

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 2503 OF 1995

BETWEEN

REPUBLIC BANK LIMITED

PLAINTIFF

AND

PAUL TAYLOR

DEFENDANT

Before The Honourable Mr Justice Stollmeyer

Appearances:

Mr. B. Reid for the Plaintiff

Mr. R. Montano for the Defendant

JUDGMENT

In these proceedings the Plaintiff claims for the balance due on a loan made by it to the Defendant at the Defendant's request. The Defendant counterclaims for the value of his motor car, possession of which was taken by the Plaintiff; loss of use of that motor car for a period of six months; an account; and damages.

When this matter came on for hearing on 10th October, 2000, an application was made by the Defendant for me to transfer the matter for hearing before another

judge. The reason advanced for this was that I was at one time “a senior partner in the firm.....which....did and still does act for the Plaintiff bank and is on record in this matter”.

In the event, and having heard Mr. Montano's submissions, I refused the Plaintiff's application for the reason given at that time. Mr. Montano not being able to appear at the trial on a day to day basis beginning on 10th October, hearing was adjourned to 16th October, 2000 when, there being no further application for a transfer nor any appeal lodged against my decision, the trial began.

After the Defendant's case had been closed, Mr. Reid for the Plaintiff indicated that he wished to call Nadiah Romany for the purpose of leading certain rebuttal evidence. Mr. Reid had indicated before closing the Plaintiff's case that he wished to do so. On that occasion, Mr. Montano made no formal objection but did so when Mr. Reid made his formal application on several grounds. I overruled the objection for the reasons given at that time. In the event, there was no cross examination of Mrs. Romany on behalf of the Defendant.

At the outset of the trial Attorneys for the parties agreed that there were two issues to be determined. First, whether the Plaintiff clogged or fettered the equity of redemption of the mortgage created as security for the loan and thus prevented the Defendant from recovering the motor car which was the subject matter of that mortgage; and second, whether the motor car was sold at an undervalue.

The Facts

In February 1994 the Defendant borrowed \$38,597.00 (“the Loan”) from the Plaintiff to pay off two existing loans, one of \$16,707.78 owed to the Plaintiff and another of \$7,882.79 to Bank of Nova Scotia Trinidad and Tobago Limited, as well as to reduce the Defendant's overdraft at the Plaintiff bank by some \$12,810.00. The Loan was to be repaid over a period of three (3) years with

simple interest at an effective annual rate of 22.81% on the reducing balance. For some reason which is not clear to me, and in which I am not assisted by the evidence, the Loan was referred to as a “discount loan”. I say this because the cost of the Loan, being the total amount of interest to be paid thereon by the Defendant, was \$15,053.00 and was arrived at by calculating interest on the amount of the Loan at the rate of 13% over the entire three (3) year period. It is therefore difficult to discern what element of “discount” there was and I can only presume that this must be ascribed to some form of arcane banking jargon. In the event, the total of amount of interest to be paid was, as I have said, \$15,053.00 thus requiring the Defendant to pay to the plaintiff a total amount of \$53, 650.00 by 35 monthly instalments of \$1,491.00 each and one final instalment \$1,465.00. These payments were to commence on 28th February 1994.

As security for this lending, the Defendant granted a mortgage bill of sale over his Mitsubishi Lancer Motor Car registration number PAW 8473. The mortgage bill of sale is dated 3rd February 1994 and was registered as number 1387 of 1994 (“the Mortgage Bill of Sale”). The Mortgage Bill of Sale provides for accelerated full repayment of the Loan in case of default in making payment of any of the agreed instalments, as well as for a rebate of interest not yet earned at the date of repayment. This rebate is to be credited against the indebtedness of the Defendant at that time and is to be calculated in accordance for the provisions of a loan agreement entered into between the parties and which is also dated 3rd February 1994 (“The Loan Agreement”).

It is to be noted that there is no dispute between the parties as to the validity of the transaction or the documentation, nor the amount of the loan, its terms of repayment, the purposes for which the loan was granted, nor of any of the terms of the Mortgage Bill of Sale or of the Loan Agreement including, particularly, the rate of interest.

