IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00109

BETWEEN	**DOREEN ELIZABETH DIETRICH**	**1ST CLAIMANT**
AND	**FIRST HERITAGE CO-OPERATIVE CREDIT UNION LIMITED**	**1ST DEFENDANT**
	MAGNE EVERING	**2ND DEFENDANT**

Mortgage – Power of sale exercised – Whether breach of duty by mortgagee – Subdivision approval obtained – Physical evidence of subdivision – Restrictive covenant not modified or removed - Splinter titles not issued -- Whether property appropriately advertised – Whether reasonable steps taken to obtain true market price at the time – Whether valuer in breach of duty.

Ravil Golding instructed by Lyn-Cook Golding & Co. for the Claimant

Andre Moulton for the 1st Defendant

Nicolas Jarrett and Shanique Walker-Howe instructed by McKenzie Howell & Co. for the 2nd Defendant

Heard: **24th October 2023, 25th October 2023, 31st October 2023, 2nd February 2024 and 26th April 2024**

In Open Court

Cor: **Batts, J.**

(G. Ashmead Esq. judicial clerk)

[1] On the first morning of trial the Claimant's counsel indicated that the experts had met, failed to agree a report and, that his expert had done a further report. The parties had not agreed, or attempted to agree, documents. No Defendant's statement of facts and issues had been filed and no statement as to reasons for the failure to agree had been filed by the respective experts. All this was in breach of case management and pre-trial review orders. I therefore adjourned to the following day for the parties to put these matters right.

[2] At the resumption all outstanding documents had been filed. Mr. Golding indicated that although his expert's response was not yet prepared the expert was available for cross-examination. The 1st Defendant's counsel was prepared to proceed. The 2nd Defendant's counsel was not as he wished to see the response of the Claimant's expert before proceeding. However, the 2nd Defendant was absent but reportedly on the way. Upon Mr. Golding's assurance, that his expert witness promised to be present on the following day, I ruled that the trial should begin immediately.

[3] All parties gave evidence and each party lead expert evidence from expert valuers and appraisers. A bundle of documents was agreed and admitted as exhibit 1. Eventually 8 expert reports and/or opinions were admitted in evidence. I will not, in the course of this judgment, outline all of that. The issues are such, and their resolution so straightforward, that it suffices for me to reference only so much as is necessary to explain my decision. I must express gratitude to all counsel for the written and oral submissions presented which were all duly considered.

[4] This case concerns the exercise of the power of sale by the 1st Defendant mortgagee. The Claimant is the mortgagor. She does not deny her indebtedness or that the power of sale had arisen. Her complaint is that the mortgagee failed to take reasonable steps to obtain the best price reasonably obtainable at the time. This is because, although the property had been subdivided, it was advertised and sold as a single residential lot without taking into account that fact. The 1st Defendant denies there had been subdivision and says if there was subdivision it

was unaware of it. Furthermore, as no splinter titles had been issued, it was not unreasonable to sell the property as a single residential lot. Additionally, the 1st Defendant blames the 2nd Defendant who prepared the expert report on which they relied to determine a reasonable sale price. The Claimant further alleges that the 2nd Defendant was negligent in the preparation of his report and the advice given to the 1st Defendant. The 2nd Defendant asserts that he did bring to the 1st Defendant's attention the fact that there was evidence of a subdivision and thus had discharged his duty. There were other tangential issues however the primary question in this case concerned how the power of sale was exercised. It is common ground that the duty of care of a mortgagee, exercising powers of sale, is to act in good faith as well as to take reasonable care to obtain the true market value (being the best price reasonably obtainable in the market at the time of sale), see **Cuckmere Brick Co, Ltd and Anor v Mutual Finance Ltd [1971] Ch 949** and **Doyen Arthur Williams v First Global Bank Ltd [2017] JMCC Comm 39.**

