IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SCan

CLAIM NO. HCV 3328/2008

BETWEEN	**DONOVAN FOOTE**	**CLAIMANT**
AND	**CAPITAL & CREDIT MERCHANT BANK LIMITED**	**1ST DEFENDANT**
AND	**THE GLEANER COMPANY LIMITED**	**2ND DEFENDANT**

Appearances Mr. Donovan Foote, Claimant in person, Mr. Courtney Bailey instructed by Dunn Cox for the 1st Defendant. Ms. Daniella Gentles instructed by Livingston, Alexander, Levy for the 2nd Defendant also present Ms. Sheila Stubbs and Mr. Jahane Williams representatives of the 2nd Defendant.

Application to strike out statement of case pursuant to CPR 26.3; whether statement of case discloses grounds for bringing action; sale under powers contained in mortgage; whether sale challengeable in action against purported purchaser; Section 106 of the Registration of Titles Act; whether damages only remedy for improper exercise of powers of sale; acts which may deprive purchaser of status as BFP.

Heard July 28; October 4 and 27, 2010.

CORAM: ANDERSON J

1) There were three (3) applications before the Court, two by the 2nd defendant and one by the claimant. The one which could be heard was the first in time but also the one, the determination of which could also determine whether it would be necessary to pursue the others. The one being pursued and which is dealt with here, was an application to strike out the claimant's statement of case.

2) By way of Notice of Application for Court Orders the 2nd Defendant herein, the Gleaner Company Limited, ("the Gleaner") seeks an Order "that the Statement of Case (Fixed Date Claim Form)" be struck out in relation to the 2nd Defendant on the grounds that:

(a) it discloses no reasonable grounds for bringing the claim against the 2nd Defendant; and

(b) it is an abuse of the process of the court. The application also seeks cost of the action on behalf of the 2nd Defendant.

3) The grounds on which the Applicant is seeking the orders are as follows:

1. Section 106 of the Registration of Titles Act provides that upon a mortgagee selling mortgaged premises to a bona fide purchaser for value is not bound to enquire if the power of sale was properly exercised, and the remedy of any person who feels aggrieved by the exercise of the power of sale is against the mortgagee in damages.

2. On the 5th day of July, 2007 the First Defendant entered into an agreement for sale as mortgagee to sell the mortgaged premises to the Second Defendant and the sale was completed and the transfer registered on the 15th February, 2008.

3. The action filed discloses no reasonable grounds for bringing the action against the second Defendant and is an abuse of

the process of the Court and therefore ought to be struck out pursuant to Rule 26.3 of the Civil Procedure Rules 2002.

4) The application is strongly resisted by the Claimant and extensive submissions were made on behalf of both parties and several authorities were also cited. The application to strike out is made under rule 26.3 of the Civil Procedure Rules 2002 which recites the court's power to strike out a Statement of Case or any part of it where it appears to the court that the Statement of Case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim or constitutes an abuse of the process of the court.

5) The Claimants case arises in the following circumstances. The Claimant, an attorney-at-law, is the owner of premises at 103 East Street, Kingston in respect of which the 1st Defendant Capital and Credit Merchant Bank Limited, ("CCMB") had provided a mortgage. The Claimant defaulted on the mortgage and the mortgagee in purported exercise of its powers of sale under the mortgage security sold the said premises to the Gleaner. The Claimant contends that there was an improper exercise of the powers of sale contained in the mortgage. It is contended that the premises were sold at an under value and after the mortgagor and the mortgagee had entered into a consent judgment for the payment of a certain sum in the amount of Three Million, Five Hundred and Twenty-Six Thousand, Eighty-Two Dollars and Sixty-One cents ($3,526,082.61) to satisfy the financial obligations of the mortgagor, then allegedly standing at Eight Million, Two Hundred and Sixty Three Thousand One Hundred and Eighty Nine Dollars and Fifty-Eight Cents

($8,263,189.58). It was also contended that the sale was in breach of the claimant's legal rights as the premises were sold without notice to the Claimant and in the absence of an Order of the Court for the sale of the same.

