[2016] JMCC COMM 34

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	**SHEILA KHIATANI**	**THIRD CLAIMANT**
AND	**SAGICOR BANK JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Lord Anthony Gifford QC and Kimberlee Dobson instructed by Nelson-Brown, Guy and Francis for the claimants

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

November 29 and December 9, 2016

CIVIL PROCEDURE – MORTGAGOR ALLEGING MORTGAGEE BREACHED DUTY WHEN EXERCISING POWER OF SALE – WHETHER PERMISSIBLE TO PLEAD THAT MORTGAGEE WAS NEGLIGENT – WHETHER TORT OF NEGLIGENCE APPLICABLE TO CLAIM – WHETHER PERMISSIBLE TO CLAIM DAMAGES FOR MENTAL DISTRESS

SYKES J

The claim

[1] In this claim Mr and Mrs Khiatani, ('the Khiatanis') and their company, Khiatani Jamaica Ltd ('KJL'), are of the view that they were hard done by by Sagicor Bank ('Sagicor'). KJL borrowed money from Sagicor Bank previously known as RBTT Royal Bank (Jamaica) Limited. The Khiatanis guaranteed the loan. The security for the guarantee was the home of the Khiatanis. It is common ground that KJL defaulted on the loan which triggered the guarantee. The home was sold and it is alleged that Sagicor sold the home for much less that could be obtained had Sagicor acted properly.

[2] KJL and the Khiatanis have brought a claim against Sagicor alleging negligence and breach of its duty to act in good faith when exercising the power of sale. There was also a claim for damages for mental distress. The claim therefore has both a common law action and a suit in equity. In short, this is the usual mortgagor/mortgagee dispute over the exercise of the mortgagee's power of sale.

[3] When the matter came on for case management the court enquired why was there a common law action in negligence as well as a claim in equity having regard to the nature of the claim. The matter was adjourned to permit counsel for the claimants to make submissions in that regard. After hearing from Lord Gifford QC the court decided that the claim in negligence should not go forward and neither should the claim for damages for mental distress. These are the reasons for those decisions.

Brief history of mortgages

[4] At common law and before the Torrens system of title by registration was introduced by the Registration of Titles Act ('RTA'), the common way in which mortgages were granted was by way of an actual transfer of the legal estate by

the mortgagor to the mortgagee. It was a contract by which the mortgagor promised to repay the sum borrowed by a certain date and if the money was repaid the land would be reconveyed to the mortgagor. Should he fail to repay by the date stated, then the common law regarded that as a breach of contract. One of the consequences was that the mortgagee need not reconvey the land.

[5] From the thirteenth to the fifteenth century three methods of effecting a mortgage were used. The first was one in which the mortgagor granted the mortgagee a lease who would then take possession which enabled him to collect the rents and profits of the land were used to pay off the debt. The sum paid also included interest but the interest portion was not separately identified for fear of accusations of usury. The lease method enabled the mortgagee to secure interest without the risk of his soul burning in eternal damnation on account of his userous conduct. The second was to convey the land to the mortgagee for a term of years with a proviso that if the money was not repaid by the end of the term the mortgagee could keep the land in fee. The third was a conveyance to the mortgagee in fee on condition that if the debt was repaid by the date specified the mortgagor could re-enter the land. As time went on this third form became the dominant form. Litigation regarding mortgages in these very early times was done in common law courts. Those courts interpreted the mortgage contract strictly and once the due date came and the money was not repaid the mortgagor lost his land for ever and a day. There was no such thing as an equity of redemption. Equity as we think of it today was in its infancy.

[6] Indeed, at the end of the thirteenth century there was no such thing as court of equity presided over by the Chancellor. The three courts in existence at that time were the King's Bench, the Court of Common Pleas and the Exchequer. The Chancellor at that time was more in the nature of very high ranking member of the King's Council than a judge. However, by dealing with petitions that were addressed the King the Chancellor gradually began to emerge as a person who was a 'judge' but was not yet recognised as such.

[7] Depending on one's interpretation of the available information it could be said that that it was not until the fifteenth century that the Chancellor finally emerged as judge in his own right and even after he did, the development of the law relating to mortgages progressed incrementally. Even as late as the reign of James 1 (1603 – 1635), the early years of this first Stuart king of England revealed no language suggesting that the concept of an equity of redemption existed. This had to await the reign of Charles 1. Ashburner records in his **Principles of Equity** (1902) 47,

> *In the reign of Charles 1, the right to redeem in the absence of special circumstances is fully recognised.*

[8] In fact until the Chancellor became a full-fledged judicial officer concepts such as equity of redemption and clog on the equity of redemption could not develop. It was not until the time of Charles 1 (1625 to 1649) that it was finally established and accepted that a mortgagor 'should be allowed to redeem his estate after the legal day of payment had gone by' (Williams, Joshua, **Principles of the law of Real Property**, (1920), 600). Also the 'main principles of equity in respect of the redemption of mortgages were settled in the reign of Charles 11 [1649 – 1685]' (Williams, 600).

