IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C.L. 1995/D 162

BETWEEN	RUDOLPH DALEY	CLAIMANT
AND	RBTT BANK (JAMAICA) LTD	DEFENDANT

CONSOLIDATED WITH

CLAIM NO. C.L. 1996/W 055

BETWEEN	ETAL WALTERS	CLAIMANT
AND	RUDOLPH DALEY	FIRST DEFENDANT
AND	RBTT BANK (JAMAICA) LTD	SECOND DEFENDANT
AND	HARLEY CORPORATION	
	GUARANTEE TRUST COMPANY LTD	THIRD DEFENDANT

CONSOLIDATED WITH

CLAIM NO. C.L. 1996/H 094

BETWEEN	HARLEY CORPORATION	
	GUARANTEE TRUST COMPANY LTD	CLAIMANT
AND	ETAL WALTERS	DEFENDANT

CONSOLIDATED WITH

CLAIM NO. C.L. 1997/W 369

BETWEEN	ETAL WALTERS	CLAIMANT
AND	RUDOLPH DALEY	FIRST DEFENDANT
AND	RBTT BANK (JAMAICA) LTD	SECOND DEFENDANT

David Batts instructed by Livingston Alexander and Levy for the estate of Rudolph Daley

Nesta-Claire Smith instructed by Ernest Smith and Company for Etal Walters

Sylvester Morris for Harley Corporation Guarantee Trust Company Limited

Christopher Kelman instructed by Myers, Fletcher and Gordon for RBTT Bank (Jamaica) Limited

October 30, 31, November 1, 2006, January 8, 9, 19, and 30, 2007

EFFECT OF PRIOR SALE OF MORTGAGED PROPERTY, EXERCISE OF POWER OF SALE BY MORTGAGEE, WHETHER LIABILITY OF MORTGAGEE IS IN TORT OF NEGLIGENCE OR IN EQUITY, SECTIONS 70, 71, 105, 106, 108, 111, 114 OF THE REGISTRATION OF TITLES ACT, WHAT AMOUNTS TO FRAUD UNDER THE REGISTRATION OF TITLES ACT, WILFUL BLINDNESS/CONTRIVED IGNORANCE, WHETHER FRAUD IS SUFFICIENTLY PLEADED

SYKES J.

1. This case raises two major issues. The first is, what is the nature of the duty imposed on the mortgagee who exercises his power of sale. An additional question is whether that duty arises in equity exclusively, or concurrently with the common law and if concurrent, is it in the common law tort of negligence. The second is whether a registered proprietor who purchased property from a mortgagee exercising his power of sale can have his title impeached under the Registration of Titles Act ("RTA") on the ground of fraud. I shall give, first, a brief overview of the factual context in which these two issues arose; second, my understanding of the law in respect of the two major issues identified; third, analyse the evidence as it relates to the contested issues of fact, and then apply the law to the facts I have found and fourth, my conclusion. Between the first and second sections I shall deal with two preliminary issues, namely, amendments to the pleadings and whether fraud has been sufficiently pleaded for it to be adjudicated upon.

PART ONE

Summary of facts

2. I should indicate that Mr. Daley's evidence was in the form of an affidavit which was sworn much earlier in the proceedings. He died and an order was made at case management that the affidavit be admitted in evidence at this trial. Similarly, Mrs. Joy Traille, a witness for RBTT Jamaica Ltd., was absent from the island at the time of the trial and I ordered, at the commencement of the trial, that her witness statement be admitted into evidence.

3. Like many Jamaicans, Mr. and Mrs. Walters wished to own their own home. They wished to have a bit of land on which they could live in peace with neighbours, nature, family and friends. They found that land. The fact that divine services from nearby church had deterred previous interested parties was of no moment. For them, the loud message about the Almighty was but a minor inconvenience in exchange for security of tenure.

4. The Walters agreed to purchase the land from Mr. Daley, the then registered proprietor, for $170,000. According to a receipt dated December 12, 1992, they paid $100,000.00 to Mr. Daley for this bit of land. It is registered land. It is registered at volume 1022 folio 570 of the Register Book of Titles. The property is located at Exchange, a few

miles from Ocho Rios in the garden parish of St. Ann. Not only did the Walters purchase the property, they have since built a house.

