[2018] JMSC COMM 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015CD00032

BETWEEN	**KHIATANI JAMAICA LIMITED**	**FIRST CLAIMANT**
AND	**SUNIL KHIATANI**	**SECOND CLAIMANT**
AND	**SHIELA KHIATANI**	**THIRD CLAIMANT**
AND	**SAGICOR BANK JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Lord Anthony Gifford QC and Kimberlee Dobson instructed by Nelson Brown Guy and Francis

Charles Piper QC and Petal Brown instructed by Charles E Piper and Associates for the defendant

January 14, 15 and March 7, 2018

MORTGAGE – MORTGAGEE EXERCISING POWER OF SALE – WHETHER IN BREACH OF DUTY TO MORTGAGOR – WHAT IS NATURE AND EXTENT OF DUTY OWED BY MORTGAGEE TO MORTGAGE - WHETHER CONTINUING WITH AGREEMENT ALREADY ENTERED INTO CAN AMOUNT TO BREACH OF DUTY TO MORTGAGOR

SYKES J

[1] The attorneys on both sides have quite sensibly agreed that the court can determine the matter without hearing from the witnesses. The witness statement and the agreed documents have spoken all that needs to be said so far as the facts are concerned. The court agreed. All the witness statements and documents were admitted into evidence. The parties were even agreed on the applicable law. The difference is the outcome of the application of the facts to the law. The claimants say that the defendant is in breach of its duty to them in that Sagicor Bank Jamaica Ltd ('the bank') failed to take reasonable steps to secure the best price for the property that it sold. The bank is saying that it acted reasonably and in good faith and the fact that there was a shortfall which has to be made good by Mr and Mrs Khiatani ('the Khiatanis') is not a sufficient reason to say that it breached its duty to the claimants.

The exercise of the power of sale

[2] What I am about to state are undisputed facts. Khiatani Jamaica Limited ('the company') borrowed from the bank a total of JA$49,166,740.00 and US$575,000.00 between June 2010 and January 2012. Mr Sunil Khiatani is the company secretary and director of the company. Mr Khiatani and his wife, Mrs Sheila Khiatani, stood as guarantors for the loans to the companies. The guarantee for the bank's loan was secured by a mortgage over the property known as The Lagoons which is located in Montego Bay, St James. The property was the home of the Khiatanis. The loans fell into arrears in 2012.

[3] The company sought other sources of funding to extricate itself from the indebtedness but without success. Mr Khiatani had the property valued and it was assessed as having a market price of US$1,200,000.00 with a forced sale value of US$1,000,000.00.

[4] The bank retained an auctioneer to have the property sold by public auction. The Khiatanis took steps to have the property advertised. A buyer was identified but that potential sale fell through.

[5] In October 2014, the Khiatanis were told that Mr and Mrs Campbell ('the Campbells') were interested in purchasing the property for US$1,150,000.00. A sale agreement was signed between the Campbells and the Khiatanis ('the Campbell contract') in December 2014. A deposit of US$300,000.00 was paid with an undertaking from the Campbells' attorneys at law to pay the balance by a certain date.

[6] The bank was told of the Campbell contract. As will be shown below, there was a constant flow of information from the Khiatanis' attorneys-at-law to the bank over the period December 2014 to January 2015. Based on the evidence presented to this court it was not until December 2014 that the bank told Mr Khiatani that the bank had found a purchaser ('Mr Hamilton') for US$852,173.00 or JA$98,000,000.00 and that a sale agreement had been signed by the bank and Mr Hamilton ('the Hamilton contract'). The Hamilton contract was signed in September 2014, some three months before the Campbell contract.

[7] The difference between the price under the Campbell contract and the Hamilton contract was US$297,827.00. The Khiatanis rely on this sale price difference to say that had the bank ended the contract with Mr Hamilton, which it had a contractual right to do having regard to the terms of the contract, and facilitated the sale to the Campbells the complete indebtedness and costs would have been covered and he would have been left with a surplus.

[8] Miss Nicole Allen, attorneys-at-law for the Khiatanis, gives the version from the lawyer's perspective. She confirms that in October 2014 she was notified by one of the realtors engaged to sell the property that the Campbells wished to purchase the property for US$1,150,000.00. That offer was accepted by the Khiatanis.

[9] Matters in the Campbell contract progressed during the months of October and November 2014. By December 5, 2014, Miss Allen was able to write to a Ms Greenland of the bank and advised her that the Khiatanis has found a purchaser and that an agreement for sale was executed.

[10] On December 8, 2014, the Campbells, through their attorneys at law, sent the deposit of US$300,582.50 as well as an executed instrument of transfer. On December 9, 2014 Ms Greenland responded to the December 5, 2014 email from Miss Allen. Ms Greenland's email said that the information was sent to the bank's lawyer. It was after the Campbell agreement that the Khiatanis, through their lawyer, learnt that the bank had entered the Hamilton contract.

[11] After speaking with the bank's lawyer, Miss Allen appreciated even more the urgency of the matter and she sent to the bank's lawyer the Campbell contract and other relevant information. Miss Allen sought to impress upon the bank that it would be in the bank's interest and that of the Khiatanis that the Campbell sale goes through because it would clear all debts owed to the bank (the other creditors) and leave a surplus for the Khiatanis. The evidential significance of this is that the bank knew that the Khiatanis were interested in clearing completely the bank's debt.

[12] On December 16, 2014, Miss Allen again wrote to the bank's lawyer about the Campbell contract but no response came. After December 16, 2014 Miss Allen wrote to the bank enquiring whether the bank had any issue relating to the Campbell's source of funds. The bank declined to respond. On December 29, 2014 Miss Allen asked the bank for details of the mortgagors' account. There was no response.

[13] By December 7, 2015, Miss Allen wrote and told the bank that she had received an undertaking from the purchasers' attorneys at law but no response.

[14] On January 12, 2015, the bank sent the mortgagor's account which showed that to close the account US$806,848.41 and JA$252,527.42 would be needed.

[15] At some point after January 12, 2015 Miss Allen was told that the bank would be proceeding with the sale to Mr Hamilton at which point Miss Allen asked why would they proceed with a sale that was less than the forced sale value.

[16] On January 27, 2015, Miss Allen received communication from Mrs Taylor that the bank was proceeding with the sale to the Campbells and that also that it had received the full purchase price.

[17] From the bank's perspective the company borrowed money and defaulted. The Khiatanis as guarantors also defaulted and so the bank took steps to enforce its security. Formal letters of demand were issued in May 2013. Discussions between the Khiatanis and the bank continued through 2013 and into 2014.

[18] In February 2014 the bank instructed the auctioneers to sell the property but those instructions were withdrawn later in February 2014. The sale instructions were reissued in March 2014. At the auction April 17, 2014 the reserve price was not met.

[19] By letter dated April 24, 2014, Mr Hamilton made an offer of JA$100,000,000.00 for the property. The bank after some delay during which it sought a higher price eventually accepted the Hamilton's offer on June 20, 2014. Later Mr Hamilton asked the bank to pay the full transfer tax and in order not to lose the sale the bank accepted the purchase price to JA$98,000,000.00. The bank and Mr Hamilton concluded an agreement in September 18, 2014.

[20] The Hamilton contract had these terms of the contract that attracted the attention of Lord Gifford QC:

(a) the completion clause stated that completion date was on or before 120 days from the September 18, 2014. That clause also said that the parties 'agree that not less than sixty (60) days before the completion date the purchaser shall obtain in favour of and deliver to the vendor's attorneys at law an acceptable undertaking for the payment of all moneys payable by the purchaser hereunder on completion failing which the vendor shall be entitled to cancel this agreement and refund the initial deposit payment without interest';

(b) the waiver clause stated: 'No relaxation forbearance delay or indulgence by the vendor in enforcing any of the terms and conditions of this agreement or the granting of time by the vendor to the purchaser shall prejudice affect or restrict the rights and powers of the vendor hereunder nor shall any waiver by the vendor of any breach

hereof operate as a waiver of any subsequent or any continuing breach hereof';

Under special conditions the following clauses are found. These are special conditions 4 and 9.