[9] As Ashburner noted in his text **Principles of Equity** at page 259:

> *What, then, are the inevitable terms of the contract of mortgage? The contract was treated quite differently at law and in equity. To deal first with mortgages of land: At law, the mortgage of land was treated as having a conditional fee in the land, which became absolute on the expiration of the time limited by the contract for redemption. The mortgagee could take possession at any time after the conveyance, and, subject only to the contractual right of the mortgagor to redeem, he could exercise all the powers of an absolute owner. The contractual right of the mortgagor to redeem was right which could only be exercised in strict accordance with the terms of the mortgage contract. At law, the mortgagor who had made default had no longer any right to redeem. The mortgagor who remained in possession after the mortgagee's estate became*

> *absolute at law was sometimes described as 'tenant at will; or 'tenant by sufferance; of the mortgagee; but these expressions were merely analogical. …* ***Courts of equity from an early time looked upon the mortgage from a different point of view. They regarded it as a mere security for the payment of money, and limited the rights of the mortgagee to such as were necessary for the purpose of protecting and enforcing his security****. … In furtherance of this view, courts of equity, from the time of Charles 1, or even earlier, gave the mortgagor a larger right of redemption that was prescribed by his contract. They held that he could redeem, on equitable terms, after the expiration of the time fixed by the contract for redemption. They held further that the equitable right of redemption could only be put an end to in two ways, by the lapse of time or the operation of a Statute of Limitations, or secondly, by the decree of the court. As the courts of equity gave the mortgagee this enlarged right, they also held that the mortgagee might, at any time after the mortgagor's right had accrued, come into a court of equity and insist that the mortgagor should either exercise his right within a reasonable time to be determined by the court, or be forever precluded from exercising it. This was called the right to foreclose.* (Emphasis added)

[10] Ashburner adds at page 279:

> *In the seventeenth and eighteenth centuries the judges in equity, in their desire to protect the equitable right of redemption, indulged in figures and metaphors which have caused many perplexities to their more prosaic successors. Thus it was laid down that 'once a mortgage, always a mortgage' …*

[11] This was Ashburner in 1902. Before him there was Digby's **An Introduction to The History of the Law of Real Property** (1897) (5th) at page 285:

> *In the time of Littleton a mortgage had become a species of estate upon condition. The land was conveyed, usually by feoffment, by the debtor to the creditor, subject to the condition that on repayment of the loan by a certain date by the feoffor (the debtor) might re-enter. On the failure to the feoffor to perform the condition, the law refused to regard the fact that the real nature of and intent of the transaction was that the land should be held by the feoffee*

> *merely as security for the debt, and insisted on the enforcing of the rules relating to estates upon condition in all their strictness, holding that the estate was thereupon vested absolutely in the feoffee.*
>
> *In later times, when the jurisdiction of the Chancellor was firmly established, the rights and duties of the mortgagor and mortgagee recognised by Equity became wholly different from those recognised by Law. …. In Equity, however, the real nature of the transaction is regarded, and even after default is made, notwithstanding the terms of the instrument creating the mortgage, the mortgagee will be made to reconvey the land to the mortgagor on payment of the debt, interest, and costs.* ***The right which remains in the mortgagor is called his equity of redemption (right to redeem), and is in fact the ownership of land subject to the mortgage debt.*** (Emphasis added)

[12] Before Digby there was Spence's, **The Equitable Jurisdiction of the Court of Chancery** (1846) (Vol 1) pp 599 – 604. The learning is to the same effect as Ashburner and Digby.

[13] In just over one hundred from the reign of Charles 1 the courts of equity had so nurtured the equity of redemption that Lord Hardwicke could declare in 1737 without any hint of doubt in **Casburne v Inglis** 95 ER 258:

> *…an equity of redemption has been considered as an estate in the land; such an interest as to descend from ancestor to heir; such an interest as may be granted, devised, entailed, and the entail barred by a common recovery. This proves that it is not a mere right, but that is such an estate, as that, in the consideration of this Court, there may be a seisin of it; for otherwise, a devise thereof could not be good. The person who has it is considered as the owner of the land, and the mortgagee to retain it only as a pledge; and therefore, even a mortgage in fee is considered as personal effects, notwithstanding the legal estate is in the heir of the mortgagee.*

[14] The equity of redemption was more than just a right; it was an estate in land albeit existing only in equity. The cadence of his Lordship's reasoning does not suggest that he thought he was expressing any novel idea. So affirmative was

his Lordship that no cases were cited. It was as if his Lordship was stating such a self-evidence first principle that authority was not needed.

[15] Clearly, from this very brief history, the common law courts were not overly concerned with equitable concepts and thus the full regulation of mortgages eventually fell within the purview of the courts of equity. The common law court looked only at the strict terms of the contract. Once the date for repayment passed as far as the common law courts were concerned that was the end of the matter for the mortgagor unless the actual terms of the contract said otherwise. Equity on the other hand, regardless of the terms of the contract, intervened and developed the equitable right to redeem and an equitable interest known as the equity of redemption. In fact, it is true to say that once the date for repayment passed, the only rights existing that the mortgagor could rely on were exclusively those created by the courts of equity.

Policing the mortgagee

[16] The mortgagee has four main remedies open to him: (a) suing on the agreement for the debt; (b) foreclosure; (c) entry into possession and (d) exercising the power of sale contained in the agreement.

[17] Before the Conveyancing Act, 1881, came into force in England there was no implied power of sale. That power had to be explicitly inserted. The Conveyancing Act made it unnecessary to insert such a term by inserting such a power automatically in mortgages by deed. The statute, in England, applied to mortgages created after December 31, 1881.