[5] It is first necessary to decide the factual issues. In this case the documentary evidence spoke for itself and much of it was contemporaneous. There is no issue that the Claimant fell into arrears and badly so. The explanation presented is not particularly material. I find that the notice to mortgagor was properly served and steps to sell lawfully taken. I do however find that the 1st Defendant knew or ought reasonably to have known that subdivision approval had been obtained by the Claimant with respect to the mortgaged property. The denial of such knowledge by the 1st Defendant is rejected because, in the first place, the Claimant's attorneys did so advise the 1st Defendant in writing. Evidence of this is to be found in a letter dated 13th October 2016 from B.A. Ricketts & Associates, attorneys-at-Law to the Credit Manager of First Heritage Co-operative Credit Union, see tab C in exhibit 1 (the bundle of agreed documents). Institutionally the 1st Defendant therefore had that information on file.

[6] I am inclined to note, with some curiosity, that the approval of subdivision of the land indicates that all stipulated conditions for subdivision had been satisfied, see

exhibit 9 (document number one dated July 15th, 2016). One of the conditions pertain to the absence of any violation of "*existing covenants or supportable objections*". There is an explicit covenant on the title prohibiting subdivision, see exhibit 1 tabs O and P. The covenant is yet to be amended or removed. It appears therefore that an oversight occurred within the parish council's approval process. Nevertheless, the uncontradicted evidence indicates that the parish council did grant approval for the subdivision. When regard is had to the expert opinions, on the effect on market value of steps taken to obtain approval, the apparent oversight at the parish council is immaterial to the question I must decide.

[7] Secondly, on the question of the 1st Defendant's knowledge, there is an email dated 19th June 2017 from Andre Johnson (Credit Risk Officer of the 1st Defendant) to the Claimant which proves awareness that subdivision was in progress. The email says in part:

> *"The property currently being held for the loan with us is in the process of being subdivided with 2-3, of the 4 lots to be sold."*
> (Exhibit 1-tab M)

[8] I also find that the Claimant did put in physical infrastructure such as roads, culverts, light poles, and drainage. This made it apparent, even to the casual observer, that either subdivision had occurred or steps to obtain subdivision were in progress. The expert report, which the 1st Defendant commissioned prior to the sale, made express reference to this infrastructural work. The 2nd Defendant in that report (exhibit 6) stated,

> *"…The property appears to be subject to further subdivision based on observation of utility poles, fire hydrant, asphalt paved ingress and egress and potable water pipeline."*

[9] The 2nd Defendant also gave evidence, which I accept, that on visiting the site he telephoned the 1st Defendant's office and spoke to one Miss Neeva Nugent. He indicated what he observed. He says he was nevertheless instructed to continue

to value the land as a single residential lot. I accept this evidence because the 2nd Defendant named the person he spoke to and maintained the position when cross-examined. His answer was convincing, and was not contradicted, nor was any explanation proffered by the 1st Defendant:

> *"Q. Look at paragraph 9 of your witness statement. Who did you call?*
>
> *A. Ms. Neeva Nugent*
>
> *Q. She is the person who wrote the instruction letter to you?*
>
> *A. Yes, loan recovery officer"*

[10] I also find as a fact, on a balance of probabilities, that the advertisement and promotion of the property made no reference either to subdivision approval or to the infrastructure for subdivision, see exhibit 1-tab T. This is surprising as an enquiry by the 1st Defendant, of the Claimant or her legal representative, would have brought to light the fact of subdivision approval. There is evidence, which I accept, that enquiries at the parish council may not readily have disclosed that fact given the "*disorganized*" situation in that office, see the evidence of Kenneth Beckles (the expert valuer called by the 1st Defendant):

> *"Q. Could you indicate the difficulty you would have as a valuer obtaining information on a particular subdivision approval?*
>
> *A. Very difficult in practice unless given to you by the person doing the subdivision*
>
> *Q. Why?*
>
> *A. Parish Council are disorganized*
>
> *Q. Explain disorganized*

A. They have the records but if you went to most Parish Council and give a property address they would not immediately even in their own system be able to say what's happening to the property."