6) The Claimant is therefore now seeking to proceed against CCMB on the basis that there was a wrongful exercise of the power of sale and also against the Gleaner, seeking to set aside the sale, alleging that the latter had wrongfully interfered with the consent judgment by accepting a transfer of the premises after it had knowledge of the consent judgment by virtue of a letter from the Claimant. In the submission of the claimant therefore, the Gleaner was not a bona fide purchaser for value without notice who was protected by the Registration of Titles Act

7) Despite the volume of submissions and the numerous authorities cited by the parties the essential issue which is before the court maybe stated in the following terms:-

Was there actual knowledge on the part of the 2nd defendant of irregularity in the exercise of the powers of sale under the mortgage or of some facts which made it the proposed sale impossible? In such circumstances, was there conduct on the part of the Gleaner which would deny the 2nd Defendant the protections offered under and by virtue of the provisions of the Registration of Titles Act, section 106?

SUBMISSIONS OF THE 2ND DEFENDANT

8) It was submitted firstly by counsel for the Gleaner that the statement of case showed no reasonable ground for bringing the action (CPR 26.3). That rule permits the Court to strike out a statement of case or part of a statement of case if it appears to the court:

> "(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

9) It was submitted that the claimant's action showed no reasonable grounds for bringing the action and should accordingly be struck out. It was submitted that authority for this proposition could e found in Stuart Sime's "A Practical Approach to Civil Procedure". There the learned author considered the meaning of the phrase "no reasonable grounds for bringing the claim". This is the case where for example, the statement of case under attack fails, on its facts which are assumed to be true, to establish that it is sustainable as a matter of law.

10) It was also submitted that where the claim was clearly an unwinnable one, it should also be struck out. Support for this proposition was drawn from the White Book where it is stated at page 68 paragraph 3.4.2: "Statements of case which are suitable

for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the Respondent and would waste resources on both sides".

11) It was the submission of counsel for the Gleaner that the mortgagee had properly exercised its powers of sale under the mortgage. Moreover, where the powers of sale had been properly exercised, the mortgagor's equity of redemption is forever extinguished once the mortgagee had entered into a binding contract for sale with a prospective purchaser. See: **Waring (Lord) v London & Manchester Assurance Co. Ltd. & Others [1934] ALL ER Rep 642**).

12) Counsel also submitted that contrary to the general rule that a party liable to be sued ought not to be subject to a multiplicity of actions, it is the right of the mortgagee so long as any of the debt remains unpaid, to pursue any or all of his remedies and the mortgagor is not entitled to force the mortgagee to choose one remedy. The only restriction on the exercise of this rule is that the mortgagee is not allowed to recover any more than the outstanding debt. As authority for this, counsel referred the Court to **Fisher and Lightwood's Law of Mortgages 2nd Edition** pages 386-387, paragraph 16.7. There the learned authors state the following:

> "Contrary to the general rule that a person liable to be sued is not to be harassed by a multiplicity of actions, it is the right of the mortgagee or other secured creditor, so long as any part of the debt remains unpaid to pursue any or all of his remedies at the same time; and in the sequence of his choice: Hence the mortgagee may at the same time sue for payment on the covenant to pay principal and interest, for possession of the mortgaged

property and for foreclosure, and these claims may be combined in the same action."

13) It was the contention of the Gleaner that even if the property had been sold at an undervalue, this did not vitiate the sale which had now transferred the property to the 2nd defendant. The mortgagee had secured a valuation of the premises and had attempted to have the property sold at public auction and had only thereafter entered into a sale by private treaty with the 2nd defendant. In any event, the fact that a sale had taken place at undervalue, was not in and of itself evidence of the mortgagee having acted in bad faith. Indeed, a purchaser is not bound to enquire into whether the mortgagee has properly exercised its powers under the terms of the mortgage security. Section 106 of the Registration of Titles Act provides that in the circumstances set out in that section, the remedy of the mortgagor who is aggrieved by the action of the mortgagee is for an action in damages against the mortgagee. Section 106 is in the following terms:

> "If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, *by public auction or by private contract*, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, *and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the*

propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power." (Emphases mine)