[18] When it came to exercising the power of sale the courts of equity developed standards by which the mortgagee's conduct would be assessed, and if in breach, provide a remedy. The mortgagee was exercising a power granted to him by the mortgagor in the agreement. The Conveyancing Act, 1881, inserted the power of sale in all mortgages unless it was specifically excluded. The courts ensured that those vested with power over other people's property used the

power for the purpose for which the power was granted. Allied to this was the concept of good faith. Not only must the power be exercised for the purpose for which was granted but it must also be exercised in good faith.

[19] The courts of equity developed practical measures by which it could be determined whether the donee of the power exercised the power for a proper purpose and in good faith. In respect of mortgagees the courts of equity took the view that the while the mortgagee was not a trustee of the power of sale in the sense of a trustee under a trust, the mortgagee was not a law unto himself. While it was accepted that the mortgagee could exercise the power at any time advantageous to himself and even to the detriment of the mortgagee, he was not without constraints.

[20] In the years before the Judicature Acts of 1873 and 1875 in England and the Judicature (Supreme Court) Act, 1880, in Jamaica, when the common law courts and the courts of equity were combined in one court the language of some of the judges of equity while not always as well-chosen as one would like were not intending to introduce the common law tort of negligence in to equitable jurisprudence. All that they were saying when speaking of the mortgagee's wrong was that the mortgagee omitted to act in good faith and/or used his power for an improper purpose.

The standard

[21] In 1882 Kay J in **Warner v Jacob** (1882) 20 Ch D 220 felt able, after reviewing previous cases, to express the standard in this way at page 224:

> *The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.*

[22] In this passage there is the expression of the mortgagee exercising the power bona fide for the purpose of realising the debt and doing so without corruption or collusion with the purchaser. If that was done the courts of equity would not interfere unless the price was so low as to be evidence of fraud. The pedantic would ask by say exercising the power bona fide and do so without corruption or collusion with the purchaser since corruption and collusion is the antithesis of acting bona fide? What Kay J was getting at was that corruption and collusion meant that it was not a bona fide exercise of the power. This meant that there may in fact be default and the mortgagee has the right to exercise the power of sale but there may well be evidence that the purpose for exercising the power when it was exercised was not really for realising the debt but for some other purpose.

[23] Previous case law would have provided the foundation for Kay J's dictum as expressed in the passage above. For example, in mind cases like **Robertson v Norris** 1 Giff 421 Vice Chancellor Sir John Stuart set aside a sale because his Lordship concluded that '*[w]hat appears upon the evidence is this, the power of sale was exercised by the mortgagee for other purposes and with other views than the merely recovering of the debt*' (1 Giff 424). The case has since been considered a misapplication of the law the facts but the principle has never been doubted. In the same case Vice Chancellor Stuart, after referring to prior cases, stated at 424 – 425:

> *Lord Eldon says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power. That expression is to be understood in this sense, that,* ***the power being given to enable him to recover the mortgage money, this Court requires that he shall exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. The legitimate purpose being to secure repayment of his mortgage money, if he uses the power for another purpose—from any ill motive to effect other purposes of his own, or to serve the purposes of other individuals—the Court considers that to be***

> ***a fraud, in the exercise of the power, because it is using the power for purposes foreign to that for which it was intended.*** *It is not disguised in this case—it is beyond all doubt—that the Defendant was goaded on by other persons, for purposes of their own, to exercise this power of sale as a means of expelling the Plaintiff from that share in the property which was the subject of the mortgage. That alone, if well established, is enough to vitiate this sale. If the Court finds that the power given for a particular and specified purpose is avowedly used to effect another purpose, that, I apprehend, would be fatal to the title conferred on the alleged purchaser. But the case does not end there. So far from there being a sale to a purchaser who pays his money and enters into possession, the immediate consequence of the sale is, not that the purchaser enters into possession and enjoyment of the property, but that the vendor, the mortgagee with the power of sale, appears in the active possession and enjoyment of the property, and he accounts for that by saying that he is in possession only as agent for the person to whom he sold. The facts are, too glaring to be covered by this excuse.* (Emphasis added)

[24] Note that the Vice Chancellor took the view that even if the power were lawfully exercisable but its actual exercise was motivated by any '*ill motive to effect other purposes*' it would be a fraud upon the power. As can be seen from this passage the Vice Chancellor was concerned that on the facts of the case before him it appeared that the mortgagee was incited by others to exercise the power of sale. The mortgagee did not help his case by quite literally taking up possession immediately after the sale and sought to explain his presence by saying that he was the agent of the purchaser. The common law could not take these matters into account but equity could and in this case did. The sale was set aside.

[25] There is also the case of **Jenkins v Jones** (1860) 2 Giff 99, another decision of Vice Chancellor Stuart. In that case it was found that the mortgagee deliberately overstated the amount due in order to put the equity of redemption beyond the reach of the mortgagor. To cap it all, the mortgagee refused to accept tender of the amount due when it was presented to him the day before the sale of the property. If that were not enough, when the mortgagor turned up at the auction

and presented the principal and interest which the auctioneer refused to accept. Unsurprisingly the sale was set aside.