(4) this agreement is subject to the purchaser obtaining a mortgage from a reputable financial institution for a loan of not less than … ($88,200,000.00) and/or a letter of undertaking from the purchaser's attorneys at law. In the event of the purchaser not obtaining and delivering to the vendor's attorneys at law a written commitment for such loan within sixty (60) days of the date hereof either party shall be entitled to rescind this agreement by notice in writing within fourteen (14) days thereof failing which this agreement shall remain absolute and binding on the parties hereto;

(9) time shall be of the essence of this agreement in respect of all payments to be made by the purchaser hereunder and on the failure of the purchaser on the due dates to pay any sum or sums payable hereunder or punctually to do any act or thing by this agreement required to be done by him or his acting in any way amounting to a repudiation or rescission of this agreement for sale by the vendor shall be entitled to cancel the same without prior notice, … provided however that the vendor shall be entitled at its option to allow the purchaser time to satisfy his various obligations under this agreement;

[21] Mr Hamilton failed to give an acceptable undertaking as required under the completion clause or special condition 4. It is agreed that even if he had the bank was not in a position to complete the sale having not done all that it needed to do at the time the undertaking was due.

[22] On December 5, 2014 Miss Allen advised the bank that the Khiatanis had found purchasers who were willing to pay US$1,150,000.00 for the property. The email also

told the bank that the purchasers had signed the sale agreement. Four days later on December 9, 2014, the bank was told that the lawyer was in possession of a signed sale agreement and a deposit of US$300,000.00. The bank also knew that the purchasers had signed the instrument of transfer.

[23] By December 16, 2014 Miss Allen sent the bank the executed agreement for US$1,150,000.00. The bank was asked whether it was minded to consent to the transaction so that the Khiatanis would be able to pay off all the debts. There was a follow up email on December 17, 2014.

[24] Miss Allen followed up with a letter of December 29, 2014 in which it was indicated that the Campbells could complete the purchase before the date of January 15, 2015. By January 7, 2015, Miss Allen wrote to the bank telling it that she was now in receipt of an undertaking from the purchaser's attorneys at law in the sum of US$850,116.50. The letter closed with a plea for the bank to consent to the sale.

[25] Miss Allen wrote again on January 9, 2015, emphasising that she had a letter of undertaking for the balance of the purchase price. Miss Allen also gave her own undertaking.

[26] By letter dated January 19, 2015, the bank wrote to Mr Hamilton's lawyer to say that the 120 days had expired and the sale was cancelled.

[27] In a letter dated January 20, 2015, the bank next wrote to Mr Hamilton's attorney to say that the bank's position was that the sale had not been completed within the 120 days but nonetheless they extended the time within which Mr Hamilton was to complete the transaction.

[28] The letter from Mr Hamilton's lawyer confirmed January 16, 2015 was the completion date. The third paragraph of the letter reads:

> *This amount [balance of purchase price] represents balance purchase monies … plus interest … being 4 day's interest …from completion date (January 16, 2015) to January 20, 2015.*

[29] This completes the narrative of important facts. Other facts will be added as needed to make the analysis intelligible.

The duty of a mortgagee when exercising the power of sale

[30] The mortgagee owes duties to the mortgagor whenever he is exercising his power of sale in respect of the property used to secure a loan or guarantee. There are three questions to be answered. These are:

a) whether the mortgagee's duty arises at common law or in equity?

b) how is that duty expressed in legal terms?

c) what is the content of the duty?

(1) <u>whether the mortgagee's duty arises at common law or in equity?</u>

[31] The court addresses the first question. An important first step in answering this question is to recognise that since 1625 to 1649 the Court of Equity created the equity of redemption as a species of property and from that period onward the Court of Equity assumed exclusive jurisdiction over the regulation of mortgages. The common law courts were reduced to answering the simple question of whether what was concluded between the parties was an enforceable contract and if the common law courts said yes, then to that extent equity followed the common law and would recognise the agreement as legally enforceable.

[32] When the judges of equity, before and after fusion, used the term 'negligent' they were not speaking of the tort of negligence. The judges meant that the mortgagee had not met the standards required by the Court of Equity. There was no intention to import common law concepts into this area and thus there is no such thing, in the law of mortgages, as contributory negligence, remoteness of damages, duty to mitigate and all the ideas one associates with the tort of negligence. The word negligence was simply a convenient label to describe conduct of the mortgagee that attracted a sanction.

[33] The idea that the mortgagee owed any duty to the mortgagor arose from the simple fact that the mortgagor had an equitable interest in the property called the equity of redemption. This way of looking at the matter sprang from the fact that in respect of land outside of the Torrens system of the Jamaican Registration of Titles Act ('RTA'), a legal mortgage was executed by way of a conveyance of the ownership of the legal estate to the mortgagee. The legal and equitable titles were transferred to the mortgagee. The equity of redemption is a right to redeem the property, that is to say, pay off the debt in full including interest and any other charges and once this was done the mortgagee was obliged to retransfer the property back to the mortgagor. In equity it did not matter that the time for repayment had passed. Once the mortgagee had not sold the property or there was no foreclosure, the equity of redemption was not extinguished.

[34] The Court of Equity – not the common law courts – developed legal standards which governed the mortgagee's exercise of the power of sale. It is the description of this standard that has led to the confusion in terminology. All sorts of expressions have been used – negligence, reckless, not business-like – but in the end they are seeking to capture in a single word, compound word or even a phrase the idea that the mortgagee who does not meet the expected standard in any given case has done something that is visited by a sanction from equity.

[35] Cases such as **Cuckmere Brick Co Ltd v Mutual Finance Co Ltd** [1971] Ch 949 must now be regarded as wrong in so far as they speak to or give credence to the idea that the mortgagee's duty to the mortgagor when exercising the power of sale is governed by the tort of negligence. This is so in Jamaica despite one Court of Appeal decision that followed **Cuckmere** and stated that it should be followed in Jamaica.[1] This is so for three reasons. First our highest court, the Judicial Committee of the Privy Council in **Downsview Nominees Ltd v First City Corporation Ltd** [1993] AC 295 has

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[1] **Moses Dreckett v Rapid Vulcanising Company Limited** (1998) 25 JLR 130.

made it clear that **Cuckmere** is authority for the proposition that should the mortgagee decide to sell he must take reasonable steps to secure a proper price. Lord Templeman explicitly stated that it is not 'authority for any wider proposition.' Second, over the last twenty years there has been a clear and decisive retreat from **Cuckmere** by the Court of Appeal of England and Wales. The retreat is consistent with sound reason and law. Third, there is no evidence that equity has been unable to provide an adequate remedy for a wronged mortgagor and so there was no remedial gap that needed to be filled. The court will now refer to the cases that demonstrate the second reason just stated.

[36] The Court of Appeal of England and Wales in **Parker-Tweedale v Dunbar Bank plc (No 1)** [1991] Ch 12 held that although the mortgagee owing a duty to take reasonable care to obtain a proper price for the mortgaged property it 'is both unnecessary and confusing for the duties owed by a mortgagee to the mortgagor and the surety, if there is one, to be expressed in terms of the tort of negligence.'

[37] Nine years later the Court of Appeal of England and Wales revisited the matter in **Medforth v Blake** [2000] Ch 86 it was stated that whether or not the duty of the mortgagee was expressed as a common law duty or a duty in equity the outcome would be the same. The court, however, did go on to say that since the mortgagee's duty like that of the receiver arose in equity 'we might as well continue to refer to it as a duty in equity.' Sir Richard explained at pages 101 – 102:

> *The equity of redemption was a Chancery invention, introduced in order to ensure that a conveyance by way of mortgage remained a security for the repayment of money whether or not the date fixed for repayment and reconveyance had passed. The duties imposed on a mortgagee in possession, and on a mortgagee exercising his powers whether or not in possession, were introduced in order to ensure that a mortgagee dealt fairly and equitably with the mortgagor. The duties of a receiver towards the mortgagor have the same origin. They are duties in equity imposed in order to ensure that a receiver, while discharging his duties to manage the property with a view to repayment of the secured debt, nonetheless in doing so takes account of the interests of the mortgagor and others*

interested in the mortgaged property. These duties are not inflexible.

[38] In 2003, the Court of Appeal of England and Wales in **Raja (administratrix of the estate of Raja (deceased)) v Austin Gray (a firm)** [2003] 1 EGLR 91 it was stated that the cases show that the duty owed by a mortgagee to a mortgagor is an equitable one and a duty in equity and although there was no difference in outcome between the common law approach or the equity approach the duty would continue to be referred to as a duty in equity.

[39] It was stated in **Silven Properties Ltd v Royal Bank of Scotland plc** [2004] 1 WLR 997 by the Court of Appeal of England and Wales that '[w]hen and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for the mortgaged property at the date of the sale, and not (as the claimants submitted) the date of the decision to sell. If the period of time between the dates of the decision to sell and of the sale is short' and '[t]he remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received.'