SUBMISSIONS FOR THE CLAIMANT

14) The Claimant's submissions commence with an assertion that the Gleaner's application to strike out the claim as against it, is premised upon two grounds, namely the reasonableness of bringing the action and "abuse of the court". It was further submitted that the 2nd defendant's submissions "has not address (sic) the assertion of abuse of the court". Mr. Foote submitted that a claim for a declaration asserting the improper exercise of a power of sale and to set aside the sale is a claim known to law. In that regard, claimant cited **Jenkins v Jones** (1860) 66 ER p 43. He submitted that this was authority for the proposition that a purchaser who buys with knowledge of circumstances sufficient against the mortgagee to invalidate the sale, becomes a party to the transaction and is not protected by the proviso that the purchaser need make no enquiry. He says that the admission by the 2nd defendant in its defence that "by letter dated March 2, 2007 the Claimant advised of the existence of the Consent Judgment" constituted "circumstances sufficient against a mortgagee to invalidate a sale and cause the purchaser to become a party to the transaction". That this is so, is of course specifically denied by the 2nd defendant.

15) The claimant also submitted that the effect of the consent judgment into which it had entered with the mortgagee had the

effect of "settling and merging the mortgage into a judgment debt thereby affecting the procedure of the mortgagee (sic) exercise of power of sale under the mortgage". This was also to be considered in light of the claimant's assertion that the property had been sold at an undervalue. Mr. Foote also asserted that the 2nd defendant "should know or ought to have known that the mortgage property and debt was now affected" by Part 66 of the Civil procedure Rules as court proceedings had already been taken. I understand him to say that court proceedings having been started, it was to the provisions of the Civil Procedure Rules rather than to the Registration of Titles Act that one must turn in order to determine how to proceed. He also submitted that the purchaser "interfered with the consent order" which it had entered into with the mortgagee. However, it is not at all clear how this interference with the order is done since the purchaser was not a party to those proceedings, nor is there any evidence that the purchaser even knew of the terms of the referenced order.

16) It was further submitted that there were authorities for the proposition that "where the ***purchaser had actual notice*** of an irregularity such as a defect in the mortgagee's power to sell ***or facts which make the proposed sale impossible***, then a court would not uphold such a purchaser's rights to the property acquired in such a sale. (Emphases supplied)

17) The claimant also submitted that **Selwyn v Garfit** (1888) 39 Ch.D. 273, was authority for the proposition that where the alleged purchaser from the mortgagee exercising his power of sale had knowledge that a required prior notice had not been given by the mortgagee to the mortgagor, he would not be afforded the protection of a provision to protect innocent purchasers for value

without notice. Claimant also cited the local Court of Appeal decision in **Sheckleford v Mount Atlas Estate Ltd.** (SCCA No:148/2000. There the Court was of the clear view that the protection afforded by section 106 of the Registration of Titles Act extended to a bona fide purchaser for value without notice "of any irregularity in the sale or in the steps antecedent thereto" (per Forte P. at page 4, or a purchaser "innocent of any wrongdoing of a mortgagee in the exercise of the power initiating a sale of the mortgaged property" (per Harrison J.A. at page 20).

18) In summary, the claimant submitted that the 2nd defendant having been made aware of the existence of the consent judgment before it had signed an agreement for sale, had been put on notice and proceeded at its peril to consummate the sale. It was also suggested that the 2nd defendant knew that the mortgagee had failed to give the requisite notice to the mortgagor but, with respect, I regret that there is no compelling evidence that the 2nd defendant had any such knowledge.

COURT'S RULING

19) As noted above, the issue which the Court has to decide in the instant application is whether the 2nd defendant had actual knowledge of any irregularity in the exercise of the powers of sale or had knowledge of any facts which would make the proposed sale impossible. For example, if the mortgagor had previously exercised its powers under the mortgage and sold the property to a third party, or, for other valuable consideration, had surrendered its rights under the mortgage to some other person, it would be impossible to claim that a proper title could be transferred to another putative purchaser who had knowledge of the prior sale. In **Cabot Paul v VMBS** HCV 5120 of 2007, Brooks J upheld the

submissions of Ms. Gentles who appeared on behalf of the mortgagee in that case. His Lordship stated:

> "It is only if there is evidence of bad faith on the part of a mortgagee that the court will be inclined to restrain the mortgagee in the exercise of the power of sale. In *Waring (Lord) v London and Manchester Assurance Co. Ltd. and others* [1934] All E.R. Rep. 642, Crossman J. stated at page 644 E that:
>
> > "After a contract has been entered into, it is, ...perfectly clear...that the mortgagee can be restrained from completing the sale only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside."
>
> The learned judge went on to say that a sale at an under-value was not, by itself, evidence of a lack of good faith".