In the event, the Defendant did not pay the agreed instalments. Indeed, he paid none of them in full although some 18 payments totalling \$5,671.83 had been made as at the 12th August, 1994. Because of these defaults, the Plaintiff, through its Area Credit Manager Shri Baball, wrote to the Defendant on the 28th June 1994 formally demanding repayment of the Loan. Repayment was not forthcoming. On or around 9th August, perhaps 12th August, it is not material, the car was seized by a bailiff acting on the Plaintiff's instructions and taken to a garage at Phillip Street, Port of Spain for storage.

The Defendant arranged to borrow money from his father to clear off the arrears of the Loan. It is a matter of some contention whether he had arranged to borrow money from his father to pay off the entire balance of the Loan. The evidence before me is clearly that he had made arrangements to pay off the arrears. He obviously must have had some idea of what this amounted to, because he would have known what the monthly instalments were, and I assume that he would have known how much he had actually paid. He denies having received the Plaintiff's letter of 28th June 1994, however, and it is possible that he might not have known precisely the entire balance due on the Loan. Additionally, he did not speak to anyone at the Plaintiff bank between the time the car was seized and 6th September 1994. Further, while in examination in chief he said that he "was able to pay off the loan", he does not say how, having previously said arrangements had been made with his father. In cross examination he was asked "as at 6th September 1994 you were not in a position to clear off your liability as regards the whole loan" and he responded "That's inaccurate". He did not say that he was in a position to clear off the balance, nor deny that that was in fact the position. This is at odds with the Defendant's usual careful precision in giving his evidence. In the event, I have come to the conclusion that the Defendant has failed to satisfy me on a balance of probabilities that he did have available sufficient funds on 6th September 1994 to pay off the Loan in full.

It is also a matter of some contention as to whether he spoke to anyone at the Plaintiff bank between the time the car was seized and 6th September, 1994. If he did, it was in my view to do no more than to enquire about the vehicle and to be told that it had been seized because of his default in paying the Loan. What is material is that he spoke to a Mrs. Nadiah Romany, an employee of the Plaintiff, and assistant to Mr. Shri Baball, on 6th September, 1994 to ascertain the amount of the arrears so that he could recover the motor car. Mrs. Romany did not give him any immediate reply but, apparently after checking the Plaintiff's records or with other employees, then informed him that the Plaintiff would not accept payment of only the arrears, and that the Defendant would be required to pay off the entire balance of the Loan which was then due. The Defendant says that he asked how much this would be and was told to put his enquiry in writing, which he did on the very same day on a letterhead of "Plus Enterprises (1990) Ltd." bearing the address "11 Dorchester Walk, Petit Valley". This letter was delivered to the Plaintiff by hand and enquires as to the arrears due on, not the balance of, the Loan. Again, given the Defendant's usual care and precision in giving his evidence I find this to be of significance.

On the same day, Mrs. Romany wrote to the Defendant a letter giving the details requested and addressed the letter to the Defendant at "c/o 11 Dorchester Walk Petit Valley". This letter set out that a total of \$40,094.71 was required to be paid in order to permit the Defendant "to retrieve your vehicle" and also gave a breakdown of this amount.

The significance of the letter being addressed as it was arises because the Defendant was at the time the Loan was granted living at 2A Hillview Drive, Diego Martin. He subsequently moved from that address, either in March or April 1994 to No. 11 Dorchester Walk, Petit Valley where he also carried on his practice of marine surveying as well as the operations of "Plus Enterprises (1990) Ltd." of which he was apparently a director. I will return to the matter of this change of address in due course, but although the Defendant said in his evidence

that he had notified the Plaintiff of same, he could not recall whether he had done so orally or in writing. This, again, I found to be somewhat at odds with the usual precision in giving his evidence at the trial and being able to produce in evidence a “computer generated” copy of his letter dated 6th September, 1994 complete with an original signature.

In the event, the Plaintiff received no response to its letter of 6th September.