5. When they bought the land, it was subject to a mortgage in favour of the then Jamaica Citizens Bank, a bank that perished in the financial sector crisis of the 1990s. Mr. Daley stood as guarantor for Mr. Martin who, in 1991, applied for loan from Jamaica Citizens Bank (now RBTT Bank Jamaica Limited) ("the bank") which was disbursed in May 1992. As guarantor the bank requested and was granted a mortgage over the property. The limit of the guarantee was JA$80,000. Mr. Martin has defaulted and has since decamped leaving behind his debt. The bank has enforced its power of sale under the mortgage. The property was sold to Harley Corporation Guarantee Trust Company Limited ("the company" or "Harley Corporation") for the paltry sum of $200,000.00. The company is now the registered proprietor. It is now common ground that the property was worth at least $2,000,000.00 at the time of the sale. The sale was effected by an agreement for sale dated February 20, 1995. The transfer was registered on March 6, 2005.

6. One may ask, what is the problem? The problem is that Mr. Walters is alleging that at the time the bank sold the property to the company, the bank and the company knew that he had bought the land. He alleges further that the company knew that he had built a house and was in occupation. The company is saying that it is a bona fide purchaser for value without notice. The bank is saying that it acted properly save for selling at an undervalue.

7. In Jamaica, mortgagees of registered land are required to send a notice to the mortgagor before exercising the power of sale. The bank sent out the statutory notice required under section 106 of the RTA and the notice of default, both dated January 25, 1994. Both documents had the incorrect address. They were addressed to Mr. Rudolph Daley c/o Happi Holiday Tour and Rental 3 Rennie Road, Ocho Rios P.O., St. Ann. This was the incorrect address. There is a 3 Rennie Road but Mr. Daley said that he has never lived there and had no connection with that address. Mr. Daley had his offices at 3 Rennie Street, Ocho Rios, St. Ann. The address of the mortgagor as noted in the schedule to the mortgage instrument is Ocho Rios Post Office, St. Ann. In the instrument of guarantee Mr. Daley is noted as being at Shaw Park Ridge, Ocho Rios, St. Ann. His affidavit described his true place of abode as Shaw Park Ridge, Ocho Rios, St. Ann. None of the documents executed between Mr. Daley and the bank has 3 Rennie Road.

8. The notice of default and the statutory notice stated the incorrect principal and necessarily, the incorrect amount owed if interest is added. The notice of default and the statutory notice stated that the principal owed was $92,822.21 with interest as January 25, 1994, of $31,998.38 making a total of $124, 820.59.

9. The sale to Mr. Walters was in clear breach of the mortgage agreement between Mr. Daley and the bank. There is no evidence that the Walters knew of this term in the mortgage. It is now agreed that at the time of the sale to Mr. Walters, Mr. Daley did not inform the bank that he had sold the property.

10. There is a conflict on the evidence between Mr. Walters and Mr. Daley on the year of the sale. Mr. Walters says it was December 12, 1992, and Mr. Daley says it is 1994. I have accepted that it was December 1992 because there is a receipt dated December 12, 1992 acknowledging that Mr. Daley received $100,000. The body of the receipt says that it was a deposit on land at volume 1022 folio 570 part of Exchange. There is no evidence suggesting that the receipt was not issued by Mr. Daley to Mr. Walters. In fact, this case has been conducted on the basis that Mr. Daley indeed sold the land to Mr. Walters with the only issues being, whether the sale was a breach of the mortgage agreement between Mr. Daley and the bank, and the effect of such a sale. I therefore find as a fact that the agreement was entered into or about December 1992. There was no written sale agreement or other documents regarding the sale other than the receipt in December and other receipts to which I shall make reference. I also accept the evidence of Mrs. Walters that the transaction took place in December 1992. This is consistent with the rest of the evidence concerning the provision of electricity which I shall examine later.

11. Mr. Walters testified that he was put into possession in December of 1992. He also said that he cleared the land, knocked down the building that was there and erected a house that was completed by June 1993. A shop was also built but it was not rendered or painted. Mr. Walters testified further that he and his family began occupying the house in June 1993 and finally moved in completed in December 1993. There is no evidence that the bank knew of these activities before 1994. Mrs. Walters appears more certain about the events involved in the construction of the house and where there is a conflict between her and her husband on this point I prefer the testimony of Mrs. Walters.

12. Mr. Rudolph Daley on the other hand said at paragraph 8 of his affidavit that the construction activities of Mr. Walters were completed in July 1994. This assertion is not consistent with the letter to which I am about to refer. There is a letter dated December 7, 1993, from Mr. Daley to the Jamaica Public Service Company authorising the company to provide electricity to property registered at volume 1022 folio 570. There is also another letter dated December 9, 1993, signed by Mr. Walters granting permission for his wife to conclude a contract for the supply of electricity to the property. These letters are more consistent with completion of construction in 1993 than in 1994, so, on a balance of probabilities I find that the house was completed in 1993. In matters of this nature the court ought to have great regard to contemporaneous documents drawn up when there was no expectation of litigation. I do so on this issue. Such documents tend to be more reliable than fading memories of witnesses.