[40] From what has been said in the authorities cited it is no longer tenable to argue in favour of the tort of negligence in this area. Also the remedies available put the matter beyond doubt. Unless barred by statute such as section 106 of the RTA, one of the remedies available was setting aside of the transaction. The common law tort of negligence knew no such remedy. The common law could only award damages. Thus there can be no doubt that equity provides a complete set of remedies and there is no need to think of, to say nothing of importing and applying the common law tort of negligence.

(2) how is that duty expressed in legal terms?

[41] Language is important. Ideas and how they are expressed have important consequences for how we understand a legal standard.

[42] Sir Richard Scott stated the duties in this way in **Medforth** at page 102:

> *What a mortgagee or a receiver must do to discharge [their duty] depends upon the particular facts of the particular case. A want of good faith or the exercise of powers for an improper motive will always suffice to establish a breach of duty. What else may suffice will depend upon the facts.*

[43] It has been noted in **Silven** that the mortgagee while not being a trustee of the power of sale does have a duty to take reasonable precautions to secure a fair, true market value or proper price for the mortgaged property. He must take proper care to secure the best price reasonably obtainable at the date of sale. Since the power of sale is regulated by equity it should occasion little surprise to find language such as good faith. It is this court's view that the good faith dimension of the rule goes to the purpose for which the power is exercised. The mortgagee's power of sale can only be utilised for the purpose of securing repayment of the money he lent. It cannot be used for any other purpose. If it is used for any other purpose even if a proper price was obtained the mortgagee will be held liable. This is what happened in **Robertson v Norris** 1 Giff 421 and **Jenkins v Jones** (1860) 2 Giff 99.

[44] In **Kennedy v de Trafford** [1897] AC 180 Lord Herschell used the expression 'good faith' to describe how the mortgagee was expected to act. However, his Lordship was of the view that an absence of good faith meant, among other things that the mortgagee acted in a manner that was wilful, reckless or even fraudulent, that it could be said that 'interests of the mortgagor' were sacrificed. Thus Lord Herschell's formulation included conduct ranging from deliberate (wilful) to unjustifiable risk taking or not caring whether reasonable steps were taken to get the best price (recklessness) to outright dishonesty (fraudulent). It would appear from **Cuckmere** that a failure to advertise that planning permission was given for the flats and the refusal to postpone

the sale were acts amounting to wilful conduct by the mortgagee. In **Cuckmere** there was no evidence of dishonesty or recklessness. all the relevant information that would affect the price. This means that an honest but incompetent mortgagee can be held liable for breach of duty to the mortgagor.

[45] It is this court 's view that the correct way to express the duty is to say that the mortgagee can only exercise the power for the purpose for which it was given and if he is exercising the power of sale he must do so in a business-like manner, that is to say take reasonable care to obtain a proper price for the property that takes account of the mortgagor's interest while at the same time pursuing his own self-interest. Acting honestly and for a proper purpose is not sufficient to escape liability. The mortgagee must also take reasonable care to get the best price.

[46] The mortgagor's interest is almost inevitably getting the best price possible at the time of the sale. If this is done, then the mortgagor may pay off his entire debt from the proceeds of sale or pay off a substantial part of it.

(3) <u>What is the content of the duty?</u>

[47] The mortgagee's question is, what must I do be safe from suit? So far the cases have used words such as 'good faith', 'reckless', 'business-like' and 'wilful.' But these expressions are conclusionary words or contractions used to capture is a single word or words the conduct of the mortgagee that is being, has been or likely to be impugned or challenged. To get a proper understanding of the kinds of conduct that have been held to be objectionable it is necessary to look at decided cases. This does not mean that because a mortgagee was held liable in a specific circumstance it follows that he will be held liable in similar circumstances. This last statement was made to take account of Vice Chancellor Richard Scott's observation in **Medforth** which was that what was objectionable in the nineteenth century may not be objectionable in the twenty first century and what was not objectionable in the nineteenth century may be objectionable in the twenty first. It all depends on the circumstances of each case. As Lord Herschell observed in **Kennedy** 'it is not necessary in this case to give an exhaustive definition of

the duties of a mortgagee to a mortgagor.' This translates into 'all the circumstances of the case must be looked at.'

[48] Lewison J in **Meretz Investments NV and another v ACP Ltd** [2006] EWHC 74 (CH) has an illuminating examination of the mortgagee's equitable duties. His Lordship proceeded on the premise that 'a mortgagee, exercising his remedies under the mortgage, owes equitable duties to the mortgagor **and to subsequent encumbrancers**' (emphasis added). That was the proposition of the lawyers for the litigants and Lewison J agreed with them. The highlighted portion of the quoted text should be noted.

[49] The court now comes to an aspect of Lewison J's decision which is vital to this case. Lewison J did not agree with Stuart VC's observation in **Robertson v Norris** (1857) 4 Jur NS 155 which was to the effect that a sale for purposes other than merely to recover payment of the debt was a fraud upon a power. Lewison J disagreed with this in principle. He drew support from Sir George Jessel MR in **Nash v Eads** (1880) 25 Sol Jo 95. Sir George expressed the matter in this way:

> *The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the Court could not look into his motives for so doing. If he had a right to sell on June 1, and he then said, 'The mortgagor is a member of an old county family, and I don't wish to turn him out of his property, and will not sell it at present,' and then on 1 July he said, 'I have had a quarrel with the mortgagor, and he has insulted me; I will show him no more mercy, but will sell him up at once' - if all this was proved, the Court could not restrain the mortgagee from exercising his power of sale, except on the terms of payment of the mortgage debt. The Court could not look at the mortgagee's motives for exercising his power. Lord Eldon had never said anything of the kind which V-C Stuart supposed him to have said. The Vice-Chancellor was entirely mistaken, and must have been citing the judgments to which he referred from his recollection, without looking at the reports. Of course there were some limits to the powers of the mortgagee. He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he*

was not in urgent want of his money, or because he had a spite against the mortgagor.

[50] This passage of Sir George was analysed by Lewison J and his Lordship concluded at paragraph 303:

> ***[303]*** *This quotation … seems to me to run counter to the modern trend of authority which imposes on the mortgagee a duty of some kind to act fairly towards the mortgagor. An exercise of a power of sale out of spite does not, at least at first blush, sit well with such a duty. Nevertheless, it does not appear to have been disapproved in any recent case.*

[51] The reference to Vice Chancellor Stuart in the passage from Sir George in **Nash** is a reference to the case of **Robertson v Norris**. Lewison J went on to examine further authorities concluded his review at paragraph 314 in this way:

> ***[314]*** *Drawing the threads together, it seems to me that none of the authorities to which I was referred gives unequivocal support to Mr Morgan's submission that the mortgagee must have "purity of purpose". On the contrary, Nash v Eads and Belton v Bass are inconsistent with it. So, too, is the statement in Fisher & Lightwood. A dissection of a mortgagee's motives is likely to be difficult in practice. Moreover, unlike statutory powers conferred for the public benefit, or trustees' powers conferred for the benefit of beneficiaries (which were two analogies on which Mr Morgan relied) a mortgagee's powers are conferred upon him for his own benefit. In such circumstances "purity of purpose" may be difficult to achieve. The cases do support the proposition that a power of sale is improperly exercised if it is no part of the mortgagee's purpose to recover the debt secured by the mortgage. Where, however, a mortgagee has mixed motives (or purposes) one of which is a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage, then in my judgment his exercise of the power of sale will not be invalidated on that ground. In addition, I consider that it is legitimate for a mortgagee to exercise his powers for the purpose of protecting his security.*

[52] It is this court's view that Sir George Jessel mischaracterised what Vice Chancellor Stuart was saying. All the Vice Chancellor was saying was that any use of

the power of sale other than for the recovery of moneys lent is an improper use of the power and therefore a fraud, in equity, on the power. Fraud in equity is not limited to dishonest as in deceit. It may be that the Vice Chancellor's dictum was too sweeping but having regard to the context of the case, the language is understandable. The extend that Lewison J was accepting the proposition that a misuse of the power of sale was not subject to sanction by equity, this court disagrees. As Lewison J himself recognised such an idea is inherently counter to equity's exacting standards.

[53] It is this court's respectful view that it was Sir George who fell into error in his effort to correct the Vice Chancellor. Sir George Jessel's dictum, taken literally, means that it matters not what the motives of the mortgagee are once the power of sale arose then he could exercise it even if his purpose was not for the enforcement of his security. That approach of Sir George is incompatible with equity's view that a power can only be used for the purpose for which it was intended.