20) The question is: what is the nature of the knowledge of which the purchaser, here, the 2nd defendant, ought to be seized so as to take away the protections afforded by section 106 of the RTA? It would seem from the authorities that, once a valid contract of sale has been entered into, a court will not restrain the completion of the sale by a mortgagee under powers of sale contained in the mortgage unless, the mortgagor establishes that the contract for sale was made in bad faith or the mortgage was not valid or the powers of sale was being used for some improper motive. The principle articulated here is laid down in **Waring (Lord) v London & Manchester Assurance Co. Ltd. & Others,** [1934] ALL ER Rep 642). In that case, Crossman J, at page 644 paragraphs G to I, considering a provision in all respects in pari materia with our section 106 had this to say:

> "In my judgment, s. 101 (1) (i) of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power

to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract, liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor.

21) In **Sheckleford v Mount Atlas Estate Ltd**. cited by both the claimant and the 2nd defendant, our Court of Appeal considered this question. The Court of Appeal applied the **Waring** case and Forte P. adopted the reasoning of Crossman J in that case. He said:

"The reasoning of Crossman J., given the specific statutory provision in our jurisdiction to limit the remedy to damages, *even before registration of the transfer*, is in my judgment most appropriate. A bona fide purchaser for value in the Jamaican jurisdiction, if the respondent's contentions are correct, would always be in danger of reversal of his contractual agreement with the mortgagee, and would never be certain as to whether there would be a completion of the sale. Nor could a mortgagee give any guarantee to the purchaser, as the mortgagor could at any time attempt to redeem the property." (My emphasis)

22) In the **Sheckleford** case. In that case, the Defendant/Appellant, (S) appealed a decision of the Supreme Court (Ellis J.) to grant an injunction to the Plaintiff/Respondent (MAE) in circumstances where S had contracted to purchase and paid the full purchase price of property registered then (and even at the time of the appeal) in the name of MAE. The property had been sold under powers of sale in a mortgage agreement between MAE as

mortgagor and a Ms. Gertrude Perkins, as mortgagee, and which mortgage was subsequently endorsed on the title. Ellis J. granted an injunction by which he ordered that S be restrained from effecting or acting upon the purported exercise of the powers of sale under the mortgage.

23) For completeness, I shall set out two of the complaints made by S in the appeal, in relation to the grant of the injunction. It was said that:

A. The learned judge failed to determine the issue on the construction of section 106 of the RTA raised before him or alternatively determined the issue erroneously.
B. The learned judge failed to appreciate that the material put by the Plaintiff before him failed to disclose any irregularity or impropriety in the sale and that accordingly no triable issue arose to support the grant of an injunction.

24) Forte P in the course of his judgment said it was his view that section 106 clearly gave protection to the purchaser from a mortgagee under powers of sale "as soon as the mortgagee, in the exercise of his power of sale enters into a contract with a bona fide purchaser for the sale of the mortgaged property". He found support for this view in the Digest of Cases Volume 35(1) 2nd Re-issue 2000 at page 500 paragraph 3306 which, in reference to Canadian legislation, stated:

> After sale proceedings regularly taken by a mortgagee of land under Real Property Act 190 ss 105-112 whereby the property is sold to a bona fide purchaser who makes the first payment called for by the terms of the sale and binds himself to complete the purchase, it is too late for the mortgagor to apply for redemption even if the purchaser has made default in strict compliance with his agreement" **Saltman v McColl** (1910) 19 Man L.R. 456 (Can)

His lordship concluded that in the circumstances, S was entitled to succeed on the appeal as the learned judge at first instance had no jurisdiction to grant injunctive relief. In light of his decision on the first stated ground of appeal, he did not need to express an opinion on the second ground, that is, whether any impropriety or irregularity had been disclosed. But, instructively, he also added:

> "Whether the sale was irregular or the subject of impropriety would now be an issue between the mortgagor and the mortgagee, in which the purchaser has no place. The trial should therefore be discontinued against the purchaser".