[26] Even where the sale was not at an undervalue and there was no doubt that the mortgagor had defaulted, equity may intervene and set aside the sale. The purchaser of the mortgaged property in **Martinson v Clowes** (1882) 21 Ch D 857 found this out. The purchaser happened to be the secretary of the mortgagee building society. North J ruled against the sale even though no intention to act unfairly or dishonourably was imputed to him. His Lordship said at pages 859 – 860:

> *The Plaintiff seeks by her statement of claim to have these sales to Culley and Nicholls set aside upon the ground that the houses were sold for far less than the real value, that Nicholls was a mere trustee or agent for Stevens, that the purchases by Culley were not real purchases but were merely made on behalf of the building society, the vendors, by the instructions of Stevens, their solicitor conducting the sales. These allegations, other than that as to value, which I pass by for the moment, are wholly unproved, and in my opinion are unfounded; and the title to relief rested upon them wholly fails.*
>
> *But this does not exhaust the case against Culley, for he was, as was well known, secretary of the society, acting for them in the matter of the sale; he bid for and purchased part of the property; and it does not appear that any person bid against him in respect of any of the lots knocked down to him. The law as to the position of a mortgagee exercising a power of sale is in my opinion correctly laid down by Mr. Justice Kay in Warner v. Jacob. The language of Vice-Chancellor Stuart in the case of Robertson v. Norris no doubt goes considerably further in treating the mortgagee as a trustee; but that language goes beyond anything to be found in the cases relied upon as authorities for it, as was pointed out by the Court of Appeal in the recent case of Nash v. Eads.*
>
> *It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for*

> *him in the matter of the sale cannot do so either. This seems clear from the cases cited in the course of the argument and from Whitcomb v. Minchin (4). It is admitted that Stevens, the solicitor, could not have himself become the purchaser of the property, and I do not see any ground for drawing a distinction between his case and that of Culley, who knew all the circumstances attending the sale, and admits that in conjunction with the solicitor he instructed the auctioneer. In the present case all competition for the property came to an end when Culley bid, and I do not think that the announcement that he was buying on his own account makes any difference in the case. I am unable to appreciate the effect which such a statement might produce upon the audience, and under the circumstances I am of opinion that Culley cannot maintain his purchase. There must be a declaration that the sale and conveyance to him are void as against the Plaintiff: and they must, in the event of the Plaintiff redeeming, be set aside. But though I think that the sale to Culley ought to be set aside, I do not impute to him any intention to act unfairly or dishonourably in the matter.*

[27] In this passage North J was concerned about the language of Vice Chancellor Stuart in **Robertson's** case. He felt that it went further than the law allowed and this fact was pointed by the Court of Appeal in **Nash v Eads** (1880) 25 Sol J 95. Nonetheless his Lordship was in no doubt that the mortgagee could not purchase on his own account. In light of this expression of principle it may well be that this was what influenced Vice Chancellor Stuart so far as the facts of **Robertson** are concerned. Recall that the Vice Chancellor had evidence that the mortgagee was in fact in possession soon after the sale to the purchaser. It may well be that the Vice Chancellor thought that that was taking coincidence a bit too far and felt that the reason for his presence was something other than what was stated by the mortgagee. Thus good faith on the part of the mortgagee is not just acting within the letter of the instrument conferring the power of sale but for a proper purpose.

[28] The cases of **Jones** and **Clowes** were ones in which the right to exercise the power had arisen. It is also to be noted that there was no issue of the usual complaints of (a) undervalue; (b) failure to properly advertise the property; or (c)

failure to describe the property accurately. The facts showed that the mortgagee did not exercise the power for the purpose for which it was given.

[29] The House of Lords in **Kennedy v de Trafford** [1897] AC 180, through Lord Herschell, stated at page 185:

> *My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J., in the Court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.*
>
> *My Lords, it is not necessary in this case to give an exhaustive definition of the duties of a mortgagee to a mortgagor, because it appears to me that, if you were to accept the definition of them for which the appellant contends, namely, that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith, still in this case he did take reasonable precautions. Of course, all the circumstances of the case must be looked at.*

[30] Lord Herschell while not attempting to give an exhaustive definition of good faith took the view that if the mortgagee took reasonable precautions and acted in good faith then the sale cannot be impugned. His Lordship emphasised that all the circumstances of the case must be examined.

[31] His Lordship was affirming the language of Lindley LJ in the same when it was in the Court of Appeal ([1896] 1 Ch 762) at pages 771-772:

> *The Vice-Chancellor begins his judgment by referring to the cases of Warner v. Jacob and Farrar v. Farrar's, Limited, which contain the principles applicable to this case, and then he says: "Now in this case it is not suggested that the mortgagees did not act bona fide; and it is not suggested that there was any corruption or collusion on their part, or that the sale itself was at an undervalue so gross as to be in itself evidence of fraud." If that is so, and I am satisfied it is, upon what ground can the sale be set aside? It is very difficult indeed to see how it can be set aside, but on an examination of the Vice-Chancellor's judgment I think I see what led him to set it aside. He was led to do so--and I think he was a little misled--by some language which I used in delivering the judgment of the Court in Farrar v. Farrar's, Limited, where I said this: "If in exercise of his power he"--that is, the mortgagee -- "acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." Now, the Vice-Chancellor has come to the conclusion that reasonable precautions to obtain a proper price were not used. The reason why these words were added was this:* ***A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first****.* ***But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all.*** *If it could be said in this case that the mortgagees had done any of those things, I can understand setting aside the sale; but when one comes to the facts it appears to me that, instead of not taking "reasonable precautions," in the sense in which those words are used in Farrar v. Farrar's, Limited, to obtain a purchaser at a good price for this property, the mortgagees, through their solicitor, acted from first to last in an honourable and business-like manner, without in the least sacrificing the interests of the mortgagors.*(Emphasis added)

[32] The Court of Appeal was reversing the Vice Chancellor's findings on the facts that the sale was not done in good faith.