[54] On the other hand, Cotton LJ in **Pooley's Trust v Whetham (**1886) 33 Ch D 111 had no difficulty in understanding the import of what Vice Chancellor Stuart was saying and actually used the principle to analyse the facts of the case and concluded this at pages 123 - 124:

> *A passage was read to us from the judgment of the late Vice-Chancellor Stuart in Robertson v. Norris, stating that the Court will consider the exercise of a power of sale improper, and will prevent it being effectual against the mortgagor if it is exercised, not for the purpose of getting the money which is due on the mortgage to secure which the power of sale is given, but for some indirect purpose - a statement of the law from which I do not dissent. It was said that here the power of sale was exercised by Mr. Kaye, not for the purpose of getting his money, but for the purpose of giving an advantage to the bank in the action which was going on between Pooley and the bank. That, in my opinion, is not the fact. The bank undoubtedly purchased in order to get an advantage against Pooley, and I quite think if it had not been for that they would not have given for his interest the sum they did; for, as far as we can make out, Pooley's interest was not worth anything at all except to the bank, whose position as to the railway might make it worth their*

> *while to purchase this interest. That explains how it was that Mr. Kaye went to the bank, and why he urged them to take it. He was going to the persons who, as he thought, would be the only purchasers, and whom he thought likely to become purchasers, not because they believed there was any real value in the interest of Mr. Pooley in the railway to an independent person, but because they might get an indirect advantage in buying it. The railway had been bankrupt, and the interest on its debentures was not paid, and as far as we can see the interest of Pooley was worth nothing at all to a purchaser not in any way connected with the railway, but was worth something to a person engaged in a litigation with him as regards their interests in the railway. In my opinion, therefore, there is nothing here to shew that the sale was at an undervalue - nothing to shew that the mortgagee's object in the sale was anything but that which was perfectly legitimate, viz. to get his money from the only persons whom he could think likely to buy.*

[55] The Vice Chancellor's position makes good sense, is consistent with, and supports the principle that the mortgagee must act in good faith. If a mortgagee enforces his security for oblique motives that have nothing to do with recovery of his security, how can that be an exercise of the power in good faith?

[56] The court also takes issue with Lewison J's view that '[w]here, however, a mortgagee has mixed motives (or purposes) one of which is a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage, then in my judgment his exercise of the power of sale will not be invalidated on that ground.' This approach in my respectful view is inconsistent with the good faith principle. It seems to this court that at the very least where there are dual or multiple motives it needs to be shown that the substantial purpose for which the power was exercised was a proper purpose for which the power was granted. The idea of dual purpose, multiple purposes, dominant purpose, proper purpose or substantial purpose is not unfamiliar to the law (See **Waugh v British Railways Board** [1980] AC 521; **Eclairs Ltd v JKX Oil & Gas plc** [2016] 3 All ER 641).

[57] It seems, therefore, that the mortgagee would be well advised to be aware of the following in order to minimise the risk of liability.

(a) the circumstances under which the power of sale may be exercise has arisen;

(b) the power of sale is given solely for the purpose of enabling the mortgagee to recover the money he has lent;

(c) the mortgagee must act in good faith;

(d) the power cannot be exercised for a purpose other than recovery of the money and where there are dual or multiple purposes the substantial purpose must be to realise the security;

(e) accepting that the mortgagee is not a trustee for the power of sale and he is not in a fiduciary relationship with the mortgagor and accepting that the mortgagee can sell at a time most advantageous to himself and accepting that he may exercise the power to the detriment of the mortgagor the mortgagee cannot act fraudulently, recklessly, in a non-business-like manner or completely ignores the interests of the mortgagor;

(f) the mortgagee must take reasonable steps or precautions to get the best possible price at the time the property is sold (not when the right to exercise the power arises) having regard to all the circumstances of the case;

(g) if the property is to be sold by auction, ensuring that it is properly and accurately described;

(h) while there is no duty to advertise the property, should the mortgagee choose to do so he must take care so that the property is accurately and fairly described and in particular he must state anything that may point to the property having a special type of value. For example, if planning permission has been given to enable a certain type of

development which may or quite likely may increase the value of the property then that must be stated;

(i) the mortgagee need not wait for an improved market;

(j) the mortgagee may sell at an undervalue but where there is a gross undervalue that fact alone may enable the court to conclude that the sale was dishonestly done and therefore fix the mortgagee with liability;

(k) If selling by auction the mortgagee cannot escape liability by saying that he hired a competent auctioneer;

[58] A mortgagee who fails to do these things is at serious risk of being held liable for a breach of duty to the mortgagor. This duty does not arise from contract or the tort of negligence but purely, solely and exclusively from equity. What has been stated in the immediately preceding paragraph covers the steps leading up to the sale. Equity did not stop there. Even at the very sale itself, equity scrutinised what took place at the point of sale and would intervene if the conclusion was that the auction or sale by private treaty was not consistent with the equities' standards. One of the remedies granted by equity was a setting aside of the sale.

[59] Proof of deceit on the part of the mortgagee is not required but if present strengthens the case. As Viscount Haldane explained in **Nocton v Lord Ashburton** [1914] AC 932 at page 953:

> *In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction.*

[60] The substance then of this area of law is that equity decided quite early that because of the significant power given to a mortgagee to dispose of property such a person would be subject to sanction if he breached the duty to act in good faith and to take all reasonable steps to secure the best prices despite the fact he can act in his own

interest. The good faith goes to the proper purpose aspect of the matter. The duty to obtain the best price goes to the process employed leading up to and including the sale.

[61] There is one final legal point that has to be addressed, namely, time of the essence.

Time of the essence

[62] The court must address the issue of whether time was of the essence in the contract. Special condition 9 has been set out above. As is well known, the difference between the approach of equity and the common law is evident on the question of time. The common law insisted that time stipulations be observed. Equity did not insist on time being essential unless that was the clear intention of the parties. Equity permitted the party who missed the time deadline to perform his obligations after that date. The common law knew no such benevolence.

[63] What has just been stated can be seen from these nineteenth century cases which are still valid today. In **Tilley v Thomas** (1867) LR 3 Ch App 61 (note that it was decided before the fusion of the administration of law and equity), the contract in 1864 stipulated that 'possession be given by the 14th January next.' On Christmas Eve of 1864 the plaintiff produced an abstract of title but there were difficulties that were not resolved by January 14, 1865. The defendant refused to accept possession on the ground that the plaintiff failed to show complete title. The parties met and had further negotiations after January 14, 1865. The defendant was sued. The plaintiff sought to say that since he and the defendant met after January 14, 1865 and had further discussions this meant that the defendant was not insisting on his strict legal rights regarding time being of the essence. At first instance the plaintiff succeeded in his suit for specific performance. On appeal, the court held that time was of the essence and the defendant was entitled to refuse to accept possession. This is what Lord Cairns LJ stated on the question of whether time was of the essence at page 67:

> *The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve*

against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry), there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Of the three grounds against interference mentioned by Lord Justice Turner, "express stipulations" requires no comment. The "nature of the property" is illustrated by the case of reversions, mines, or trades. The "surrounding circumstances" must depend on the facts of each particular case.

In this case the property sold was a residential leasehold house, not apparently let or producing rent at the time of sale, and intended by the Defendant to be used as his own residence.

[64] Sir John Rolt LJ in the same case explained at page 69:

Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the Court to give relief against the breach, and sometimes even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The Defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law, though not necessarily so in equity. The language of Lord Redesdale in Lennon v. Napper, cited by Lord Justice Knight Bruce, in Roberts v. Berry, fully explains my view on this part of the case.

[65] This case is important for several reasons. First, the contract for the purchase of the lease did not have any of the clauses that are present in the case at bar. That is to say, there was no clause explicitly stating that time was of the essence of the contract 'in respect of all payments to be made by the purchaser.' [2] This explains why the court in **Tilley** had to examine all the circumstance of the case in order to determine whether time was of the essence of the contract. Second, the contract in **Tilley** did not have any provision dealing with how any relaxation, forbearance, delay, or indulgence was to be treated. Third, the dicta from Lord Cairns were careful to make the point that equity did not act in a capricious manner by simply ignoring whether adhering to time was important. His Lordship stated, in the passage cited above, that equity will relieve a party from the consequence of a time breach if it could do justice between the parties and if there was nothing that would make it inequitable to interfere. An indication of what may make it inequitable to interfere would be whether (a) there were express stipulations about time; (b) the nature of the property was such that time was very important or (c) whether the surrounding circumstances led to the conclusion that time was important. In this present case before this court Hamilton and the bank had clauses dealing with (a) forbearance and (b) time for making payments.