25) The claimant, in his written submissions, stated that "the 2nd defendant purchaser contracted with full knowledge of the Court approved final Consent judgment settling and merging the mortgage debt into a judgment". He pointed to other dicta of Forte P and Harrison J.A. in **Sheckleford** in support of his submission that the 2nd defendant was not a "bona fide purchaser for value without notice". He suggests that the dicta provided authority for the proposition that knowledge of mortgagee's impropriety or irregularity would compromise the 2nd defendant's bona fides. In particular he refers to the following by their lordships:

> The validity of this complaint depends on an interpretation of section 106 of the Registration of Titles Act. This is agreed on both sides. Also agreed is the fact that the 2nd defendant/Appellant is a bona fide purchaser for value without notice of any irregularity in the sale or in the steps antecedent thereto. (per Forte P at page 4)

And Harrison J.A. at page 20 said:

> The statute must be read as a whole. The words and tenor of section 106 provide protection to a bona fide purchaser for value innocent of any wrongdoing of a mortgagee in

the exercise of the power initiating a sale of the mortgaged property.

26) In the context of this case, what I understand the claimant to be saying is that the protection of section 106 does not extend to the 2nd defendant herein as it is not a bona fide purchaser for value "*without notice*". It had notice and that "notice" takes away the protection. The "*notice*" in this submission is, if I understand correctly, knowledge of a consent judgment entered into between the mortgagor and the mortgagee, of which the claimant said he advised the 2nd defendant in a letter dated March 2, 2007.

27) It may be useful to set out the terms of the said letter from the claimant to the 2nd defendant.

> *Thanks for bringing to my attention the Gleaner's endeavour to purchase the captioned property (my legal office) which came to me as a surprise.*
>
> *I respect the fact that you have brought same to my attention and appreciate your offer to work with me to accommodate my needs.*
>
> *I must bring to your attention however that the two mortgages with interest in the property are in court with the matter and there are judgments in their favour to satisfy their interest in the property. One is by consent and the other is presently on appeal.*
>
> *It is questionable therefore whether they can exercise any power of sale in your favour which they might have without my knowledge and consent.*
>
> *In order to be able to let you know my position I would need to know and have full disclosure of the terms and conditions of the proposed sale to you of my property.*

28) The 2nd defendant acknowledges that it got the letter but denies that this letter deprived the mortgagee of its right to exercise its

powers of sale under the mortgage. I agree. It is clear from the very citation of Harrison J.A. above, that the purported purchaser continues to enjoy protection as long as he is "*innocent of any wrongdoing of a mortgagee in the exercise of the power initiating a sale*". There is no averment that the letter quoted above provides evidence of "any wrongdoing of a mortgagee in the exercise of the power initiating the sale" nor that it conveyed any information of such wrongdoing to the purchaser. Indeed, it is probably instructive that the claimant did not cite the subsequent dicta from Harrison J.A. in the Sheckleford case. His lordship had stated:

> "The mortgagee however, like any mortgagee who exercises a power of sale under section 106 of the Registration of Titles Act is subject to the scrutiny of the court to ensure that there is no .....' unauthorized or improper or irregular exercise of the power'. This sanction for any misbehaviour found, is for the protection of a wronged mortgagor, *although the liability is in damages only*". (My emphasis)

29) It seems clear to me that the Court of Appeal was saying that in order to deny the purchaser of his section 106 protection, it is necessary for the purchaser to have ***actual knowledge of the irregularity or impropriety in the exercise of the power of sale by the mortgagee***. It must be obvious that the letter quoted above does not provide knowledge of the character which Harrison J.A. said was necessary to deny the purchaser protection under section 106.

30) Indeed, this view finds support in the section of the text, The Law of Mortgages by Cousins at page 227, cited by the claimant. That part reads:

> "A number of authorities appear to lay down the rule – that when the purchaser had actual notice of an irregularity such as a defect in the mortgagee's power to

sell, or of facts which make the proposed sale impossible or inconsistent with the proper exercise of the power, the sale will be set aside and the purchaser's title impeached'.

31) This passage reinforces the view that it is actual knowledge on the part of the purchaser that is required to compromise the purchaser's rights as against the mortgagor whose equity of redemption is extinguished by the exercise of a power of sale on the part of the mortgagee.