[33] There was no real difficulty with understanding what was meant by acting in good faith or taking reasonable precautions until **Cuckmere Brick Co v Mutual Finance Ltd** [1971 Ch 949. In that case the plaintiff owned some land which had received planning permission to erect 100 flats. The property was mortgaged. At some point the plaintiff obtained planning permission to make 35 houses. Problems arose and the mortgagee took possession and instructed the auctioneers to sell the land. The advertisement for the sale by public auction spoke about the permission to build 35 houses but failed to mention that planning permission was received to make the 100 flats. The plaintiff brought this omission to the attention of the mortgagee. The plaintiff asked the mortgagee to postpone the auction in light of the failure to mention planning permission for the construction of the flats. The mortgagee said it would ask the auctioneer to mention the permission for the flats at the auction. The land was sold for £44,000.00. The plaintiffs brought a claim alleging that the land was worth £75,000.00. The judge found for the plaintiff. The mortgagee appealed on the ground that the judge's findings that should not have found that it failed in its duty of care. The mortgagee's primary contention was that it had used competent agents and had properly instructed them. The evidence showed that while it was more profitable to build flats rather than houses, the construction of flats required far more capital.

[34] Salmon LJ observed at page 966:

> *It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it…*
>
> *The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the*

> *matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are "neighbours." Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the "proper price," others to the "best price." Vaisey J. in Reliance Permanent Building Society v. Harwood-Stamper [1944] Ch. 362, 364, 365, seems to have attached great importance to the difference between these two descriptions of "price." My difficulty is that I cannot see any real difference between them. "Proper price" is perhaps a little nebulous, and "the best price" may suggest an exceptionally high price. That is why I prefer to call it "the true market value."*

[35] His Lordship felt that both duties were applicable. But then his Lordship went on to speak of 'neighbours' and 'proximity' thereby introducing ideas of the tort of negligence. Cairns LJ spoke in terms of the tort of negligence.

[36] On the facts of **Cuckmere** there was no necessity to introduce the tort of negligence. The cases referred to earlier showed that equity had a well developed arsenal to deal with all kinds of misconduct on the part of mortgagees. The tort of negligence was adding nothing of value to relationship between mortgagee and mortgagor when the former was exercising the power of sale. There was no remedial gap to be filled. In effect, the tort of negligence was now being introduced into an area of law where there was no need for it.

[37] Perhaps even more important was that liability could have been established on the facts of the case because the auctioneers failed to indicate that the property had planning permission for 100 flats. The omission and the equity's response to these kinds of errors were indicated over one hundred years ago in two cases.

The first is **Wolff v Vanderzee** (1869) 20 LT 353 where it was held that the mortgagee was liable for the loss incurred because the auctioneer had misstated that the rent for the property was lower than it was in fact. This points the mortgagee's inability to escape liability on the basis that he employed a competent auctioneer.

[38] This principle was reaffirmed in **Tomlin v Luce** (1890) LR 43 Ch D 191 where the first mortgagee was held liable for the loss suffered by the second mortgagee because the property was not accurately described. The defence appeared to have been a competent auctioneer was employed. The court's view of the competent auctioneer defence is important to note. Cotton LJ held at page 194:

> *The defence seems really to have been very much, if not entirely, directed to this, that the first mortgagees, selling under their power, employed a competent auctioneer, and were not answerable for any blunder which the auctioneer committed. There they were wrong, and that point was not I think argued before us.*

[39] The point then is that the **Cuckmere** case raised no new or novel circumstance that was not already covered by the courts of equity. **Wolff** and **Tomlin** had provided the answer to the question of whether competent auctioneer defence was viable.

[40] In **Medforth v Blake** [2000] Ch 86 the issue again arose before the Court of Appeal of England and Wales. The plaintiff brought a claim against receivers alleging that the receivers owed more than a duty of good faith in the manner in which they managed the business. The basis of the claim appears to be that under the charge which secured the mortgages the mortgagee had the power to appoint a receiver and any receiver so appointed had the power, under the charge, to *'(a) to take possession of collect and get in any property hereby charged . . . (b) to carry on manage or concur in carrying on and managing the business of the farmer...*' The complaint was that receiver in fact exercised the power '*to carry on manage or concur in carrying on and managing the business of the farmer*.' It is in respect of this latter power that the claim arose. The

allegation was that the receiver while exercising the power of manager failed to take advantage of discounts which were available. The pleaded case against the receives, as understood by Vice Chancellor Scott, is captured at page 91:

> *The amended statement of claim alleged, in paragraph 5, that in conducting the farm business the receivers had owed the plaintiff a duty of care and that their failure to request or obtain the discounts was a breach of that duty. In the alternative, if the receivers' only duty to the plaintiff was a duty of good faith, it was accepted that the receivers' failure to do anything about the discounts was not a result of any deceit or of any conscious or deliberate impropriety, but nonetheless it was alleged that the failure was a breach of that duty.*

[41] The receivers denied liability and contended that they only owned a duty to exercise their powers in good faith. The parties asked the trial judge to try that preliminary issue. The judge held (1) the receivers when exercising their power of sale owed a duty over and above that of good faith; (2) the standard was that of a reasonably competent receiver and (3) no sensible distinction could be drawn between exercise of the power of sale and exercise of the power to manage a business. The judge also held that if it were shown on the evidence that the receivers acted unreasonably by failing to seek discounts then such a failure would be a breach of duty of good faith.