[66] The court now refers to **Roberts v Berry** (1853) 3 De Gex, Macnaghten & Gordon 284; 43 ER 112 which was cited by Lord Cairns in **Tilley**. The judgment was delivered on a demurrer and not after a trial, that is to say, the facts pleaded were assumed to be true. The pleaded case of the plaintiff in **Roberts** was this: there was a contract for the sale of land. One of the conditions of sale was that an abstract of title would be provided seven days from the day of sale. Another condition was that all objections to the abstract should be taken within eight days of delivery or considered waived. The purchaser called for the abstract two days after the sale which could not be delivered because the property was the subject of a mortgage and the title deeds were in the possession of the mortgagee. It turned out that the mortgagee was out of England

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[2] See special condition 9 set out above.

and this led to the delay in producing the abstract of title. The abstract was delivered thirteen days later. The purchaser declared that he rescinded the contract and brought a suit to recover his deposit. The vendor countered by seeking specific performance. The purchaser took the view that the vendor's case as pleaded was legally insufficient to secure a decree of specific performance. The Master of the Rolls ruled in favour of the vendor who had demurred. The purchaser appealed and lost.

[67] The purchaser lost because there was nothing to show that time was of the essence. Knight Bruce LJ held pages 290 – 291; 114:

> *There is nothing on the face of the contract to shew a strict attention to time to be of importance; and I apprehend that, when from the contract, or from the nature of the case, time is not shewn to be of the essence of the contract, Courts of Equity have long been in the habit of relieving against mere lapse of time where it has been consistent with the substance of justice to do so. I could not express the rule better than by referring to the language of Lord Redesdale in Lennon v Napper. The Defendant may be able to shew the existence of circumstances such as to make time essential or material, and it is quite consistent with the decision of the Master of the Rolls that upon the answer of the Defendant, and evidence, the bill may be dismissed, especially as a time is limited within which the purchaser is to state his objections to the title. This stipulation may be of importance with regard to the question before us; but it may be that if the vendor does not abide by his stipulation as to the time of delivering the abstract, the purchaser may not be bound to abide by his. It appears to me that, as the Court has nothing before it but the bill, and is bound to treat the statements of the bill as admitted and as not being met by any additional fact, this must at present be treated as a case for specific performance. I agree in the conclusion of the learned Judge, the Master of the Rolls, which, I repeat, is perfectly consistent with a case being made at the hearing for dismissing the bill with costs.*

[68] Thus it was a matter of interpretation of the contract. It is not that equity simply said time was never ever important and could never be important. What equity was saying is that merely to say that an act should be done by a certain date in and of itself may be insufficient to make time of the essence. Equity was also saying that there may

be circumstances - even if there is no explicit term making time of the essence - that may in fact make time of the essence. What was held in **Roberts** was that even though there was reference to doing some act by a certain date that reference did not have the legal consequence of making time of the essence and there was nothing in the circumstances or the nature of the property that made time of the essence hence time was not of the essence. May be that outcome was the result of how it was phrased.

[69] The judgment of Turner LJ in **Roberts** brings out the point just made. His Lordship said at pages 291 – 292; 114 - 115:

> ***Time may be made to be of the essence of a contract, by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, shewing the intention of the parties that the contract was to be completed within a limited time. The question here is, whether in the absence of any of these circumstances time is to be considered of the essence of the contract.*** *I have always considered that the Court looks at the substance, and not at the mere form of a contract. In order to give legal rights it is necessary that some time should be specified at which the contract is to be completed; but this Court looks at such a stipulation as being merely intended to create a legal right, and not to determine the substance of the contract, or anything beyond the mere legal right.* ***The time for the completion of the title, and of the conveyance from the vendor to the purchaser, may be made essential either by an express stipulation originally entered into, or, where the vendor is guilty of delay, by notice on the part of the vendor that he requires the contract to be completed within a limited time. A mere statement, however, in the conditions of sale that the abstract will be delivered on or before a particular day is not, as it appears to me, sufficient to render the time of its delivery of the essence of the contract.*** (emphasis added)

[70] The learned Lord Justice was saying that the case before him did not have any of the factors necessary to make time of the essence.

[71] The court will refer to the case of **Parkin v Thorold** (1851) 2 Simons, New Series 1; 61 ER 239. In this court's view the judgment of Vice Chancellor Lord Cranworth

captures the principles of equity in this area quite accurately. As will be explained below Lord Redesdale's views in **Lennon v Napper** 2 Sch. & Lef. 684 were more suited to a leisurely agrarian economy and despite its endorsement by Knight Bruce LJ it must be regarded as an overstatement of the principle.

[72] The facts in **Parkin** were that the agreement for sale dated July 25, 1850 stated that the abstract of title should be delivered within 10 days and the purchase money should be paid with the purchase to be completed on or before October 25, 1850. A deposit was paid. The abstract was delivered on August 1, 1850 (within the time stated by the contract). However, there was a dealing with the land that was not properly abstracted. The purchaser requested the document so that more could be known about the transaction and consequently the title. The purchaser extended the time for producing the rest of the deed to November 5, 1850 failing which the purchaser would regard the contract as at an end. The date passed. On November 8th the vendor told the defendant that he found the relevant deed and would produce it in a few days. By November 9, the purchaser demanded the return of his deposit. In January 1851 the vendor told the purchaser that he was not able to produce the deed. The purchaser refused to complete the purchase. The vendor filed a suit for specific performance alleging that time was not of the essence and that he had not been guilty of unreasonable delay. The vendor also sought an injunction restraining the purchaser from proceeding with his action for recovery of the deposit. The learned Vice Chancellor, Lord Cranworth, stated this at pages 6 – 9; 241 - 242:

> ***The jurisdiction of this Court to decree specific performance depends entirely on contract: and the principle upon which it exercises that jurisdiction is that damages, which are the only redress that a party complaining of a breach of contract can obtain at law, are an inadequate remedy. The relief is different; but the foundation for it is the same in both Courts, namely, the contract.*** *Consequently, the first point to be ascertained is, what is the contract? This must be decided from the terms of the contract itself; and not at all from the peculiar doctrines of the Court in which a party injured by the breach of it may happen to seek redress. In the case of a written contract the same words must surely have the same meaning, whether they are construed by a*

Court of law or a Court of Equity. When, therefore, it is once ascertained that the contract of a purchaser is that he will purchase if a title is made by a given day, but, otherwise, that he will not, I apprehend, if there is nothing more, that a Court of Equity cannot, any more than a Court of law can, give relief to a vendor who has failed to make a title at the day specified. Lord Thurlow's dictum importing that a purchaser could not so stipulate manifestly rests on no principle, and has been often repudiated as not truly expressing the doctrine of this Court. Such a restriction would be a most unwarrantable interference with the freedom of contracts, without any principle for its justification. When, therefore, a contract has been entered into by which a Court of law decides that the purchaser is not bound unless a title be made before a given day, if a Court of Equity gives relief, it must be, not on the ground that it puts on the words of the contract a construction different from that put on it at law, but because there are grounds, collateral to the contract, on which it can found a jurisdiction warranting its interference. What then are those grounds? I answer the conduct of the contracting parties. Though the terms of the agreement stipulate for the completion of the purchase on a given day; yet, if the parties have dealt together on the footing that the contract should be construed as a contract to complete in a reasonable time, this Court acts on that as the real contract to be enforced. There is, no doubt, some difficulty in reconciling this, which is certainly the doctrine of the Court, with the Statute of Frauds. A contract to purchase, if a title is made on a given day, is not the same contract as a contract to purchase if a title is made in a reasonable time; and so to admit parties by agreement not in writing (and conduct is but evidence of agreement) to substitute the latter for the former contract is, in truth, to give effect to a contract relating to lands not reduced into writing and signed by the party to be charged; and this cannot be done consistently with the Statute of Frauds, as was decided by the Court of Common Pleas in Stowell v. Robinson (2 Bing. N. C. 928). Perhaps this Court has acted on the ground that it would be a fraud in a purchaser, after dealing with a vendor on the footing that he did not consider the time fixed as material, to turn round and insist on the strict terms of the written contract; or it may be that the Court has, from the conduct of the parties, felt itself warranted in inferring that the day named was intended only as a security for performance in a