13. I also rely on a valuation prepared by Mr. Barry A. Wharmann dated January 23, 1995. I shall say more about this report and the credibility of Mr. Wahrmann and Mr. Harley later on. This report speaks to two buildings located on the lot of land: a house and a shop. The report stated that the house was approximately two years old with another fifty eight years left in it. The shop was said to be in need of rendering and painting and should last another fifty years. No opinion was expressed about the age of this shop at the time of this valuation. All

this is consistent with the Walters' evidence of a sale, occupation and construction before 1994. It follows from this that Mr. Sylvester Morris' submission that Mr. Walters hurriedly constructed the house after he learnt of the interest of Harley Corporation in late 1994 is untenable. This submission was made all the more improbable if Mr. Morris accepts that December 31, 1994, was the first and only time Mr. Harley visited the property (a date given by Mr. Harley) and January 23, 1995, was the date of the report. There is no evidence that the Walters knew of Harley Corporation's interest in the property before the visit. I should indicate that this report does not indicate the date on which the property was visited by Mr. Wharmann. This means that it might have been earlier than January 23, 1995, but certainly not later than that date.

14. After ten years of denying liability to Mr. Daley, the bank was struck by a sudden and unexplained desire to admit part of Mr. Daley's claim. Approximately six weeks before the trial was due to commence, the bank, through a sworn affidavit of Miss Nicole Roberts, attorney at law, for the bank, accepted that the property was sold at an undervalue and that the bank wished that the proceedings be dealt with as an assessment of damages. This affidavit is dated September 18, 2006 and was filed on September 19, 2006. As far as I can see nothing has happened between 1995 and 2006, from an evidential standpoint, to explain this volte-face. This affidavit was sworn to support a notice of application for court orders dated September 15, 2006, in which the bank was applying for the following orders:

a. that the defendant, Citizens Bank admits that the land subject of this Claim had a market value as at March 1995 of $2,758,000.00 when it was sold.
b. it be directed that there be a trial on an issue of quantum only.
c. the defendant Citizens Bank is permitted to file a further defence admitting liability but disputing quantum.

15. The affidavit was brought to the attention of the court by Miss Claire-Smith, counsel for Mr. Walters. In light of this concession the curious may wonder why I found it necessary to deal with the duties of a mortgagee to the extent that I have. Strange as it may sound, Mr. Kelman in his written submissions attempted to make the point that the bank did not breach its duty as a mortgagee in that it acted reasonably and prudently in attempting to ascertain the true market value when it held an auction at which the property was not sold. Then in the very next paragraph Mr. Kelman states that the bank "has admitted that at the time of the sale the market value (sic) of the property was considerably higher than the price at which it was sold i.e. $200,000". When the oral submissions were made, Mr. Kelman seemed to be saying that if the bank erred it was selling at an under value. I have found that this was not the only sin committed by the bank. It also breached its duty as a mortgagee who is exercising the power of sale by misdescribing the property when the advertisements were placed in the newspapers and sold the property based on the erroneous description.

16. Extensive written submissions were made regarding the duty of a mortgagee and so I shall address the issue in a fulsome way. In light of the evidence put before the court, the admission by the bank ought to have been made a decade ago since it could not have possibly escaped liability.

