auctioneers. Had there been

evidence that such advertisements had not yielded any better offer within a reasonable time, then the Bank may well have been taken to have obtained a reasonable price.

74. As it stands, the evidence satisfies me on a balance of probabilities that this was not a forced sale. Advertisement was inadequate. The sale price was not reasonable. It was in the circumstances too low. BNS wrongfully waived interest payments due by Amalgamated and the transaction meandered along, rather secretly.

I find that BNS failed to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which it decided to sell it.

75. Allison Pitter valued the fair market value of the premises as being between $40 and $45 million. I accept 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. I am not impressed by the addendum of Mr. Steer submitted in 2006, more than five years later, seeking to lower the original valuation of 2001.

76. 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.

Conspiracy

77. Mr. Codlin for Cornwall submitted that BNS and Amalgamated had acted together with a common purpose of injuring Cornwall. This he said was evident from the fact that the premises were sold at an undervalue when both parties were aware of

valuations which far exceeded the sale price and that also BNS inexplicably waived interest which Amalgamated ought to have paid on the outstanding sale price.

78. Mr. Braham on behalf of Amalgamated submitted that the evidence is that Mr. Dabdoub denies knowing of those previous valuation reports. He submits further that the elements of conspiracy had not been proved by Cornwall. He relied on **Halsbury's Laws of England** 4th Edition Volume 45(2) para. 697:

> "In order to make out a case of conspiracy the claimant must establish: (1) an agreement between two or more persons; (2) either, where the means are lawful, an agreement the real and predominant purpose of which is to injure the claimant or, where the means are unlawful, an agreement a purpose of which is to injure the claimant; and (3) that acts done in execution of that agreement resulted in damage to the claimant."

79. I consider firstly whether there was an agreement between two or more persons. It is my view that even if I accept the evidence that officers of BNS met and/or knew officers of Amalgamated and/or communicated with each other, that in itself is insufficient evidence of any agreement existing between those parties. In any event there is no evidence from which I am prepared to infer that BNS and Amalgamated were together agreeing to do injury to Cornwall.

80. I do not agree with Mr. Codlin's view that Amalgamated in conjunction with BNS failed to carry out proper investigations and employ proper marketing strategy which would enable BNS to sell the property for a fair market value as reflected in Langford & Brown's valuation of 22nd May 2000. His view would mean that Amalgamated would have had a duty to research the market to try to convince BNS to sell at a higher purchase price. Amalgamated had no such obligation. The claim for conspiracy against BNS and Amalgamated fails.

Fraud

81. Mr. Codlin submitted that since there is no "Civil Evidence Rule Act," fraud in civil cases must be taken to be the same as fraud in criminal law.

82. Mr. Chin of BNS, Mr. Codlin submits, clearly intended to influence any valuation subsequent to Langford & Brown's because it was his evidence that he had had two valuations and wanted one lower. Mr. Codlin stated that having received a valuation from Allison Pitter which was so much lower, BNS ought to have investigated as to the difference. Failure to do so he saw as an act of fraud by BNS.

83. The fraud alleged is further based, inter alia, on (1) the sale at $26 million to tenants of Cornwall who continued to pay rent up to December 2001, after the purported sale, and (2) the failure of BNS to advise Cornwall of the pending sale which would prevent Cornwall from taking any steps to prevent the sale or to identify a purchaser for a higher purchase price.

84. The further allegation of fraud against BNS is that BNS charged interest on the loan after having received monies from the purchase of the property, thereby increasing the outstanding amount due from Cornwall.

85. Counsel for Cornwall argues that Amalgamated committed fraud when Mr. Dabdoub failed to ascertain from the auctioneer what the reserve price was and thereafter presumably offer a higher price for the premises.

86. Mr. Codlin, for Cornwall argued that there was an act of fraud in yet another situation. Amalgamated had indicated that it had had losses from a robbery which it suffered whilst occupying the premises as Cornwall's tenant. Mr. Codlin submitted that Amalgamated was disguising the sale by claiming against Cornwall, under the lease, for a

robbery, knowing that at that time, September 2001, they were in fact buyers in possession. This, he argued, was another act of fraud.