> *reasonable time; and so has dealt with it as in the nature of a penalty. Be this, however, as it may, whatever be the foundation of the doctrine of the Court there is no doubt of its existence; that is, though the contract, according to its terms, is that the purchase shall be completed on a given day, and is so framed that if not completed on that day the purchaser is at law entitled to recover back his deposit; yet if the parties deal together on the footing of having disregarded the appointed day; as having, according to the ordinary language used, agreed to treat time as not being of the essence of the contract, then this Court will give relief, although the day for completion may have passed. But this relief is, as I have already stated, given solely on the ground of such dealing of the parties. I have not been able to discover any case, in modern times at all events, in which the Court compelling the purchaser to complete the purchase after the appointed day has not proceeded on this ground. In Seton v. Slade (7 Ves. 265) (a leading case on this subject) Lord Eldon expressly says: "There is no authority that has not some reference to the conduct of the parties;" and I find similar expressions in almost all the subsequent cases. Whether the facts have, in all the cases, been such as fairly to warrant the inference relied on; whether this Court has not sometimes made a new contract for the parties, and so enforced on the purchaser the performance of what he never undertook to do, is not the point for decision. It is sufficient to say that the ground on which the Court has professed to proceed has always been that the parties have so acted as to enable it either to give to the original contract a meaning differing from its prima facie obvious import, or else to say that the original contract, so far as relates to the time fixed for its completion, has been abandoned, and a new and more extended one has been, by implication, entered into.* (emphasis added)

[73] Lord Cranworth is stating that the starting point is the text of the contract. His Lordship stated that once it is understood from the terms of the contract that the parties have contracted for a particular thing to happen by a certain date then equity and the common law would come to the same conclusion. It is to be noted that his Lordship insisted that should it be the case that time is of the essence and this is arrived at on a proper construction of the contract then that interpretation prevails. However, the Vice Chancellor noted that if equity grants relief despite the breach then such an outcome cannot be on the basis that time was not or was not any longer of the essence. There

has to be some other foundation. That foundation, according to the Vice Chancellor must be found in the conduct of the parties, that is to say, despite the terms of the contract the parties have decided themselves, evidenced by their dealing with each other, to disregard the terms of the contract. This is why in cases of this nature where there is a dispute about whether a time of the essence clause was being insisted on there must be some evidence of the conduct of the parties did after the time had passed. The person proposing that time was no longer of the essence has to show that the parties have acted in a manner towards each other so that it can be said that despite the terms of the contract the parties are not insisting on it. It is also important to note that the Vice Chancellor repudiated the idea expressed by Lord Thurlow that the parties were never able – regardless of the strength of the language - stipulate that time was to be of the essence. The Vice Chancellor was making this statement because he was seeking to ensure that Knight Bruce LJ's unreserved and effusive endorsement of Lord Redesdale's views did not see a return to an approach to time more suited to an economy that moved at glacial speed and not an industrial economy that was in full flow by 1851 when **Parkin** was decided.

[74] Why was Lord Cairns in **Tilley** and Lord Cranworth in **Parkin** so insistent on the views they expressed? A bit of background is necessary. In 1802 in the Irish case of **Lennon v Napper** 2 Sch & Lef 682 it was declared that the Courts of Equity, in effect, ignored time and always granted specific performance where possible. This led to a very generous interpretation of reasonable time which meant that defaulting parties were given great indulgence in the performance of their obligations. This lax approach to time was at its core inconsistent with an industrial economy where time was becoming more and more important. To use the language of Lord Hoffman, the background fact of a receding agrarian economy and a rising industrial economy meant that contracting parties expected time standards to be met where the parties so stipulated and equity should not ignore any such stipulation. To do so would be an unwarranted interference with freedom of contract. As can be seen by the time we get to Vice Chancellor Lord Cranworth, the Courts of Equity had tightened on equity's view of time. This is not surprising given that England was now in the midst of the Industrial Revolution and so the approach to time that was appropriate to an agricultural economy

would not do in an industrial and manufacturing based economy. Lord Redesdale had come of age in the 1700s and so too Lord Eldon who was able to say in 1802 in **Seton v Slade** (1802) 7 Vesey Junior 265, 32 ER 108, that it was impossible to say that equity and the common law looked at time in the same way, thereby giving the impression that any mention of time would be ignored by equity. As time went on that view was modified to the point where we have the formulation as stated by Lord Cairn in **Tilley** and Lord Cranworth in **Parkin**. It only remains to mention **Walker v Jeffreys** (1842) 1 Hare 341; 66 ER 1064 where Vice Chancellor Sir James Wigram in 1842 summarised the movement of the law on the question of time in this way at page 347-348; 1067:

> ***In contracts relating to land time is not in general considered in equity as of the essence of the contract, and it was once considered that it could not be made so, even by express stipulation. But after it had been decided that time might be made essential, the tendency of the decisions, especially those of Sir John Leach, has been to hold persons concerned in contracts relating to land, bound, as in other contracts, to regard time as material****. Reynold v Nelson (6 Madd. 18); Heaphy v. Hill (2 Sim. & Stu. 29); Watson v. Reid (1 Russ. & Myl. 236); Stewart v. Smith (V.-C., 16th Dec. 1824: not reported); Cooper v. Emery (Rolls, 17th July 1829: not reported); Williams v. Edwards (2 Sim. 78); Lloyd v. Collett (4 Bro. C. C. 469). And this principle has been applied with the greater strictness where the property was connected with trade, as in Wright v. Howard (1 Sim. & Stu. 190); and Coslake v. Till (1 Russ. 376).* ***These cases appear to me so sound in principle*** *that I certainly will not be the first to shake them. Heaphy v. Hill and Watson v. Reid are direct authorities that if one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party, to whom the notice is so given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to their remedies and liabilities at law.* (emphasis added)

[75] It was this position that Lord Cairns and Lord Cranworth were anxious to preserve why they spoke in the way that they did in **Tilley** (1867) and **Parkin** (1851) respectively. These two Vice Chancellors affirmed the view of Vice Chancellor Wigram in **Jeffreys** (1842) which has just been cited.

[76] Equity's approach to the question of time is now the prevailing position whether the claim is brought as a common law action or as one in equity, that is to say, unless the parties specify that time is of the essence or there was something in the nature of the property that made time of the essence or there was in the circumstances factors that made time of the essence, equity would not conclude that time was of the essence. This is the effect of section 49 (g) of the Judicature (Supreme Court) Act. However, this does not mean that the parties cannot make time of the essence. This is now the legal position in Jamaica.

Application to facts

[77] It is important to examine the terms in this contract more closely in order to show that the contracting parties were fully aware of equity's position as decided by the cases referred to above and had put in clauses to capture those principles. It is now settled law that the parties can make time of the essence. It is also settled law that merely to say that an act should be done by an identifiable date may not be sufficient to make time of the essence. This explains why the parties who wish to make time of the essence actually say, as in the case at bar, 'time is of the essence.' The court is not saying that this is the only formulation that can do the trick. What the court is saying is that this formulation puts the matter beyond question that time is indeed of the essence. Freedom of contract enables the parties to specify that time is of the essence while at the same time give themselves maximum flexibility.

[78] In **Tilley** it has been noted that there was no express clause making time of the essence and neither was there any clause expressly dealing with how forbearance, delay and indulgence were to be treated yet the court was able to find that time was of the essence because of the nature of the property and the surrounding circumstances. If the court was able to so find in **Tilley** (given the contractual omission there) then in

light of the express provision in this contract this court has no difficulty in finding that time was of the essence. In the Hamilton contract, the parties improved on **Tilley**. What the bank and Mr Hamilton did in this case to make time of payment of the essence.

[79] In **Tilley** it will be recalled that January 14, 1865 was the deadline. The parties engaged in negotiations after January 14 and this led to an argument by the plaintiff that since he and the defendant had further negotiations after January 14, 1865 that meant that the deadline of January 14 was no longer applicable. That argument also failed on appeal. In the Hamilton contract, the parties explicitly stated that no relaxation, forbearance delay or indulgence in enforcing the terms and conditions of the agreement or the granting of time by the bank shall prejudice or restrict the rights and powers of the bank. Translation: any fact of relaxation, forbearance, delay, indulgence or granting of time does not mean that time is no longer of the essence. The Hamilton contract made explicit what was implied in **Tilley**. Put another way, Mr Hamilton and the bank were fully aware of **Tilley**, **Roberts** and **Parkin** and made the clear decision to put in clauses to cover the risk that arose in **Tilley** namely having to make a derived argument that time was of the essence and further discussion after January 14 was not evidence of not making time any longer of the essence.