Mr. Baball’s evidence was that the Plaintiff advertised the car for sale in a daily newspaper sometime prior to 5th September 1994 and received a number of written offers to purchase it ranging from \$8,500.00 - \$26,000.00. Fifteen of these offers came into evidence as a bundle exhibit SB2 through Mr. Baball as to the fact that they were written and received by the Plaintiff. None of the authors of these letters gave evidence and they could be therefore admitted for no other purpose. As at 19th September the highest written offer received was \$22,000.00. On that date the Plaintiff wrote to the Defendant saying that this was the best offer received and that if he did not make a better offer by the 26th September the Plaintiff would sell the car, with any “resulting shortfall” (i.e. any balance still due on the Loan after applying the net proceeds of the sale of the car to the outstanding balance then due) being for his account. There was no response to this letter, which was addressed to 2A Hillview Drive, Diego Martin.

Four further written offers were received after 20th September and on 4th October 1994 Mr Baball again wrote to the Defendant at 2A Hillview Drive, saying that a higher offer of \$26,000.00 had been received and that, there being no response to the Plaintiff’s letter of 19th September, the Plaintiff was in the process of selling the car. There was no reply to this letter.

The car was sold sometime after 4th October, 1994 for \$24,000.00, the person offering \$26,000.00 having failed to complete the sale. The precise date of the sale being completed is not clear, but by 20th October certain amounts had been

credited to the Defendant's account with the Plaintiff. The expenses of and associated with the sale and transfer of vehicle to the purchaser totalled \$5,640.56 and included bailiff's fees, storage fees and the two fees payable to the Licensing Authority to enable the motor car to be transferred in its records, first from the Defendant to the Plaintiff, and then from the Plaintiff into the name of the purchaser. This is apparently a requirement from the Licensing Authority.

A further amount of \$8,543.63 was credited to the balance due on the Loan, representing what is referred to as a rebate of then unearned interest on the Loan. This was done on 10th November 1994, leaving a balance due on the Loan of \$21,056.99 at that date. Thereafter, interest charges on this amount at the rate of 13% per annum totalling \$662.90 were debited to the account, thus leaving a total balance due on the Loan of \$21,719.89 as at 13th January, 1995. The various amounts credited and debited to the Defendant's account are reflected in the Statement admitted into evidence as exhibit SB5 without objection. They are not in issue. On the amount of \$21,719.89 shown as being due on this account as at 13th January 1995, further interest charges of \$304.37 were debited to the account thus leaving a balance due thereon of \$22,024.26 as at 15th February, 1994. The Plaintiff claims this amount, and continuing interest thereon at the rate of 13% per annum from that date to the date of judgment. It is not clear to me why this rate of interest is being claimed if the Mortgage Bill of Sale specifies an effective rate of 22.81%.

It is not in dispute that no part of this sum has been paid by or on behalf of the Defendant, nor is it in issue that these various amounts have been calculated in accordance with the terms of the Mortgage Bill of Sale and the Loan Agreement.

There is no evidence before me which would indicate that any of the expenses of or associated with the sale of the motor car totalling \$5,640.36 were either excessive or exorbitant, as the Defendant had pleaded. Indeed, I am satisfied that

they are properly for the account of the Defendant in accordance with the terms of the Mortgage Bill of Sale.

As to the issue of whether the motor car was sold at an undervalue, Robert Reid, who was at the material time a Loans Officer employed by the Plaintiff, prepared a written report having inspected the motor car on 13th September 1994. He estimated the market value of the car at \$40,000.00 and the forced sale value at \$20,000.00. His report sets out that the body of the car was then in good condition, albeit with a dent to the left back fender and no oil in the engine, and that the odometer reflected a total distance travel of 270,314 km. The car was air-conditioned and fitted with manual transmission.

Cleveland Garcia, who has been an automobile mechanic for the past 18 years, gave evidence on behalf of the Defendant as to the value of the motor car. He worked with the local Toyota agent from 1984 – 1989, during which time he received training, and has been self-employed from 1989. Apart from his business as an auto mechanic he has been doing appraisals of motor cars since 1991 and at present performs the m at the rate of about 1 per day on average.

Mr. Reid's estimate of the market value of the car, he having had the benefit of having inspected it, is not any event materially different from that of Mr. Garcia. There is a difference of perhaps \$5,000.00. The material difference of opinion as between these two witnesses was as to the forced sale value of the car.