[42] The receivers went on appeal. They argued among other things that (a) when exercising the power of sale their duty was to take reasonable steps to obtain a reasonable price and (b) when exercising the power to manage the business their duty was to act in good faith. They also argued that fraud, deliberate or wilful misconduct must be present for there to be a breach of the duty to act in good faith.

[43] After an extensive review of the case Vice Chancellor Richard Scott held at page 102:

> *I do not accept that there is any difference between the answer that would be given by the common law to the question what duties are owed by a receiver managing a mortgaged property to those interested in the equity of redemption and the answer that would be given by equity to that question.* ***I do not, for my part, think it matters one jot whether the duty is expressed as a common law duty or as a duty in equity.*** *The result is the same. The origin of the receiver's duty, like the mortgagee's duty, lies, however, in equity and we might as well continue to refer to it as a duty in equity.* (Emphasis added)

[44] Respectfully it does matter whether the duty is expressed as a common law duty or a duty in equity. If expressed as a common law duty in the tort of negligence which brings with it ideas such as contributory negligence and remoteness of damage. Equity does not carry these notions when dealing with the mortgagee's power of sale.

[45] As in **Cuckmere** the allegations raised no new problems that equity had not solved. Equity had already decided that when exercising the power of sale the mortgagee had to act in a business-like manner. By parity of reasoning the same idea could be applied to the mortgagee who took up the challenge of running the business. Equity would not allow him to operate the business in an irresponsible manner. This point is supported by **In re Manchester and Milford Railway Company Ex parte Cambrian Railway Company** (1880) 14 Ch D 645, 653 per Sir George Jessel MR:

> *That being so, what is the meaning of "the appointment of a receiver and, if necessary, of a manager"? "A receiver" is a term which was well known in the Court of Chancery, as meaning a person who receives rents or other income paying ascertained outgoings, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind. We were most familiar with the distinction in the case of a partnership. If a receiver was appointed of partnership assets, the trade stopped immediately. He collected all the debts, sold the stock-in-trade and other assets, and then under the order of the Court the debts of the concern were liquidated and the balance divided. If it was desired*

to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade. The same distinction was well known also in the working of mines. If a receiver only was appointed, the working of the mine was stopped, but if it was desired to continue the working of the mine, a receiver and manager was necessary. So that there was a well-known distinction between the two. The receiver merely took the income, and paid necessary outgoings, and the manager carried on the trade or business in the way I have mentioned.

[46] The learned Master of the Rolls is drawing the vital distinction between a received and a manager. They are separate roles even though it is common to have them combined in one person so that the person can exercise both powers. There can be just an appointment of a receiver or an appointment of a receiver/manager. When a person is appointed receiver and he also has manager powers he is not bound to exercise the power of manager but if he chooses to do so then clearly he is at risk of being held accountable in equity for any breach of his equitable duty. Chitty J in **Taylor v Neate** (1889) 39 Ch D 538, 544 summarised the position excellently;

The power of the manager is very well explained by Jessel, M.R. (Sargant v. Read). ***The manager must carry on the business, and carrying on the business involves entering into contracts. What the nature of the contracts is is another thing, but still they are, according to law, contracts****. Suppose that a business, which is very prosperous, has to be sold as a going concern, there is a large amount of stock which in the ordinary course is worked up for the purpose of sale. It was suggested, and indeed argued, that a manager could not employ persons to work that stock up, but must leave it as it stood at the moment of dissolution; in other words, he must starve the business; must not carry it on, but stop it. In some businesses there are sales across the counter, and many things must be done in the business which involve new contracts of some nature. Put the case of a jobmaster, a business which involves keeping a large number of horses; some may be out on contract in the usual way; some are kept in the stable for letting to regular or chance customers. To say that there can be no dealing*

> *with those horses would be an absurd proposition, because the manager would have to keep them in the stables; he must feed them; and in order to feed them he must buy corn. In my judgment a business of that sort must be carried on in the ordinary way.* ***A manager does not speculate with the business, but he carries it on according to the general course of business adopted in the particular trade.*** (Emphasis added)

[47] It seems obvious from this extract that the misconduct of which the receivers in **Medforth** stood accused was covered by equity. His duty, when exercising the powers of manager, was to carry on the business according to the general course of conduct adopted in the particular trade. **Medforth** could have been resolved applying well-established principles of equity. The allegations revealed no remedial gap.

[48] Finally there are two judgments from the Judicial Committee of the Privy Council on this. In **Tse Kwong Lam v Wong Chit Sen** [1983] 1 WLR 1394. In that case the mortgagor challenged the sale. The mortgagee, his wife and children were the only shareholders in a company. The company, by resolution, resolved that the wife should purchase the property for the company for no greater than $1.2m. At the auction the mortgagee instructed the auctioneer that the reserve price was $1.2m. It turned out that the wife was the only bidder and the property was sold to the company for $1.2m. The trial judge found that the price obtained was not a proper price but did not set aside the sale because he felt that in the circumstances of the case damages were the appropriate remedy. The Court of Appeal set aside that judgment and dismissed the borrower's cross appeal seeking an order that the sale be set aside.