17. There is one further point that I need to deal with at this juncture. The agreement for sale between the bank and Harley Corporation was executed on the date stated, namely, February 20, 1995. Before the execution of this agreement, Mr. Daley's attorneys at law, Abendana and Abendana, by letter dated January 23, 1995, to the manager of Jamaica Citizens Bank Ltd, Ocho Rios P.O., St. Ann, asked whether the property had been sold. The bank responded in a letter dated February 3, 1995, indicating that the property had been sold by private treaty. This response by the bank was legally incorrect. As a matter of language it is difficult to describe something as being sold if there is no enforceable contract in existence between the parties. There was no sale agreement and the company could not have received an order for specific performance based on the doctrine of part performance. On January 3, 1995, when the deposit was paid there was no enforceable contract for the sale of the land to the company. The evidence regarding the sale by private treaty, is, that on January 3, 1995, the company paid a deposit, and received a receipt, which, in its terms, was insufficient to constitute a sufficient memorandum in writing under the Statute of Frauds, because the receipt did not have all the necessary information, and specifically, it did not contain the purchase price. Further the executed sale agreement had as a special condition precedent that the agreement for sale shall not come into effect until it was signed by both vendor and purchaser. Mr. Morris wanted to suggest that at the time the deposit was paid by Harley Corporation on January 3, 1995, the receipt was a sufficient memorandum in writing, and therefore a contract capable of being ordered to be specifically performed was in existence. This was an attempt to suggest that the company had a proprietary interest that was enforceable by court action. The ultimate goal was to suggest that the company and not the Walters had a proprietary interest in the land by the time of the 1995 sale by the bank to the company. That submission is not consistent with known authority. It is too well established that any document relied on as a sufficient memorandum in writing for the purposes of the Statute of Frauds must contain the essential terms of the contract (see ***Patrick Grant v Laurel Maloney*** (1989) 26 J.L.R. 240); ***Mclean v Espuet*** (1991) 28 J.L.R. 92; ***Tiverton Estates v Wearwell*** [1975] Ch 146). It therefore means that absent a memorandum in writing the parties are treated as if the contract is purely oral. One would have to see what acts of part performance were done to see if those acts could ground an order of specific performance.

18. The doctrine of part performance could not be prayed in aid because the company had not done any act capable of meeting the demands of ***Maddison v Alderson*** 8 App. Cas. 467. This is so despite the efforts of the House of Lords in ***Steadman v Steadman*** [1976] A.C. 536 to suggest that the doctrine is not as stringent as ***Maddison*** states. ***Steadman v Steadman*** is at odds with the defining case of ***Maddison v Alderson***. The Law Lords forming, in ***Steadman v Steadman*** the majority failed to demonstrate the unsoundness of the major premise of ***Maddison v Alderson*** which was that, if acts such as payment of money alone or some other equivocal act was admitted as a sufficient act of part performance, there would be, in effect, judicial repeal of the Statute of Frauds. They did not show, by compelling reason, that Lord Selbourne's historical analysis was incorrect, lacked internal coherence, or that the relationship between the Statute of Frauds and the doctrine of part performance, as explained in ***Maddison***, was based on a fundamental misunderstanding of the statute.

Steadman v Steadman has failed to adequately explained why the law drifted away from the early view, expressed by none other than Lord Harwicke, that payment of money alone was a sufficient act of part performance (see ***Gunter v Halsey*** Amb 586). Lord Salmon, for example, without examining the cases and placing them in their historical context, concluded that the authorities on the subject were not easy to reconcile. This is not quite accurate as Lord Selbourne did show that the initial position taken by the Courts of Equity shortly after the passing of the Statute of Frauds withered away and had not resurfaced until ***Steadman v Steadman***. Lord Simons' conclusion after his examination of the issue of whether payment of money alone was a sufficient act of part performance is inconsistent with the actual history of the matter. Lord Reid for his part did not demonstrate as distinct from his conclusion that Lord Selbourne's analysis was unsound.

19. The law has so far departed from Lord Harwicke's opinion that Vice Chancellor Wigram in ***Dale v Hamilton*** 5 Hare 369; 67 ER 955 could state the law with such emphatic finality in the passage below. There is no trace of hesitation in his opinion. It does seem extraordinary that the majority in ***Steadman***, all common lawyers, speaking one hundred years after the Judicature Acts of 1873 and 1875 could "discover" that a century and a half of a particular understanding by specialist equity lawyers and judges could have gotten it so wrong.

20. The doctrine of part performance was explained by Sir James Wigram in ***Dale v Hamilton*** 5 Hare 369, 381; 67 ER 955, 960:

> *It is in general the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their rights, they would be in if there were no contract. Of this a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as shewing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground been admitted to be an act of part-performance: (Morphett v Jones* 1 Swanst. 172). ***But an act which though in truth done in pursuance of a contract admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example the payment of a sum of money alleged to be the purchase money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not in general give relief.*** (My emphasis)