Mr. Garcia had not had any time seen the motor car in question. His evidence was based on the description read out to him and did not take into account any actual sales of such a car at or around that time. He said that in September - October 1994 he would have placed a market value of about \$45,000.00 on a PAW registration Mitsubishi Lancer in good condition. Further, he said he would place a forced sale value of about \$30,000.00 - \$40,000.00 on such a car. His valuation, he was adamant, depended upon the condition of the car and not the

recorded mileage, and in his view such a vehicle in good condition which had travelled 127,000 km would have no different market value from one which had travelled 27,000 km. I find that difficult to accept. Indeed, I do not. Mr. Garcia maintained that a sale at \$24,000.00 was not realistic, but conceded that accepting such a price would, to some extent at least, be determined by the length of time for which the car had been on the market.

The evidence before me is that the Plaintiff had received offers over a period of at least 4-5 weeks. The car was seized on or about 12th August. There is oral evidence of advertisement and it is improbable that the offers were unsolicited or procured. There is no evidence of this. It is therefore reasonable to conclude that the sale of the car was advertised about one week prior to the first offer dated 5th September. The highest offer it received was \$26,000.00 and when called upon to complete the purchase the offeror, for whatever reason, did not do so

The Plaintiff's Claim

I am satisfied on the evidence before me that the Plaintiff must succeed on its claim. There is no dispute as to the amount of the Loan, nor of its terms of repayment, nor as to the amounts actually paid by the Defendant towards repayment. I have not been satisfied by the Defendant that the expenses of the sale were excessive or exorbitant. In the circumstances, therefore, there will be judgment for the Plaintiff on its claim in the sum of \$22,024.26 together with further interest on the amount of \$21,056.99 at the rate of 13% per annum from 16th February 1994 to judgment.

The Defendant's Counterclaim

The counterclaim is underpinned by two principal allegations. First, that there was a clog or fetter on the equity of redemption of the mortgage, thus preventing the Defendant from recovering his motor car and, second, that the motor car was sold at an undervalue.

The phrase “equity of redemption” is used to denote the equitable interest of the mortgagor where the fee simple in a parcel of land is conveyed to a mortgagee by way of mortgage. In equity the mortgagor is the owner of the land subject to the mortgage. This is different from the position in law in England after 1925 where the phrase now denotes the whole interest of the mortgagor in the land because the legal estate in fee simple remains in the mortgagor (see *Fisher and Lightwood’s Law of Mortgage* 10th Ed. page 8). The equity of redemption arises as soon as the mortgage is made and is to be distinguished from the equitable right to redeem which arises only when the contractual date of redemption has passed (See *Fisher and Lightwood* page 8, page 543; *Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25. This equitable right to redeem must be carefully distinguished from the equitable estate (see *Kreglinger* at page 48). The position in law as to the mortgage of a chattel is no different.

The equity which arises on the failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction. This rule is equally applicable to all mortgage transactions (see *Kreglinger* page 48).

Section 10 of the Mortgage Bills of Sale Act Chap. 82:32 provides that the person granting a mortgage bill of sale may apply to the High Court for an order restraining the grantee of the mortgage bill of sale from removing or selling the chattel, and that such an application is to be made within five days from the seizure of the chattel. It should be noted that in this case no issue was raised as to the validity of the seizure itself. Such an order of the Court is predicated upon it being satisfied that the cause for the seizure no longer exists because of the payment of money or for some other good and sufficient reason.

The provisions of Section 10 give the grantor of a mortgage bill of sale a summary procedure in lieu of the remedy which equity would have given, and if the application is not made, the summary remedy is lost. This does not, however,

affect the grantor's equitable remedies on making good his default (see *Johnson v. Diprose* (1893) 1QB, 512, at 515). If the grantor does not pay or tender the money payable under the mortgage bill of sale within the time limited by the Act, or tender payment at a subsequent date, then the grantee's existing right to hold the goods cannot be affected. This right of the grantee to take and keep possession is absolute (see *Johnson v. Diprose* page 515) and, referring to the decision in *Maughan v. Sharp* 17 CB (M.S.) 443; 34L.J. (C.P.) 19, Bowen LJ said "*That is a clear authority that in an ordinary mortgage of chattels to secure an advance of money, when the conditions are not performed, the property in the chattels rests absolutely and indefeasibly in the mortgagee*". (See *Johnson v. Diprose* at page 517). He went on to say at page 518 "*the Plaintiff still has a remedy in equity so long as the goods were the possession of the grantee*".