[49] Lord Templeman summarised the less than exemplary behaviour of the mortgagee in this paragraph at page 1358:

> *The company, unlike an independent bidder, knew all about the property through the mortgagee and knew the amount of the reserve in advance. The company and the mortgagee did not have to arrange finance. The company bought the property for $1.2 m.*

> *provided by the mortgagee, who received back that sum in reduction of his mortgage debt. The sale transferred from the borrower to the mortgagee's family company at a price advised by the mortgagee the chance of making a profit which the mortgagee could not acquire for himself. The borrower was exposed to an action for $200,000 being the difference between $1.2m, the price paid by the company and $1.4 m. the amount of the mortgage debt. That left the mortgagee with a hold over the borrower which he exercised when the borrower complained about the sale. If, as appeared probable, the borrower could not pay $200,000 the mortgagee would suffer a loss which he could have prevented by advising the company to bid $1.4 m. for the property. No doubt the mortgagee did what was best for himself and the company.*

[50] His Lordship stated the applicable principle at pages 1359 – 1360:

> *Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for the sale to be set aside.*

[51] Despite the outrageous behaviour of the mortgagee, the mortgagor failed to overturn the sale because he was guilty of inexcusable day which may have had a deleterious on the mortgagee. This case is yet another example between equity and the common law. If this were a pure common law action the only thing that could defeat it is a statute of limitations. In equity, delay may be fatal.

[52] The other Privy Council decision is **Downsview Nominees Ltd v First City Corporation** [1993] AC 295. The factual context of this case was that Glen Eden Motors Ltd ('GEM') issued a debenture to bank which contained powers to appoint a receiver and manager. GEM issued a second debenture to First City Corporation Ltd ('FCC') which also contained powers to appoint a receiver and manager. GEM ran into problems. FCC was the first to act and appointed a

receiver. One Mr Pederson, the manager and principal shareholder of GEM, spoke to a Mr Russell who controlled Downsview Nominees Ltd ('Downsview') and it appears that the bank was persuaded to assign and Downsview persuaded to take an assignment of the first debenture that had been issued to the bank. Downsview appointed Mr Russell a receiver of GEM. Part of the arrangement was that FCC would surrender the assets of and management of GEM to Mr Russell. This arrangement meant that FCC's receivers stepped aside.

[53] Mr Russell and the receivers appointed by FCC had different views about the long term viability of GEM. Mr Russell wanted to trade GEM out its problems whereas FCC's receivers wanted the assets of GEM sold to recover its loan. After Mr Russell made his position known, FCC offered to purchase Downsview's debenture for the full price of the debt due to Downsview. Downsview rejected that offer. Eventually the debenture held by Downsview was transferred to FCC which now held both debentures.

[54] FCC reappointed the receivers it had initially appointed. FCC later assigned the first debenture to an associated company First City Finance Ltd ('FCFL'). FCC and FCFL brought a claim against Downsview and Russell alleging that when Downsview acquired the first debenture it had done so for an improper purpose namely hampering FCC in enforcing the second debenture. In respect of Mr Russell it was alleged that he conducted the receivership in a reckless or negligent manner which caused them loss.

[55] The trial judge, Gault J, held that liability was in negligence. His Lordship stated (page 310 of the report):

> *'the proposition that a receiver will not be liable in negligence so long as he acts honestly and in good faith no longer represents the law of New Zealand. . . . the authorities clearly indicate that on an application of negligence principles, a receiver owes a duty to the debenture holders to take reasonable care in dealing with the assets of the company.'*

[56] The Court of Appeal of New Zealand accepted that proposition by the trial and held (page 310 of the report):

> *'that, if there were any duties on the part of [the first defendant] and [the second defendant] as receiver to a subsequent debenture holder, they would have to be based in negligence.'*

[57] When the matter came before the Board, neither side challenged those statements of principle but so concerned were their Lordships about the approach of both courts that they took the very unusual step and ; gave leave to the plaintiffs to raise the whole question of the foundation and extent of the duties owed by a first debenture holder and his receiver and manager to a subsequent debenture holder.' Their Lordships even granted an adjournment 'so that both sides could reconsider the whole question and submit supplemental cases and arguments.'

[58] The question of whether the holder of a security who wished to enforce it owed a duty in negligence was squarely before the Board. It was their Lordship's opportunity to enhance the status of **Cuckmere** or restricts its operation. Their Lordships chose the latter position. Both defendants were held liable. Downsview was held liable because on the basis that it had improperly refused to accept FCC's offer to redeem the first debenture and because of that FCC suffered loss. It appeared that Lord Templeman went back to the fundamental of the role of security in creditor/lender relationships. The role of security was simply to enable the creditor to get back his money. If money is offered to the security holder even if not by the debtor there is no good reason for the creditor not to accept it because it would mean that the interest that the creditor had over the property has run its course and fulfilled is only function, namely, giving the creditor the means to realise his loan. Hence Downsview's refusal to accept the security was improper.

[59] Mr Russell was found liable on the basis that he used his powers of receiver in bad faith and for an improper purpose which was to hamper the appointment of

the receiver by FCC. He had colluded with Mr Pedersen to stymie FCC's effort to get back its money. Their Lordships did not base the liability of Downsview and Mr Russell in negligence as the trial court and New Zealand Court of Appeal had done.