[11] I find that the fact of subdivision approval, even without the issuance of splinter titles, will positively affect the price at which premises might be sold. The evidence of the 1st Defendant's expert as well as that of the Claimant's expert, Mr. Paul Thomas, supports this fact. The latter's evidence is sufficiently important to be quoted here,

"Q. All outstanding was the splinter titles for each lot?

A. Yes sir

Q. If there is a restrictive covenant affecting the land how that affect issuing of splinter titles?

A. It can if not being removed or modified or lifted

Q. The covenant?

A. Yes

……

Q. Where subdivision approval of parcel of land and put in infrastructural works that would increase value?

A. Yes

Q. A prudent valuer would take note of those things in arriving at a value?

A. Yes sir

Q. If a valuer ignores the presence of sub divisional approval and infrastructure works and issues a report, that report is flawed?

A. Once due diligence is done sub-divisional and infrastructure works would be taken into consideration

Q. If you continued to do a valuation on premises and you make certain observations and note infrastructural works, what would be prudent thing to do, would you refer to it as a vacant lot?

A: Depends on instructions given, but would indicate what is seen and observed. And assuming no infrastructure then this is value. Assuming your client gave instructions to value vacant parcel of land not taking into consideration any infrastructure then that can be done. However, if it is there reference at some point has to be mentioned of what is there

Q. If no reference at all to infrastructure works, subdivision, that value would not be true reflection of value?

A. I don't think so sir"

[12] The 1st Defendant contended that the Claimant had the opportunity, at the time she returned to receive a second mortgage, to disclose the sale of the two lots or the subdivision. It is said her failure to do so constitutes a breach on her part. I do not find that the Claimant's failure, to disclose the sale of two lots or the subdivision, absolves the 1st Defendant of the duty of care owed as mortgagee. In any event, the evidence clearly shows that the 1st Defendant was cognizant of the subdivision or ought reasonably to have been. I find that the 2nd Defendant

carried out the correct procedure, clearly outlined that the property had the appearance of a subdivision and, indicated his observations to the 1st Defendant. He discharged his duty of care. It was for the 1st Defendant armed with that information to either make further enquiry or to instruct the valuer to give an opinion based upon his observations of the property.

[13] Mr. Kenneth Beckles' explanation, as to why the experts were unable to arrive at a joint position on the market value of the land is instructive. He stated, (see exhibit 8),

> *"We were not able to agree since Mr. Thomas appears to have more information of the on-going subdivision process for the subject property than I was privy to at the time of my assessment. I was in the position of a typical valuer and could only use information that was visible on the ground and/or in the public domain. Therefore our percentages of completion of the subdivision varied considerably. This differential impacted the following:*
>
> *(a) a time line for completion of the subdivision*
>
> *(b) the cost of completion of the subdivision; and*
>
> *(c) the discounting process used by a reasonable, rational purchaser in attempting to negotiating* (sic) *purchase of this property to compensate him for his effort to complete this subdivision."*

It appears to me therefore that Mr. Beckles is prepared to defer to Mr. Thomas' assessment given Mr. Thomas' greater knowledge of the subdivision.

[14] The report of the 2nd Defendant (see exhibit 6) explicitly detailed that the property had the appearance of a subdivision. The 1st Defendant's witness, Quilston Harrison, gave oral evidence that generally speaking a completed subdivision increases the value of the land,

> *"Q. You did not believe subdivision would materially affect the price of the land?*

A. I don't know

Q. Why?

A. Completed subdivision generally speaking increases the value of the land."

Despite this, the 1st Defendant made no investigation as to whether subdivision approval had been obtained and followed through with a sale via private treaty at the price of $14,000,000, see paragraph 22 witness statement of Quilston Harrison. That is less than the market value, but higher than the forced sale value, indicated in the 2nd Defendant's report, see exhibit 6, which took no account of subdivision and valued it as a vacant residential lot. The 1st Defendant therefore failed in its duty of care when selling under powers of sale.