No such application to invoke this summary procedure was made by the Defendant within the statutory period of five days. Indeed, no such application was ever made. Further, the Defendant made no effort to retrieve the car, or to pay up the arrears until perhaps 6th September, at least three weeks after the seizure of the car, when he asked the Plaintiff what were the total arrears on the Loan. He took no steps to invoke his equitable right to redeem save, perhaps, for asking the Plaintiff what amount was required to pay off the arrears of the Loan.

The Defendant does not seek to set up that there is any term or stipulation in either the Mortgage Bill of Sale or the Loan Agreement which might be regarded as a clog or a fetter on his equity of redemption, and my reading of those documents does not give me any reason to believe that they do so. Those documents contain no terms or stipulations that impose any clog or fetter on the Defendant's equity to redeem. It has not been advanced on behalf of the Defendant that the seizure of the car or its sale constitute such a clog or a fetter on his equitable right to redeem. What the Defendant does say is that the lack of a response or information from the Plaintiff is what gives rise to the clog or the fetter, and that it is a clog or a fetter on the equity of redemption. I do not agree

with this submission. It is not the equity of redemption which, as the Defendant says, had been clogged or fettered because the contractual date for repayment had passed. It is the equity to redeem the mortgage. That is clear law from the principles to be distilled from *Kreglinger*.

Between the 6th and the 20th September he did not speak to Mrs. Romany. He telephoned to speak to Mr. Baball but did not succeed in doing so. He did not go into the Plaintiff bank to make any enquiries, or to speak to any of its personnel, at any time after the car was seized.

This is a motor car which the Defendant says was used mainly in his business. He was involved in two businesses at that time: first, his practice as a Marine Surveyor, which takes him across the length and breadth of Trinidad, as well as to Piarco Airport on the occasions when he goes to Tobago and other islands in the Caribbean; second, he operates a stationary supply business using the letterhead "Plus Enterprises (1990) Limited", although he gives its name in examination in chief as "Plus Stationary Supply Company Limited".

I find it difficult to accept that if, as the Defendant would have me do, his business affairs required the everyday use of this motor car, the loss of which he says required him to spend \$50.00 per day on transportation costs, he would not have been on the telephone to the Plaintiff bank every day from seizure onwards trying to get back his motor car. Further, if there had been no response from the Plaintiff's personnel, or no positive response from them, by telephone, then surely he would have gone in person to the Plaintiff to do whatever he could to retrieve his motor car.

There is no evidence before me of the Defendant treating this matter with any sense of urgency, which would be only normal and expected if the motor car was as essential to his business as he would make out.

The Defendant did not enquire as to how much was required to pay off the arrears for over three weeks. Having been told that the Plaintiff would accept only payment of the entire balance on the Loan, and not merely the arrears, in order for him to retrieve his car, he then enquires in writing - as he was requested to do - as to what amount is required to pay off the arrears. He says that he got no response, but he then takes another two weeks to speak to Mrs. Romany on the telephone to be told, or so he says, that the car is being or has been sold. This is a man who sets out to be careful and precise in giving his evidence, as I have already alluded to more than once, but he can only say that in that two week period he tried on several occasions to speak to Mr. Baball on the telephone. That is all. After 20th September, 1994 he does nothing at all, even after he says he received the Plaintiff's letters on 12th and 14th October respectively, until such time as he is served with a writ seeking payment of the outstanding balance of the Loan. That Writ, and Statement of Claim, was filed on 27th July 1995 and, having entered an appearance on 5th September, 1995, the Defendant filed his defence and counterclaim on 5th October, 1995.