32) I wish to refer to the authority **Jenkins v Jones** (1866) 66 ER p 43, cited and heavily relied upon by the claimant. In that case, it was held that a purchaser who buys with knowledge of circumstances *sufficient against the mortgagee to invalidate the sale, become a party to the transaction, and is not protected by the proviso that the purchaser need make no enquiry".* It should be noted that that case states in the opening lines of the report:

> Where a mortgagee, *after tender of his principal and interest*, (the costs being unascertained) sold under the power in his deed, the court set aside the sale against him and *a person who had bought with knowledge of the tender*.

Also:

> Where the costs are unascertained and the security ample, a mortgagee, *after a tender of principal and interest, is not entitled to proceed with the sale*. (Emphases mine)

Indeed, it is extremely instructive that the learned Vice Chancellor, Sir John Stuart, in the course of his judgment in which he overturned a sale in exercise of a power of sale in a mortgage, pointed out what, in that case, made the exercise untenable. He said:

> The defendants *were distinctly informed on the 1st of April, that is five (5) days before the sale, that the plaintiff was desirous of redeeming the property*. It is not and cannot

> be pretended that this (read: "the intention to redeem") was other than bona fide, for from the beginning of the controversy down to the day of the sale there has been a struggle on the part of the plaintiff to recover this estate. (Emphasis Mine)

In the instant case, there has been no evidence led of any intended offer to redeem the property by the claimant. Certainly, there is no information in the March 2, 2007 letter (on which great store is laid by the claimant), which may be compared with the circumstances in **Jenkins v Jones**.

33) I also wish to note two other cases which were cited by the claimant in his submissions. The first case is **Selwyn v Garfit** (1888) Volume 57 Law Journal Reports, page 609. It does not, in my view, assist the claimant's case as that was a case where the exercise of the power was set aside as under the very terms of the mortgage, the time for exercise of the power of sale had not arisen. Secondly, the Jamaican first instance case of **Auburn Court Ltd v Jamaica Citizens Bank Ltd.** (1997) 34 JLR 136, also does not assist the claimant. There, the issue to be determined by the court was whether, where a demand promissory note did not contain a specific clause allowing the rate of interest **not** to be merged in a judgment debt, such loan is merged into a judgment, and accordingly, the rate of interest would be the judgment debt rate. It was held that in the absence of such a specific clause, the loan merged in the judgment debt. With respect, I do not see how this affects the issue of the validity of a claim between the mortgagor and the purchaser, the 2nd defendant.

34) In the recent case of **Cabot Paul v VMBS** mentioned above, (a case with which I entirely agree with his lordship's ruling and

analysis, Brooks J. referring to the **Waring** case stated the following and I adopt his reasoning for the purposes of this judgment:

> That decision has been approved in the courts of appeal, both in England and in our jurisdiction (*per* Forte, P. in *Sheckleford*). A major element of the decision in *Waring* is the principle that a mortgagor lost his equity of redemption upon the execution of the contract of sale between the mortgagee and the purchaser. That reasoning is supplemental of the principle contained in section 106, namely, that the mortgagor in those circumstances has his remedy only in damages.

35) Based upon the analysis above and my view of the authorities, I have formed the view that any question as to the proper exercise of the power of sale is one to be determined between the claimant and the mortgagee. It is not an issue which is of concern to the purchaser and the remedy for the mortgagor who was been wronged, if it turns out to be the case is in damages pursuant to section 106 of the Registration of Titles Act. In the circumstances, the claim against the 2nd defendant ought to be struck out as it discloses no cause of action against that defendant. I also award costs of this application to the 2nd defendant Gleaner, to be taxed if not agreed.

36) Finally, it should be noted that there were some hinted questions as to whether, in any event, the terms of the consent judgment had been adhered to by the claimant. It was suggested by the 2nd defendant that those terms had not been honoured and that therefore. the full powers of sale under the mortgage instrument were thereafter exercisable by the mortgagee. I need only say that that is not an issue which on my reading of section 106 affects the

purchaser who is under no obligation to make enquiries as to whether a power of sale is validly exercised.

37) Leave to appeal refused.

ROY K ANDERSON
PUISNE JUDGE
October 27, 2010