[80] So careful were the bank and Mr Hamilton in this case they made a clear distinction between the legal consequence between (a) failure to give the mortgage or letter of undertaking from a lawyer within 60 days of signing the contract and (b) time regarding payments to be made. In the former the parties made provision for either party to rescind the contract by giving notice in writing within fourteen days of the date of failure. The provision was that if there was no such notice the contract ‘shall remain absolute and binding on the parties.’ But absolute and binding as to what? One of the binding and absolute terms was that payment was to be made by the purchaser on the due dates. The clause did not say an undertaking to pay or promise to pay but stipulated actual payment. The relevant clause gave the bank a contractual discretionary power to either rescind or affirm the contract if there was a breach of the payment clause.

[81] This is how Mr Piper put the case for the bank on this point. Mr Piper submitted that the bank was not free to rescind the contract, in January 2015, without giving Mr Hamilton an opportunity to fulfil his part of the bargain. The court does not agree in light of its understanding of time of the essence clauses and section 49 (g) of the Judicature (Supreme Court) Act. There was another clause in the Hamilton contract indicating that any indulgence or forbearance shown by the bank was not to be seen as a waiver and would not prejudice the bank's right to enforce any of the terms of the agreement. These terms were put in to enable the bank to end the contract lawfully or to continue with the contract.

[82] There is evidence that the bank received an undertaking from Mr Hamilton's lawyer by way of letter dated January 15, 2015 which was received on January 16, 2015, the date of completion. The undertaking was given in exchange for documents to complete registration. Presumably this was to suggest that Mr Hamilton's attorneys at law had locked in the contract and therefore the bank would have had no basis to seek to get out of the contract.

[83] The context of this January 15, 2015 letter from Mr Hamilton's lawyer is important. There is a letter dated January 6, 2015 from Mr Hamilton's lawyer asking for a two-week extension of time for completion. By January 6, 2015, to the bank's certain knowledge, the Campbells and the Khiatanis had executed a sale agreement. Miss Allen had sent an email dated December 5, 2014 to the bank telling it that the Campbells had committed by signing the agreement to pay US$1,150,000.00. By December 9, 2014 the bank was told that the deposit of US$300,000.00 had been paid. The bank was also told that the agreement had a 60-day completion date but the attorney was confident that completion could take place before the end of the 60-day period. By December 16, 2014, the bank was sent the Campbell sale agreement. On December 17, 2014, the bank was asked whether it needed proof of funds. On January 8, 2015 (wrong date of January 7 is on letter) the bank was told that Miss Allen had received an undertaking from the Campbell's lawyers. The letter of undertaking was sent to the bank.

[84] Pausing here to analyse and highlight an important fact. Mr Hamilton's lawyers wrote on January 6, 2015 asking for a two-week extension of time for completion. By the time this request came in the bank knew of and was sent a copy of the Campbell sale agreement. The bank knew that the deposit has been paid. By January 8 or shortly thereafter the bank knew that an undertaking from the Campbell's lawyer had been given and the bank had possession of the undertaking. In a letter dated January 9, 2015, Miss Allen added her own undertaking to the transaction. She gave her undertaking to the bank. Up to January 9, 2015 there is no evidence that bank responded to Mr Hamilton's lawyer's request for an extension of the completion date.

[85] From the court's perspective it is this time period from January 6, 2015 to January 20, 2015 that is crucial. The court has outlined what the bank knew and has stated in detail the circumstances from December 2014 to January 8, 2015.

[86] There is another part of the story. The other part is that an examination of the correspondence between the bank and Mr Hamilton's lawyer shows that Mr Hamilton's lawyer accepted that they were late and paid interest to the bank on the balance outstanding. The evidence showed that the bank regarded Mr Hamilton as being in breach of the completion obligation. This means that both parties to the transaction – Hamilton and the bank – agreed that there was a breach.

[87] The bank wrote a letter to Mr Hamilton's lawyer, dated January 19, 2015, cancelling the sale agreement. The banks reason for taking this position is stated in its letter. It reads:

> *We refer to previous correspondence.*
>
> *As you are aware the agreement for sale in this matter provided for completion to occur within 120 days.*
>
> *The 120 days has (sic) now expired and we have not received the balance of purchase price to close. Unfortunately, I am instructed to inform you that the bank has not agreed to an extension of the time period, given the length of time which as expired since our client's bid for the property was accepted and draft agreement for sale forwarded to you.*

[88] The bank wrote another letter of January 20, 2015 (the fourth day after the completion date):

> *While the bank's position remains that the sale has not been completed within the 120 days as stipulated in the agreement for sale we have agreed to allow your client up to 2:00pm today, January 20, 2015, to provide the bank with the balance purchase price to close this sale, failing which we consider this sale to be cancelled.*
>
> *….*
>
> *Please be advised that as agreed, interest shall be payable by your client from the date of closing to today's date at a rate of 10% per annum or a daily rate of $24,444.44 calculated on a 360 day basis.*

[89] There is no evidence that the bank replied to Miss Allen's numerous letters from December 2014 to January 20, 2015. Miss Allen wrote yet again in a letter of January 22, 2015 asking about the sale of the property. The bank responded by letter dated January 26, 2015. In that letter the bank stated that it acted on its legal right to sell the property. The letter also stated that the bank had a legally binding agreement with a purchaser and was therefore legally bound to complete the transaction. The court must say that this is not compatible with the bank's known position on January 19 and 20, 2015 where the bank stated twice – once in each letter – that it regarded Mr Hamilton of being in breach of the completion clause and was entitled to cancel the contract. The letter also says that the bank received an acceptable letter of undertaking to pay balance of purchase price on January 16, 2015.

[90] In this present case the parties inserted express terms to negate the possible effect section 49 (g) of the Judicature (Supreme Court) Act would otherwise have had on the contract had there not been express terms managing the various risks that might have arisen. Special conditions in sale of land contracts are often designed to manage the risks that can arise in a conveyancing transaction as well as to keep at bay equity's default position. In sale contracts there are the usual boiler plate clauses but the special conditions are bespoke terms addressing the circumstances of the particular sale.

[91] The contract between Mr Hamilton and the bank shows quite clearly that both parties were aware of these principles and the terms were designed to manage them. When one looks at special condition 5 (not cited above) in the Hamilton contract which states that risk of loss or damage to property remained with the vendor until the purchaser is entered on the certificate of title as the registered proprietor it is obvious that the parties were circumventing the effect of equity when an agreement for sale is signed. Special condition 5 went even further to say that either party would be entitled to rescind the agreement for sale if the property was damaged before the purchaser was entered on the title as the registered proprietor.

[92] Special condition 9 expressly states that time shall be of the essence. The full term has been set out already (see paragraph 20 above). It is crafted in such a manner that enables the bank to rescind the contract if all payment to be made on the dates required are not paid. The clause gave the bank the power to resell the property after cancelling the contract. The bank, under the clause, had the right to allow the sale to continue even though the purchaser breached his obligations under the agreement.

[93] The power to resell in special condition 9 was to eliminate the issue of whether a vendor had the right to resell in the absence of an express clause so to do where there has been default by the purchaser.[3] There had been some doubt, in equity, as to whether in the absence of such a clause in the contract the vendor was at liberty to simply cancel and sell to another without the risk of incurring liability to the purchaser.