What I find to be of significance is that he waits until such time as he is sued for the outstanding balance of the Loan to set up his counterclaim. This is in respect of a car which he claims he used on a daily basis and which was essential to his business operations. I regret that this does nothing for the Defendant's credibility.

In all the circumstances it does not seem to me that he took all the reasonable required and necessary steps to inform himself of what was required of him in order to redeem the mortgage and recover his motor car. It is not sufficient, in my view, for him to sit back and await word from the Plaintiff. Nor in my view would a reasonable person in those circumstances merely satisfy himself with a series of telephone calls to the Plaintiff none of which yield any satisfactory response. Further, when told that the car had been sold, he does nothing until such time as he is sued for the balance of the Loan.

Finally, I am not satisfied on the evidence before me that the Defendant was in a position to pay off the balance then outstanding of the Loan and thereby redeem the mortgage and recover the motor car. I find that he enquired as to the arrears. I accept, as he claimed, that had an arrangement with his father which would permit him to satisfy the arrears. But I do not accept on the evidence before me that he had an arrangement with his father which would enable him to pay off the entire balance of the Loan.

Turning to the letters written by the Plaintiff to the Defendant, the Defendant says he never got the letter of 28th June, 1994 demanding repayment of the Loan. He says further that the Plaintiff's letter to him of 6th September 1994 was received by him on 14th October, in an envelope postmarked 27th September 1994 (exhibit PT3) addressed to 11 Dorchester Walk; that the Plaintiff's letter of 19th September was received by him on 12th October in an envelope postmarked 27th September 1994 (exhibit PT1) addressed to him at 2A Hillview Drive; and that this envelope was in yet another envelope postmarked 5th October, 1994 (exhibit PT2). This last envelope has a "window" through which the address of the letter it contained can be seen. That letter is the one of 4th October, 1994. It has a typed address "2A Hillview Drive" which also has a line drawn through it and a handwritten address "11 Dorchester".

It is clear that of the four letters sent by the Plaintiff to the Defendant, only one, that of 6th September 1994 was addressed to the Defendant at Dorchester Walk. It is also clear that it is postmarked 27th September, 1994.

As to the other three letters, that of 28th June, 1994 was addressed to the Defendant at 2A Hillview Drive. The Defendant says it was never received, but neither is there any evidence that it was returned to the Plaintiff.

The other two letters are also addressed to the Defendant at 2A Hillview Drive. The letter of 19th September is in an envelope (exhibit PT1) addressed to him at

2A Hillview Drive and is also postmarked 27th September 1994. It is stamped “return to sender” and is received by the Defendant, he says, on 12th October 1994 in the envelope marked in the envelope (exhibit PT2) postmarked 5^h October 1994. Exhibit PT2, as I have said, is a “window” envelope. The letter was, also it appears, originally addressed to 2A Hillview and then, presumably after having been returned to the Plaintiff, it is also stamped “return to sender”. The address is changed by hand to read “11 Dorchester”.

I have three principal difficulties with the Defendant’s evidence in relation receipt of these letters.

First, the envelope exhibit PT2 was returned to the Plaintiff. How then does that very same envelope find itself back into the postal system and into the Defendant’s hands only seven days after it was first posted, particularly since the other letters took substantially longer to do so.

Second, the Defendant’s evidence was that the envelope PT1 was folded so as to fit into the envelope PT2 and that this can be seen by the creases on the envelope PT1. I have folded exhibit PT1 in accordance with those creases, but having done so I find that it cannot then fit into the envelope PT2.

Third, the Defendant says that he got his office boy Kurt Diaz to sign these these envelopes on the date when they were received. I can see no good reason why the Defendant would have Diaz do this but then the Defendant himself write on envelope PT3 as he said he did. Additionally, what is in fact written on those two envelopes PT1 and PT2 allegedly by Diaz is not just the date. There is also the word “Removed”. Not “Received” as the Defendant said in his evidence, “Removed”. If Diaz did write on these envelopes as the Defendant says, why would he write “Removed”, but the Defendant write “Received”.