21. The Vice Chancellor is saying that if a man is in possession of property which would have made him a trespasser, in light of the high protection given to proprietary and possessory interests in land, such a possession is without more evidence of part performance. I am excluding from this the case of a tenant who holds over at the end of a lease. If there is possession coupled with expenditure of funds then the acts of part performance are virtually

irrebutable. So although the company paid a deposit on the property on January 3, 1995, that payment was not a sufficient act of part performance. The reason for this as explained by the Earl of Selbourne, Lord Chancellor, in ***Maddison v Alderson*** at pages 474 - 476 is that unless there is something more than just payment of money, even payment in full, the contract between the parties is still at the stage it would be before the Statute of Frauds. The Statute of Frauds intervened and made oral contract unenforceable; not void. This explains why it is said that an oral contract for the sale of land agreement even accompanied by payment of full purchase price is valid but not enforceable. It is the part performance which raises the equity in favour of the party seeking specific performance. This is the underlying reason behind the Lord Chancellor's statement that the contract is not wholly void but executory - executory because it is compliance with the decree of specific performance that executes the contract. If the parol agreement was wholly void then no amount of part performance could breathe life into the agreement. There would be no terms that could be acted upon. In an oral contract for the sale of land the terms are there but unenforceable. I hope I have stated clearly why I reject the submission that there was an enforceable contract between the company and the bank when the deposit was paid by the company on January 3, 1995.

22. This point is not an academic one because I have found that Mr. Daley acquiesced in or encouraged the Walters to erect the house and the shop. This gave the Walters a proprietary interest in the land. They had done acts which have been accepted as quintessential acts of part performance which would have entitled them to a decree of specific performance had Mr. Daley resisted their claim to the land. Further, under the principle of ***Ramsden v Dyson*** they would have acquired an equitable interest in the land because of the encouragement given to them by Mr. Walters with the only issue being how best to satisfy the equity. What I am saying is that Mr. and Mrs. Walters acquired a proprietary interest in the land from as early as 1993, two years before the land was sold by the mortgagee to the company.

The amendments

23. The statements of case of the parties were amended as follows: Ital Walters was changed to Etal Walters (correction of spelling); Jamaica Citizens Bank Limited was changed to RBTT Bank Jamaica Ltd (it succeeded Jamaica Citizens Bank Limited) and Rudolph Daley is now the Estate of Rudolph Daley because Mr. Daley died after the claim was filed. Finally, Mr. Etal Walters amended his particulars by deleting JA$135,000 and replacing it with JA$170,000 as the purchase price of the land in question.

The pleading point

24. Mr. Kelman and Mr. Morris have submitted that there is no allegation of fraud, meaning that it was not specifically alleged and relied on and so I cannot adjudicate on whether there was fraud. I do not agree. The relevant legal principle is found in ***Davy v Garrett*** (1878) 7 Ch. D. 473, 489 per Thesiger L.J.:

> *There is another still stronger objection to this statement of claim. The Plaintiffs say that fraud is intended to be alleged, yet it contains no charge of*

fraud. In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think that this cannot be correct. It may not be necessary in all cases to use the word "fraud"--indeed in one of the most ordinary cases it is not necessary. An allegation that the Defendant made to the Plaintiff representations on which he intended the Plaintiff to act, which representations were untrue, and known to the Defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the Defendant--that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention.

25. This statement of principle was approved in ***Armitage v Nurse and others*** [1998] 241, 256 - 257 per Millet L.J. (as he was at the time):

The general principle is well known. Fraud must be distinctly alleged and as distinctly proved: Davy v. Garrett (1878) 7 Ch.D. 473, 489, per Thesiger L.J. It is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct complained of fraudulent are pleaded; but, if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud. As Buckley L.J. said in Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. [1979] Ch. 250, 268:

> *"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used . . . The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."*

26. Mr. Kelman cited the case of ***John Wallingford v The Directors of Mutual Society*** (1879-80) LR 5 App. Cas 685 to rebut the cases just cited by me. Lord Selbourne said at page 697:

With regard to fraud, if there be any principle which is perfectly well

settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded; and the conclusion is, that it is only for the purpose of taking the account that any defence ought to be admitted in this case.

27. Lord Hatherly in the same case said at page 701:

There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

28. Finally Lord Watson at page 709:

My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of Common Law, I think the terms of Order XIV. would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the Defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

29. Mr. Kelman also relied on ***Thomas v Stoutt and Others*** (1997) 55 WIR 112, 117g where Byron CJ (Ag) (as he was at the time) said:

The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of the case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest. The requirement

for giving particulars of fraud in the pleadings is mandated in the Rules of the Supreme Court, Order 18, rule 12 (1) (a).