[94] The court will now deal with a submission made by Mr Piper that for time to be of the essence in the Hamilton contract a notice would need to be served. The court does not agree. The history of this practice is needed in order to explain why the court does not accept that argument. The practice of giving notice to the party in default arose because of the uncertainty produced by equity's approach to time. If a party did not

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[3] Williams, Cyprian T, A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real, Vol 1 (Sweet and Maxwell) (1906) pp 42 – 45.

perform the question was how long would the non-performance need to persist before it was said that the non-performing party had no intention of meeting his obligations so that the innocent party could, without risk, conclude that he should regard the contract as at an end? That was not an easy question to answer. In **Lloyd v Collett** (1793) 4 Bro CC 469; 29 ER 992, for example, a vendor was not permitted to secure a decree for specific performance because he exhibited behaviour that was evidence the abandoned the contract. The lawyers come up with the practical solution of serving a notice on the delinquent party reminding him of his obligation and giving him time to comply; thus the practice of serving a notice making time of the essence was born. It appears that the practice of giving notice to the defaulting party made its appearance sometime in the early 1800s. In 1821 Vice Chancellor Sir John Leach in **Reynolds v Nelson** (1821) 6 Madd 18 was not prepared to say that time could be made of the essence of a contract by a notice served on the defaulting party. However, by 1839, the tide had turned decisively against that idea. So much to that Lord Langdale MR in **Taylor v Brown** (1839) 2 Beavan 180; 48 ER 1149 could say with complete confidence at page 183; 1150:

> *Now as I have before stated, where the contract and the circumstances are such that time is not in this Court considered to be the essence of the contract--in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time in which the contract shall be perfected by the other. It has been repeatedly so considered in this Court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this Court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this Court has dismissed them with costs.*

[95] Note that this statement was made in 1839. **Parkin** (1851), **Roberts** (1853) and **Tilley** (1867), especially, **Parkin** and **Tilley** as well as Turner LJ in **Roberts** were still some years away. Between **Reynolds** (1821) and the cases beginning with **Parkin** (1851) how to treat time of the essence clauses was still being worked out and in that period of uncertainty lawyers wanted to give their clients protection and created the

notice making time of the essence and then added the power to resell the property. Once equity settled its position and gave full effect to time of the essence clauses as well holding that any negotiations held after the stipulated time did not necessarily mean that the time of the essence clause had no legal effect then, inevitably this approach, this would in turn have an impact on time of the essence notices. The effect was that it was no longer necessary to serve time of the essence clauses even after the stipulated time had passed and even though there were negotiations between the contracting parties after the time had passed once the parties to the contract had expressly made time of the essence.

[96] The notice making time of the essence is also useful in circumstance where the contract has not stipulated time of the essence or where there is nothing in the nature of the property making time of the essence or where there is nothing in the circumstances making time of the essence. In this context the notice is designed to make it plain to the party who has not completed that his breach will not be tolerated indefinitely. In other words, the notice draws a line in the sand.

[97] What does all this have to do with this case? There as a time of the essence clause in respect of 'all payments.' For these reasons the court does not agree with Mr Piper's submissions on this point.

[98] It is this court's considered view that the bank was under a duty to cogitate on whether it would consider ending the Hamilton contract. The bank knew that the Campbell contract would have paid off the debt fully and left a surplus for the Khiantanis. There is no evidence that the bank had any reason to believe that the Campbells could not make complete the purchase from the Khiatanis. Thus on the face of it, the bank's position was secure. On the face of it the Campbells could complete the purchase from the Khiatanis and the bank knew of Miss Allen's undertaking and the undertaking from the Campbells' lawyer. From January 6, 2015 based on Mr Hamilton's lawyer's letter, the bank knew that the payment date of January 16, 2015 would be breached. How then should the bank have exercised its contractual power when under a legal duty in good faith; under a legal duty to consider the interests of the mortgagor;

under a legal duty to act in business-like manner so that it can secure the best price reasonably available? The answer is clear. The bank ought to have ended the contract with Mr Hamilton.

[99] Mr Piper said the bank acted in good faith. That may well be true but that is not the end of the matter. The bank had to meet the objective part of the standard. This means that acting in good faith does not exonerate a mortgagee if, on an objective view, he went about the sale badly which resulted in loss to the mortgagor or subsequent mortgagee. Or as in this case, if it exercised its contractual power badly and unreasonably and such exercise caused loss to the Khiatanis.

[100] Clauses were in the contract to enable the bank to get out of the contract should Mr Hamilton not complete on day 120. The very risk that the clause 9 was designed to manage in fact came to pass. That clause was crafted to enable the bank to slip out of the contract if a better opportunity was in view at the time of completion and the purchase did not meet the 120-day deadline. The risk materialised. The better opportunity was at hand. The decision by the bank to continue with the sale to Mr Hamilton was not reasonable and business-like in all the circumstances of this case. It showed a complete disregard for the mortgagor's interest. The bank had certain knowledge that the price it had contracted for with Mr Hamilton was not the best price. There is the clear and unambiguous evidence of that was the Campbell contract which showed that a higher price was not just possible but a reality. The bank had the contractual space to get out the Hamilton contract but chose not to do so and by making the wrong choice inflicted significant damage to the Khiatanis. Had the bank considered the mortgagor's interest, which the law requires it to do, there was, in the circumstances of this case, only one decision that could reasonably be made: rescind the contract for failure to pay the money on the date specified and give permission for the sale to the Campbells.

[101] The court accepts that a mortgagee has a margin of discretion in how and when it exercises its power of sale. The court also accepts that there are no mandatory specifically prescribed steps that the mortgagee must take. There is no principle of strict

liability which states that any failure to take any of those specific steps, without more, means that the mortgagee has committed a breach of his duty to the mortgagor.

[102] The court also accepts that the mortgagee must take account of the mortgagor's interest. That interest in the vast majority of cases will be that the property is sold for the best price possible so that his indebtedness can be reduced by as much as the sale permits. The margin of discretion afforded to the mortgagee does not mean that he can act as if he is disposing of his own property. He is actually constrained by legal standards in what he can do and how he does what he does. At the end of the day if his conduct is called into question once it can be shown that he breached the legal standard in the particular case he will be held accountable despite the margin of discretion afforded him.

[103] The point being made is that it is not sufficient to say that the bank acted honestly. It can still be liable if it acted, on an objective view, unreasonably and by so doing failed to take into account the mortgagor's interest and that conduct led to the property not being sold for the best price.

[104] The difference in price between the Hamilton contract and the Campbell contract was, by any measure, quite substantial. Not only was the difference substantial but the undisputed evidence is that had the Campbell contract gone through the complete debt would have been repaid and, even after the relevant costs were taken into account, there would be a surplus to return to the Khiatanis. It is this court's considered view that the bank in carrying out its duties to take reasonable steps to get the best price could not ignore the completion date breach in the context of this case. By that date the bank had full, complete and accurate knowledge about the Campbell contract and there was nothing to suggest that the Campbells were not able to complete the purchase by January 16, 2015 if permitted to purchase the property.

Resolution

[105] The company and the Khiatanis have succeeded in their claim. There is a counter claim by the bank in which it is claiming the balance of the mortgage. In light of

the court's decision the bank's claim is dismissed and judgment entered for the claimants with costs to the claimants on the counter claim. The reason is that had the bank taken into account the mortgagor's interest and that of the guarantors whose property was used to support the guarantee and acted in both its interest and that of the claimants that sum now being claimed would have been recovered from the sale to the Campbells.

Remedies

[106] This is a claim in equity. The measure of loss in this case is the difference in United States currency between the price of the Campbell contract and the Hamilton contract less any necessary fees the Campbells would have had to pay for legal fees and necessary government taxes. The court accepts the calculations done by the claimants' attorneys at law which were submitted during the course of the hearing. The bank is to pay interest on the loss. Interest at 3% is to be paid on this sum from the date of service of the claim form to the date of judgment and thereafter interest at 6% accrues on the sum adjudged to be owing from the date of judgment to date of payment.

[107] There is also evidence that the price at which the bank sold the property did not leave sufficient funds to pay off the Khiatanis' other creditor. The evidence is that had the property been sold for the price the Campbells were willing and apparently able to pay then not only would bank have been paid but also the other creditor. It seems to this court that the Khiatani ought to be able to recover from the bank any interest which has accrued on that loan. bank ought to pay any interest that has accrued on that loan from January 17, 2015 to the date the bank makes the payment to the Khiatanis.

[108] On the question of costs. In this case success on the claim necessarily means success on the defence to the counter claim and so there should not be additional costs to the claimant other than the cost of preparing the defence to the counterclaim.

[109] Also there is nothing in the case for the claimants that would necessitate different costs. No additional work was required to be done arising from any peculiarity unique to

any of the claimants. This means that at the assessment of costs, if not agreed, there should a single assessment that applies to all three claimants and that single assessment if there is no agreement is to cover the claim and defence to the counter claim.

[110] From what has been said the bank has failed on the counter claim. The sums claimed by the bank in the counter claim is not due from the Khiatanis because had the bank not acted in the way that it did that sum owed would not have arisen. The bank is the creator of that loss so should absorb that loss.

[111] The bank is not entitled to collect any interest from the Khiatanis from January 17, 2015 because had the bank not acted in the way that it did it would have been paid in full. This means that it is not right that the Khiatanis should pay interest on the sum owed beyond that date because of the bank's default.

[112] Counsel are to prepare a draft order to give effect to these reasons for judgment.