I have dealt with these envelopes in some detail because of the submission on behalf of the Defendant they are of considerable importance to his case. If I accept what the Defendant says as to the receipt of these envelopes, then it is in consonance with my observation that he set out to be careful and precise when giving his evidence. That care and precision, as well as his credibility, however, are called into question by my findings as to the envelope PT1 and also when regard is had to the imprecision, perhaps vagueness, of his evidence as to whether he notified the Plaintiff bank of his change of address; as to whether he spoke to anyone at the Plaintiff bank after seizure of the motor car; and if so when prior to 6th September, and as to about what spoke with them; as to the occasions on which he tried to speak to Shri Baball between 6th September and 20th; as to not going in person to the Plaintiff bank at anytime after the car was seized – even when it must have been apparent to the Defendant that there was the very serious prospect of losing the motor car. He is definite only as to speaking to Nadiah Romany on 6th September to find out the amount of the arrears, and that the response to his letter of that date was not received until 14th October, 1994 through the post. I regret that all this leads me to conclude first, that the Defendant's evidence cannot be accepted without reservation; second, that he did not inform the Plaintiff of his change of address; and third, that he received the letter of 6th September at some time prior to 12th October, and not on that date as he said.

Additionally, regard must be had to the undisputed fact that the Defendant had never paid the instalments on the Loan fully and/or when due, starting with the first instalment due on 28th February 1994. He could not have known other than he was in danger of losing the motor car almost from the very outset, and that is so even if I accept that he never received the Plaintiff's letter of 28th June, 1994. The car was seized and he did not, he could not, protest. He obviously knew that, and for some three weeks thereafter, he did not have, or have available to him, he was careful to distinguish between the two in his evidence, the resources to pay off those arrears. When he was told on 6th September that he would have to pay

off the Loan in its entirety, and that he would have to put his request as to the balance due into writing, he promptly enquires as to the arrears outstanding (see exhibit D3 of the Agreed Bundle). He says that he hears nothing, receives no reply to that enquiry. He telephones the Plaintiff, he says, but does not say that he ever asked to be told on the telephone what the amount was, or as to the whereabouts of a reply to his letter. He does not go to the Plaintiff bank at any time to enquire personally of anyone as to these matters. He becomes aware that the Plaintiff has received offers for the purchase of the motor car. The motor car is material, if not vital, to his business operations. But in all this, he takes absolutely no steps at any time to redeem the mortgage and treats the sale of the car as a “fait accompli”.

The Defendant limits the assertion that he was prevented from redeeming the mortgage and recovering the motor car after its seizure to raising this issue in equity. He does not seek to do so on the basis that he was prevented from asserting his rights under Section 10. of the Act. It is clear that if he were to attempt to set up such a claim, then it must fail.

I have been unable from the evidence before me and the authorities to which I have been referred to come to the conclusion that there was any clog or fetter on the equity to redeem. It fell to the Defendant to take whatever steps were necessary to redeem the mortgage and he did not do so. The only reason he has put forward for his failure to redeem the mortgage is the alleged failure on the part of the Plaintiff to supply him with the necessary information. In my view, the Defendant has failed to satisfy me that all he needed to do was make this enquiry and nothing more. At the very least, it was incumbent upon him, having made that initial request and having received no reply, to go into the Plaintiff and obtain that information, but he made no attempt to do so. Merely to say that Mr. Baball was Area Credit Manager for three branches of the Plaintiff bank and that the Defendant had no assurance Mr. Baball would be present if he went to the branch concerned, is not in my view sufficient. The Defendant had spoken with

Mrs. Romany and she was fully aware of the status of the matter. The Defendant's insistence that he wanted to speak to Mr. Baball to find out what was going on with the car was in my view more with a view of persuading Mr. Baball to hold off any sale of the motor car and extend the time for the Defendant to make good the arrears on the Loan. But that being my view of the matter does not alter the fact that he took no steps to go to the Plaintiff and ascertain the amount he had to pay so as to be able to exercise his equity to redeem.

In these circumstances I have come to the conclusion that the Defendant has failed to satisfy me that there was any clog or fetter on his equity to redeem.

I turn now to the issue of whether the motor car was sold at an undervalue. It would seem to me that, as a matter of law, a mortgagee owes a duty to take reasonable care to obtain a proper price when exercising his power of sale (see *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] 2AER 633) and it is for the mortgagor to prove a breach of this duty.