30. The cases cited by Mr. Kelman do not contradict the principle I identified. In all the cases, the allegations have to be examined to see what exactly they say before a determination can be made on whether they comply with the law. In ***Wallingford***, for example, the pleading simply stated that the Wallingford by fraud and misrepresentation had been induced to enter the society. The claimant did not say what the fraud and misrepresentation were. In ***Thomas***, the claimant tried to set aside the decision of an adjudication officer registering land on the basis of fraud. The history of the case was that on April 20, 1978, the adjudication officer, ordered that a parcel of land was to be registered and shared among a number of persons he had identified. The appellant commenced an action to set aside the decision of the adjudication officer on the ground of fraud. At the trial the judge indicated that the particulars were inadequate to maintain the claim. There was an application to amend the statement of claim. It was at the hearing of this application that the claim was struck out. The appellant appealed from this decision to the Court of Appeal. The allegations of fraud were that the defendants by "fraudulent actions" (a) represented to the adjudication officer that Richard Stoutt (one of the defendants) was entitled to the land; (b) concealed from the adjudication officer that Richard Stoutt was an illegitimate child and was not a lawful defendant of one of thirteen children to whom the land was donated; (c) some of the persons to whom the officer granted shares were descendants of the same person. The amendment would have added that "another fraudulent representation that 'the gift land' was the disputed land, when it would have been the land in the 1911 deed." The learned Chief Justice said at page 118b - d that the allegations did not say how it was represented that Richard Stoutt was entitled to the land. He held that there were no particulars about how Richard Stoutt's illegitimacy was concealed or what was fraudulent about it. Finally Chief Justice Byron found that the pleadings did not explain the relevance of his illegitimacy to the order of the adjudication officer. His Lordship stated at page 119a that the pleading did not allege any definite facts or conduct nor demonstrate any character to the fraud alleged. In other words, the conduct alleged was consistent with fraud as well as innocence, and therefore failed to meet the pleading standard. Indeed when one examines the whole context of the judgment it is not hard to see why the Chief Justice came to the conclusion that he did. The pleadings were consistent with fraud and innocence. The case before me is quite different.

31. The key is to look at the pleadings to see whether the allegations made by Mr. Walters in his claim against Harley Corporation are consistent with innocence as well as fraud. If this is the case then the pleading is incurably defective. In Claim No C.L. W 055 of 1996 (***Walters v Daley, RBTT Jamaica Ltd and Harley Corporation Guarantee Trust Company Limited***) the pleading states that in or about November 1995 a representative of Harley Corporation attended the property and told the claimant that the bank had offered to sell the property to him for $200,000.00 and that the property was a vacant lot. The claimant said he told the representative that he (claimant) had purchased the property from Mr. Daley with the knowledge of the bank and two buildings were constructed on the property. The statement of claim further alleges that in April 1995 he was told that the Harley Corporation had

purchased the property and that he should vacate the property. Paragraph 25 specifically states that "the third defendant was at all material time aware of the Plaintiff's (sic) interest in the property, that the property was worth and valued far and in excess of $200,000.00 and that the Third Defendant (sic) was not a bona fide purchaser for value without Notice (sic) of the Plaintiff's interest". The allegations alleged by the claimant are (a) the claimant bought the land; (b) this fact was told to Harley Corporation; (c) the lot was not vacant as Harley Corporation believed; (d) this fact was certainly known by Harley Corporation; (e) with all this knowledge Harley bought the property. The pleading does not just say that Harley Corporation knew of the claimant's interest. It stated how the company knew, from whom it got the information; the circumstances under which it received the information and what it did. The fraud alleged is purchasing the property with this knowledge. Is this not particular?

32. In this case, the witness statements together with the particulars of claim (as they were known them), have pleaded all the particulars of fraud that could be pleaded in this case. The case is about purchasing property with certain knowledge that another person is saying that they had an interest, evidenced by the erection of two buildings.

33. All this is pointing towards the knowledge possessed by Harley Corporation and is alleging that Harley knew all the facts that would prevent it being a bona fide purchaser for value without notice. It is my view, supported by Salmond J. of the Court of Appeal of New Zealand (***Waimiha Sawmilling v Waione Timber Company Ltd*** [1923] N.Z.L.R. 1113), the basis of an allegation of fraud in cases under the Torrens System, when there is no caveat or injunction barring the transaction sought to be impugned, is the registered proprietor's proceeding with the transaction in certain knowledge that the claimant had a prior interest in the property. The pleading in Claim No. C.L. W 055 of 1996 could hardly have gone further than it did in the particulars. The only thing missing was the use of the word "fraud". All the defendants in that claim and in particular, Harley Corporation, could not have failed to appreciate that Mr. Walters was alleging fraud against the company.

34. This case is not complicated and anyone familiar with fraud under the RTA would realise that the allegations of Mr. Walters raises the issue of fraud especially since it is well known that the doctrine of notice, actual and constructive, has been severely curtailed under the RTA. However, as the case law makes clear, this does not mean that knowledge is irrelevant under the RTA. For these reasons I do not accept Mr. Kelman's and Mr. Morris' submission on this point.