[60] Lord Templeman reaffirmed the equitable view of a mortgage at page 311:

> *A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment or demise or by a charge on any interest in real or personal property. An equitable mortgage is a contract which creates a charge on property but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court. All this is well settled law and is to be found in more detail in the textbooks on the subject and also in Halsbury's Laws of England, 4th ed., vol. 32 (1980), p. 187, paras. 401 et seq. The security for a debt incurred by a company may take the form of a fixed charge on property or the form of a floating charge which becomes a fixed charge on the assets comprised in the security when the debt becomes due and payable. A security issued by a company is called a debenture but for present purposes there is no material difference between a mortgage, a charge and a debenture. Each creates a security for the repayment of a debt.*

[61] At page 312 his Lordship stated:

> *Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage.* ***From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower.*** *These principles and*

> *rules apply also to a receiver and manager appointed by the mortgagee.* (Emphasis added)

[62] The Privy Council reaffirmed the supremacy of equity over the common law in this area. In dealing with whether the common law was applicable to this area of law, Lord Templeman was forceful. His Lordship stated at 315:

> *The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor**. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor**. Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] Ch. 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition.* (Emphasis added)

[63] Lord Templeman did more that restrict **Cuckmere**. As the latter sentence of this passage shows, his Lordship regarded the case as authority for the basic proposition that if a mortgagee decides to sell he is to take reasonable case to obtain a proper price. The case had no effect beyond this elementary proposition.

[64] In addition to what has already been referred to above Lord Templeman's advice reaffirmed the proper view that the unification of the administration of equity and the common law did not mean a unification of principle where the principles of equity and the common law no longer proceeded according to their historical foundations. It simply meant that both remedies could now be had in a single proceeding, in one court, rather than multiple courts as was the case before the

Judicature Acts in England in 1873 and 1875 in England and the Judicature (Supreme Court) Act, 1880, in Jamaica. Hence Ashburner's famous formulation in **Principles of Equity** at page 23:

> *But the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. The distinction between legal and equitable claims – between legal and equitable defences – has not been broken down in any respect by recent legislation....A legal claimant cannot be put upon equitable terms and a legal claim is not determined merely by lapse of time, apart from the operation of a statute of limitations.*

[65] This does not mean that the principles are frozen as at 1873, 1875 or 1880. It means that the law is developed as it has always been in a case-law system – incrementally, by analogy and syllogistic reasoning as new fact patterns come before the court.

[66] In **PK Airfinance v Alpstream** [2015] EWCA Civ 1318 the Court of Appeal of England and Wales seem to be having second thoughts about the soundness of **Cuckmere** and **Medford**. Clarke LJ stated at paragraph 121:

> *The basis upon which a mortgagee owes a duty was once said to have been tortious: see Lord Denning in **Standard Chartered Bank v Walker** [1982] 1 WLR 1410, 1415 E-G. But later authority shows that the duty is a duty that arises in equity to those with a recognised interest in the equity of redemption: **Downsview Nominees Ltd v First City Corporation Ltd** at 315A-C.*

[67] This case has realigned English law with the decision of the Privy Council **Tse** and **Downsview**.

[68] The final point to be made is that in Jamaica where one is dealing with land under the Registration of Titles Act, section 106 states that the purchaser from a mortgagee exercising the power of sale is 'not bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice … shall have been served, or otherwise into

the propriety or regularity of any such sale.' The import of this was stated further in the section which stated that 'any persons 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.' This would suggest that the only remedy available to the courts may be simply to award damages. If this is correct then setting aside the sale may not be a remedy available to the mortgagor. However, litigation will determine that question.

Application

[69] In the instant case, the allegations are the usual ones of

(1) failing to obtain the best price which was reasonably available;

(2) selling the property at an undervalue;

(3) failure to advertise the property adequately;

(4) failure to get a proper valuation.

[70] There are other allegations. Some have been pleaded as breach of duty in negligence and others breach of duty in equity.

[71] There is no need for pleading both in common law and equity where the mortgagor is bringing an action against the mortgagee for a breach of his duties in relation to the exercise of his power sale. This present case is an ordinary mortgagor/mortgagee dispute which equity has been dealing with for over 200 hundred years. The common law adds nothing to mortgagor/mortgagee disputes. It does not provide any remedy where none existed. There is no remedial gap. The case can proceed adequately without implicating the tort of negligence. The allegations of the claimants, if established, are sufficient to secure their remedy.

Damages for mental distress

[72] The second pleading point can be dealt with more quickly. The second and third have sought to recover damages for mental distress occasioned by the exercise of the power of sale by the mortgagee. This is a novel extension of the law for which there is no legal principle to support it.

[73] The exercise of the power of sale particularly where the property is the family home is always distressing. If this claim were to be allowed to go forward then in every case where the mortgagee is exercising the power of sale there would be some person who could claim mental anguish.

[74] This court is of the view that this extension of the common law in this area is not warranted. The mortgagee's liability regarding the exercise of his power of sale is governed solely and exclusively by equitable principles and not the common law.

[75] The court strikes out all pleadings relating to the claim for damages for mental distress.

Decision

[76] The pleadings of negligence are struck out and the case is to be pleaded as a claim in equity. The allegations, if proven, will provide an adequate remedy for the claimant. The pleadings relating to the claim for mental distress are struck out. Since this decision arose at a case management conference and not on an application by the defendant the costs are to be costs in the claim.