[15] I am mindful of the restrictive covenant, regarding subdivision, on the title. Restrictive covenants may be removed and/or modified, on the Register Book of Titles, by an order of the court. The process of discharging or modifying restrictive covenants/agreements is found in the **Restrictive Covenants (Discharge & Modification) Act.** Section 3(1)(a) of the said Act provides,

> *"3. – (1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied –*
>
> (a) *that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may*

think material, the restriction ought to be deemed obsolete.

(b) *to (d)"*

[16] I accept the evidence of Mr. Thomas that there are other properties in the neighborhood which were subdivided and had their covenants modified. To the extent therefore that modification or removal of covenants is a pre-requisite to the issue of splinter titles, I find as a fact that, splinter titles were more likely than not to be issued upon an application being made. I also accept the evidence of Mr. Thomas that the fact of subdivision, even without the issuance of splinter titles or the modification of covenants, enhances the market value of a property. It seems to me that, all other things being equal, a lot which has infrastructure in place and a parish council's approval of subdivision offers more advantages, to a prospective buyer, than one without. A prospective developer may have found it particularly appealing. I agree with the 1st Defendant's, as well as the Claimant's, expert that the market price reasonably obtainable at the time was higher than that for which the premises was ultimately sold.

[17] I find that the existence of subdivision approval, although unaccompanied by modification of the restrictive covenant, resulted in an appreciable increase in the market value of the land. The failure of the 1st Defendant to advertise, the fact of subdivision approval and/or the existence of infrastructural works, therefore deprived the Claimant of the possibility of higher offers to purchase. On the evidence, I find, that the price obtained was less than that which was reasonably obtainable in the market at that time. As it pertains to the best, proper or, market price which was reasonably obtainable, the evidence of each expert will now be reviewed.

[18] I begin with the Claimant's expert, Mr. Paul Thomas who, in a letter dated October 25, 2023, to the Registrar of the Supreme Court (exhibit 5), stated that he and Kenneth Beckles were unable to come to an agreement on the values. In their discussion they could not split the difference between Beckles' $20,000,000 and Thomas' $22,000,000. The $20,000,000 is a figure Mr. Beckles was prepared to agree to in their discussion, his reserved price was $17,000,000. Mr. Thomas' reserved price was $17,600,000. Mr. Beckles ultimately indicated that he was not changing his previous figures as the 1st Defendant said they had no knowledge of a subdivision. Mr. Thomas states that the values he arrived at took into consideration:

a. The comparables used
b. His knowledge of the area
c. The fact that the subject property had been subdivided and documents show that the relevant authorities granted permission with only the splinter titles to be obtained
d. He was informed by Ms. Dietrich that the lots were in contract at prices to which his company has established values.

[19] In an appraisal dated October 19, 2023, see exhibit 4, Mr. Thomas valued the property as at January 14, 2020 at $22,000,000. He opined that the reserved price (considering factors which normally affect the market and do not allow a reasonable period for proper marketing) was $18,000,000, see exhibit 4. I understand the denotation of a reserve price to be a minimum acceptable price sometimes referred to as a "forced sale" price. Both these values assumed sale as a single lot with infrastructure. This was a sale by a mortgagee exercising powers of sale after efforts to sell at public auction had failed. It is fair to assume there was no "reasonable time" for proper marketing and that the normal depressing factors which attend a sale by mortgagee would apply. Mr. Thomas also opined on values obtainable if the subdivided lots were sold individually. However, it is well settled that a mortgagee is entitled to sell mortgaged premises as is and has no obligation to expend resources thereon prior to sale. Therefore, I do not consider possible earnings from a sale as separate lots to be a feasible measure of damage. Splinter

titles had not been issued at the time of sale and the mortgagee could not therefore transfer a title for individual lots in the subdivision. I therefore only consider valuation of the lot as a whole as relevant to this assessment of damages. Mr. Thomas used a sales/comparable approach which examined the actual sale of similar properties in the given and surrounding areas and/or extrapolated relevant sale data from similar locations; five such locations were noted in the report. For this valuation he took into consideration the subdivision approval and noted that the only step left in the subdivision process was the application for splinter titles. He noted that the value arrived at was also based on the following:

> *"a. There is no contamination or environmental risk to the property or site, which would materially affect the value*
>
> *b. The property is valued on the basis of open market value*
>
> *c. There are no onerous conditions or covenants located within the legal documentation of the property. However, there were no individual titles available for the subject lot."*

[20] The expert report of the 1st Defendant's expert, Mr. Kenneth Beckles, dated March 20, 2023 (exhibit 7) notes that the general principle is that a property which is large enough and with potential for subdivision (i.e. there is nothing on title or government policy for the neighbourhood restricting it) will have more value than one that has no such potential. He acknowledges that the extent of value change will depend on the stage to which the subdivision implementation has progressed and that usually after a specific proposal for subdivision of a parcel is approved the value starts to increase. Then at each stage of the subdivision process, the value to the property will increase until it reaches maximum value at the completion of the process when splinter titles are issued. He opined that as at January 2020, the market value before subdivision was $12 million, after subdivision $24 million and, with the subdivision process ongoing $17.5 million. Mr. Beckles' report expressly states that it appears that the property was sold below value. Furthermore, he stated that it is clear that the subdivision process was at an advanced stage at the time of valuation and that the valuer had or ought to have at least a sense that the

subdivision process was ongoing. The report, on the other hand, states that since the covenant was not discharged from the title at the time of marketing it for sale the property was not mis-advertised. I do not agree with this position. As stated above, to fail to reference the grant of approval or the infrastructural works would not accurately describe the property. Beckles' opinion, that the stage of the subdivision approval process positively impacts its market value, is inconsistent with his opinion as to how the property ought reasonably to be advertised.

[21] The expert report of the 3rd Defendant concludes that the open market value at the time was $15,000,000 and the forced sale value at the time was $11,250,000 (see exhibit 6). This is the opinion arrived at after the 3rd Defendant was instructed to conduct the valuation of the said property as a single residential lot with no subdivision. The 3rd Defendant is of the opinion that a higher valuation would obtain were subdivision approval to be considered.

[22] All things considered, I find that the evidence of the Claimant's expert, Mr. Paul Thomas, takes into consideration all the relevant factors and provides the most thorough and accurate view of what the property ought reasonably to have been sold for. I accept his evidence. The property was sold for $14 million in the period December 2020 to March 2021, see exhibit 1 tabs J, K, O and M. Its fair market value was $22,000,000 but its reserve (or forced sale) value was $18 million. I, for reasons stated in paragraph 19 above, accept $18 million as the best price that could reasonably be obtained being the fair market price obtainable by the mortgagee. The Claimant is entitled to be put in the position, as far as money can do so, in which she would have been in had the Claimant not breached its duty to her. The statement of account, presented to her by the 1st Defendant and dated 19th day of April 2021, see exhibit 1-tab M, makes this assessment straight forward. Her loss is the difference between, the total debits on the mortgagor's final statement of account being $12,952,786.31 and, the price that ought reasonably to have been obtained being $18 million less, the surplus already stated as being

due to her and deposited in her account, being $1, 047,213.69, see exhibit 1-tab

[23] There will therefore be judgment as follows:

(i) Judgment is entered in favor of the Claimant against the 1st Defendant in the amount of $4,000,000.40.

(ii) Interest is awarded pursuant section 3 of the Law Reform (Miscellaneous Provisions) Act at 3 percent from the 19th April 2021 (being the date the final account was rendered) until payment.

(iii) Costs to the Claimant and 2nd Defendant against the 1st Defendant. Such costs to be taxed if not agreed.

David Batts
Puisne Judge