35. There is another point to make. We are now in the era of the Civil Procedure Rules (CPR). In the days when the rule relating to pleadings, generally, and fraud in particular, there was no requirement to produce witness statements, statement of facts and issues and such like. In the old days, no one knew what the evidence was likely to be and the source from which it would emanate. The litigants would wait with breathless anticipation to see who would mount the steps into the witness box. That has now changed. These days by the time the trial is to commence, each side knows with greater particularity what is being alleged and who will speak to particular facts. While loose statements of claim are not to be encouraged, we must take a

realistic view of litigation today. One ought to look at the whole statement of case to see if the claimant has made it clear that is pleading fraud and what particulars have been pleaded.

36. Another way of looking at this matter is to ask, why does civil procedure insist on pleadings?, and in the second, why did the rules develop in relation to fraud? The purpose of pleadings is to create issue. When the claimant sets out his case and there is a defence, issues are created. The purpose is to let each side and the court know, the issues on which evidence is required. Before the reforms introduced by the Civil Procedure Rules of 2002, no one would know the proposed evidence until the day of trial when the witness turns up and climbs into the witness box. Under the new rules the parties are required to file witness statements. This is far removed from the 1800s and 1900s. Today, judges no longer just look at the particulars of claim and defence to find out what the issues are. We look at witness statements, the statement of facts and issues as well as the particulars of claim and defence. The emphasis now is to take a global view of what the party's case is. When it came to fraud, it was felt that it was an imputation on a person's character. A finding of fraud would do much to sully a person's reputation, hence it was said that such a grave imputation should be specifically pleaded. A corollary of this was that the evidence of fraud needed to be cogent. The question is whether the purpose behind the pleading rule has been met in this case. I say that it has. There is not simply an allegation that the company knew of the claimant's interest and then bought the land with this knowledge and was therefore not a bona fide purchaser for value without notice. That would be too general. Knowledge, simpliciter, is not necessarily fraudulent. Had the pleadings stood there it would have been consistent with fraud and consistent with innocence. The company was told the type of knowledge it had, how it gained it, from whom, when and in what circumstances. I shall summarise the claims before dealing with the major legal issues.

The Claims

37. I have already dealt sufficiently with Claim No. C.L. W 055/1996. Claim No. C.L. W 369/1997 (***Etal Walters v Daley and another***) covers much the same ground as CL W 055/1996. The only difference between the two claims is that Harley Corporation Guarantee Trust Company Limited is a defendant on CL W 055/1996. In both claims Mr. Walters is seeking:

a. a declaration that he is the beneficial owner of land at volume 1022 folio 570 of the Register Book of Titles;
b. that he is entitled to be registered as sole proprietor in fee simple of the said property;
c. further or in the alternative that the defendants either jointly or severally are obliged to pay to him the current market value of the said property;

38. Claim No. C.L. D 162/1995 (***Daley v RBTT Bank***) sees the Estate of Rudolph Daley alleging that the bank knew that he had sold the property to Mr. Walters. It alleges that Mrs. Traille, a loan officer at the bank, was told of the sale and she raised no objection. It is alleged that Mr. Walters without the knowledge or agreement of Mr. Daley constructed a house and began to reside on the land. The bank is accused of selling the property by private

treaty without the knowledge or consent of Mr. Daley. The claim continues by saying that the bank did not send the notice of default or notice required under section 106 of the RTA to the address in the schedule to the mortgage instrument. The Estate is claiming:

a. damages for negligence and/or breach of contract and/or breach of fiduciary duty and/or breach of statutory duty that occurred because the property was sold at a gross undervalue and at a time when the bank knew or ought to have known that at the time it sold the property, the property had already been sold and at a time when the claimant was servicing his mortgage;
b. further or in the alternative an account of the alleged or any sum due and owing under and by virtue of instrument of mortgage dated 29th day of July 1991 and made between the claimant and the defendant;
c. a declaration that the claimant is entitled to an indemnity and/or contribution from the defendant with respect to any or any alleged claim by Mr. and Mrs. Etal Walters with respect to their purchase of the said land from the claimant.

39. In Claim No. C.L. H 094/1996 (***Harley Corporation Guarantee Trust Company Ltd v Etal Walters***) the company is alleging that Mr. Walters was at all material times a tenant of Mr. Daley. The claim states that the company purchased the premises from the bank when it exercised its power of sale. According to the company, the bank gave it possession of the property by letter dated January 6, 1995 and completed the sale on March 6, 1995. It ends by alleging that it served a notice to quit dated April 14, 1995, on Mr. Walters which indicated that the premises should be vacated by April 30, 1995. Mr. Walters is still on the property. The company is claiming:

a. possession of the premises;
b. mesne profits from April 30, 1995 until possession is given to the claimant;
c. inspection of premises
d. interest.