87. The Title was transferred to Amalgamated pursuant to the Registration of Titles Act. Section 105 of the Registration of Titles Act empowers a mortgagee to sell mortgaged property where the mortgagor is given notice of the requirement to pay the mortgage debt and nonetheless fails to pay. Section 106 of this Act removes from the purchaser of such premises, the obligation to enquire into the regularity of such a sale.

Section 106 provides that:

> "... [No] purchaser shall be bound to ... inquire ... into the propriety or regularity of any such sale."

88. Amalgamated has a good title. However, proof of fraud would alter that position (Section 71 of Registration of Titles Act). Although fraud is not defined in the Registration of Titles Act, several authorities consider what fraud is. Carey, J.A. in **Alele, Christian v Honniball, Robert D.** SCCA No. 111/89 reviewed many cases concerning fraud and concluded at page 24 that "fraud must involve a deliberate or conscious act of dishonesty on the part of the registered proprietor." I now therefore consider if there is evidence of fraud.

89. The sale was not completed until January 2002 therefore rent remained due and payable until then. I do not regard the payment of rent by Amalgamated, as being evidence of fraud.

90. I am aware of no legal duty resting on Amalgamated, as a purchaser, to inform Cornwall, the registered proprietor, of sale negotiations and I therefore do not consider Amalgamated's failure to so inform, as evidence of fraud.

91. There is no evidence to support the allegation that Amalgamated was seeking to disguise the sale or that Amalgamated sought to prevent Cornwall from stopping the sale nor indeed that Amalgamated's efforts to purchase prevented Cornwall from seeking a purchaser for a higher price.

92. Paragraph 6 of the lease existing between Amalgamated and Cornwall provided that:

> "The Lessor shall not be liable for any damage to the property of the Lessee ... unless caused or contributed by the Lessor."

The evidence is that Amalgamated regarded Cornwall as being liable for the robberies because of a change made to the security arrangements. The claim by Amalgamated that Cornwall was liable for robberies in my view is based on the terms of the lease, the view of Amalgamated as to the cause of the robberies and the fact that the sale was not completed It was not evidence of fraud.

93. Clearly, Amalgamated cannot be held liable for BNS continuing to charge interest after receiving purchase monies. If it is that BNS were in fact charging interest on an incorrect amount this would not be evidence of fraud in the instant proceedings but may be considered under other reliefs.

94. In the Privy Council case of **Assets Company Limited v Mere Roihi and others (1905)** AC 176 at page 210, it was stated:

> "The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part."

95. The undisputed evidence is that the last offer for purchase of which Amalgamated was aware was that of $12 million at the public auction and that it was BNS who made

overtures to Amalgamated about purchasing approximately one year after that. I see no evidence of fraud by Amalgamated.

96. The evidence of Mr. Dabdoub that similar premises were sold at comparable prices and that he was unaware of earlier valuations remains unchallenged. However, there is evidence that Mr. Dabdoub was not aware of the details of the circumstances of those sales, for example, whether or not there was a mortgage. His informant was his brother who appeared to be involved in both purchases of these other properties but who did not testify in these proceedings. I am not in a position to accurately compare the sales as there is no evidence of important details surrounding those other transactions.

97. In the Privy Council case of **Waimiha Sawmilling Company Limited v Waione Timber Company Limited** (1926) AC 101 at page 106 it was stated that:

> "Now fraud clearly implies some act of dishonesty....
> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent...."

98. BNS' action in this matter I do not view as being dishonest. Rather, I find that BNS failed in its duties which it owed to Cornwall, whilst selling under the power of a mortgage.

99. Similarly, there is no evidence of fraud on the part of Amalgamated. Amalgamated benefitted from the bargaining skills of Mr. Dabdoub, skills which did not give rise to fraud.