What is in issue is whether the price of \$24,000.00 at which it was sold represents a breach of that duty owed by the Plaintiff. As I have said, there is a difference of perhaps \$5,000.00 between the estimates of the market value of the motor car which were given to me in evidence. Mr. Reid for the Plaintiff placed a market value on it of \$40,000.00, and Mr. Garcia for the Defendant placed a market value on the car of \$45,000.00. Mr. Reid placed a forced sale value on the car of \$20,000.00 while Mr. Garcia placed this at between \$30,000.00 to \$40,000.00.

It is well known that on the sale of a motor car in circumstances such as those which obtained in the instant case, the price which it might fetch is very often substantially lower than its market value. I would think Mr. Reid's estimate of a forced sale value of \$20,000.00 to be low, or conservative, but I would at the same time regard Mr. Garcia's estimate of a forced sale value of \$40,000.00 as high or optimistic. A reduction of 10% below the market value is not to my mind

realistic. Further, the actual sale price of \$24,000.00 is not that materially below Mr. Garcia's lower range estimate for a forced sale value.

While there is no formal plea of the Plaintiff being in breach of its duty in relation to the sale of the motor car, the Defendant has relied on the actual sale price of \$24,000.00 as evidence of the Plaintiff having breached its duty. I am not satisfied on the evidence before me that this is so. Mr. Garcia said during the course of cross examination that he did not know over what period of time the sale of the car had been advertised and conceded that this could have an effect on the price at which it was so. On the evidence before me offers were received over a four to five week period in response to advertisement. The offers of \$22,000.00, \$24,000.00 and \$26,000.00 received are above Mr Reid's forced sale value of \$20,000.00, but below Mr. Garcia's lower estimate of \$30,000.00.

It has not been demonstrated, however, that in all the circumstances the motor car was sold in haste, or that it was not exposed to the market for a reasonable length of time, or that the Plaintiff should have kept it on the market for a longer period because better offers could reasonably be expected if this was done. Appraisals do not stand alone as evidence of proper value; they are a guide as to what price a sale might, or should, fetch in normal circumstances. The burden of proving that the Plaintiff was in breach of its duty to obtain a proper price for the motor car falls to the Defendant and I have come to the conclusion that the Defendant has failed to satisfy me that the Plaintiff was in breach of its duty of care.

In all the circumstances, therefore, the Defendant's counterclaim must fail.

Disposition

In summary, there will be judgment for the Plaintiff in the sum \$22, 024.26, together with further interest on the amount of \$21,056.99 at the rate of 13 % per annum from 16th February 1994 to judgment.

The Defendant's counterclaim is dismissed.

The Defendant will pay the Plaintiff's costs of the claim and the counterclaim.

1st day of June, 2001.

C.V.H. Stollmeyer

Judge

Postscript

There is one further matter to which I feel obliged to make reference although it has played no part in either my findings, conclusions or reasons. The law is well settled that a matter or cause is *sub judice* until judgment has been delivered. Hearing of the evidence at this trial was completed on the 18th October, 2000 and the hearing was then adjourned so that attorneys for the parties could file their written submissions and copies of supporting authorities. The last of those submissions was filed on 3rd November, 2000.

On the morning of 23rd October 2000, however, advocate attorney appearing for one of the parties in this matter appeared on a television morning "talk show" and made known to the viewing public certain views he held as to matters taking place during a trial in which he had appeared. While he did not, to my hearing, make known the names of either of the parties, he did express emphatically what he referred to as "the arrogance" of the other party and that one of the witnesses had "lied".

I regret that anyone should find it necessary to make statements of this nature in such a forum. It is even more regrettable that the statements should be made by an attorney of not inconsiderable length of practice who must know better than any member of the lay public what is expected of an attorney, and what can and cannot be said both in and out of Court during the course of a trial. That much the same statements were made again on a radio morning “talk show” of October 29th 2000 serves only to compound the error.

I need only say further that if those statements were made with a view to somehow influencing this Court in coming to a decision, then they failed to achieve that objective.