Recovery of items left on Property

100. Cornwall seeks to recover sums for items it alleges it was unable to recover from the premises. Correspondence which is exhibited between Amalgamated and Cornwall displays a conciliatory approach by Cornwall towards Amalgamated.

101. Cornwall in letters dated February 4, 2002 and February 8, 2002 stated that:

> "Every effort is being made to remove the remaining steel stocks to another location. We are also making arrangements to remove the scrap metal to make your occupation of the premises less difficult." and
>
> "In an effort to vacate the premises by the end of February we made arrangements for the sale of our inventory on extended credit terms, in this case being 60 to 90 days. Such being the case, we are prepared to pay the sum of $200,000.00 on account of the cost for the use and occupation of the premises once we have collected the funds from these credit sales. We are also prepared to have our client give an undertaking to pay over this sum to your client."

102. There is no mention in these important letters of any items which are being unlawfully held by Amalgamated either on its own behalf or on behalf of BNS. Cornwall appeared to be making arrangements to retrieve what it wished. The receiver appointed by Citibank had earlier been selling Cornwall's goods to recover Citibank's debt. I am not satisfied on a balance of probabilities that BNS or Amalgamated is liable for any goods remaining on the premises.

Redundancy Payments

103. Cornwall left the premises. Redundancy payments are being claimed on behalf of Ms. Pierce and other persons who are not parties to this suit. Ms. Pierce was never an employee of Cornwall but she claimed redundancy for herself and for her former employees, from BNS and Amalgamated.

Ms. Pierce's evidence is that Amalgamated did not employ these persons. There is no evidence that BNS was their employer. Nothing has been presented to provide any nexus between any redundancy payments sought/due and the fact that the premises which housed the business of Cornwall were sold.

The fact that the business would have been required to move from one location to another cannot by itself be taken to be the cause of a cessation of its operations. The uncontradicted evidence that Cornwall had also been put into receivership before the property was sold, because of its failure to honour another debt, fortifies my view. Neither Amalgamated nor BNS is responsible for redundancy payments.

Liability

104. In my judgment, Amalgamated is not liable to Cornwall under this claim. Cornwall is however, entitled to recover some losses from BNS which failed in its duty as mortgagee. The amount will attract interest. The rate of interest I award is based on BNS' lending rates of interest to Cornwall as at the date of the transfer.

Portions of Cornwall's outstanding debt to BNS were subject to various rates of interest. The promissory note and the Scotia Plan loans, and the mortgage loan, each attracted different rates of interest so I have recourse to the average of these rates.

Orders

105. The orders of the Court are:

1. Judgment for the claimant, Cornwall Agencies Limited against the 1st defendant, Bank of Nova Scotia Ja. Ltd.
2. Damages payable by the 1st defendant, Bank of Nova Scotia Ja. Ltd. to the claimant, Cornwall Agencies Limited in the sum of:
    a. $14 million and
    b. the amount waived for interest.

The amount waived for interest is to be assessed by the Registrar of the Supreme Court or is to be agreed between Bank of Nova Scotia Ja. Ltd. and Cornwall Agencies Limited.

3. The rate of interest on damages for the award in paragraph 2 above is the average of all the rates of interest which applied to the outstanding loans due at the date of the transfer.

   This rate is to be determined by the Registrar of the Supreme Court or agreed between Bank of Nova Scotia Ja. Ltd. and Cornwall Agencies Limited.

   The interest is to be compounded in the same manner as set out in BNS' mortgage security document providing security for these loans.

   The calculation of interest is to commence from the date of the transfer.

4. Costs to the claimant, Cornwall Agencies Limited as against the 1st defendant, Bank of Nova Scotia Ja. Ltd. to be agreed or taxed.

5. Judgment for the 2nd defendant, Amalgamated Distributors Limited as against the claimant, Cornwall Agencies Limited.

6. Costs to the 2nd defendant, Amalgamated Distributors Limited as against the claimant, Cornwall Agencies Limited to be agreed or taxed.