PART TWO

Duty of mortgagee exercising the power of sale

40. Much has been written about whether ***Cuckmere Brick Co Ltd and another v Mutual Finance Ltd*** [1971] 2 All ER 633 introduced a hitherto unknown concept in this area of law, namely, a duty of care as in the tort of negligence. Mr. Batts has submitted that it is now too late in Jamaica to say that we should not follow the English position regarding the duty on a mortgagee who exercises his power of sale. This was in response to Mr. Kelman's submission that as long as the mortgagee acts fairly and in good faith he will be held to have exercised his power of sale properly. Mr. Batts relies on ***Cuckmere Brick Co Ltd and another v Mutual Finance Ltd*** [1971] 2 All ER 633, ***Moses Dreckett v Rapid Vulcanising Company Ltd*** (1988) 25 J.L.R. 130, ***Zachariah Sharief v National Commercial Bank (Jamaica) Ltd*** (1994) 31 J.L.R. 304 and ***Diane Jobson v Capital and Credit Merchant Bank Ltd*** SCCA 113/2002 (unreported) (delivered July 29, 2005). The first two cases are decisions of the Court of Appeal of Jamaica and the third is a decision of the Supreme Court of Jamaica. ***Dreckett*** expressly adopted ***Cuckmere*** as stating the law of Jamaica. ***Jobson*** reasserted this jurisdiction's adherence to ***Cuckmere*** and Patterson J. (as he was at the time) applied

Cuckmere in ***Sharief***. Mr. Kelman relies on ***Cuckmere***, ***Dreckett*** and ***Joan Adams v Workers Trust and Merchant Bank Ltd*** (1992) 29 J.L.R. 447.

41. The written submissions of Mr. Batts and the agreed statement of facts and issues submitted by Mr. Batts on behalf of the Estate of Rudolph Daley and Mr. Morris on behalf of Harley Corporation, raise the questions of whether the mortgagee has a fiduciary duty to the mortgagor, and whether any loss suffered by the Estate was the result of negligence on the part of the mortgagee. These submissions are the product of two misunderstandings. The first is the idea that the mortgagee has a fiduciary duty towards the mortgagor. The second is that the common law tort of negligence is applicable in this area.

42. It is therefore necessary to see what exactly was decided in ***Cuckmere***, and what the Court of Appeal of Jamaica approved. This requires an examination of the law relating to the exercise of the power of sale by mortgagees prior to ***Cuckmere***. As a preliminary observation I note that none of the three judges in ***Cuckmere*** cited a single case from the common law tort of negligence when deciding whether the duty of care in the tortious sense existed. They all relied on cases decided by the Courts of Equity. An examination of the cases cited by their Lordship shows different equity judges formulating the duty of the mortgagee in different terms. Despite this it is impossible to suggest that an equity judge, prior to 1873, would have been importing the law of tort into this area. Such blasphemy would be unthinkable to say nothing of being uttered.

43. To speak of a duty of care in equity in cases where the Courts of Equity exercised exclusive jurisdiction had not before ***Cuckmere*** generated the idea that this was merely equity's version of the common law tort of negligence's duty of care. This conclusion is not difficult to support because of the powerful exposition given by Jordan C.J. of New South Wales, Australia, in the case of ***Coroneo v Australian Provincial Assurance Association Ltd.*** (1935) 35 SR (NSW) 391, 394 (cited in *Fisher and Lightwood, Law of Mortgages (2nd Australian Ed), page 480 - 481)*:

> *The power of sale, where it occurs in a legal mortgage, is not a common law power. It is an equitable power which is inserted to enable the mortgagee to convey a title which was not only good at common law, but good in equity to defeat the equitable rights of the mortgagor. The purpose of this equitable power is to cut down the jealously guarded equity of redemption. Such powers do not appear to have been recognised as valid by the Court of Chancery until the end of the 18th century; and it was only then that the practice of inserting them in mortgages began. The operation of the equitable power of sale is simply this, that if it is exercised in a way that a Court of Equity regards as unexceptionable, that Court will not treat the title of the purchaser as being encumbered by any equity of redemption in the mortgagor.*

44. In this analysis the learned Chief Justice is supported by history. His Lordship makes the unassailable point that the equity of redemption was a creation of equity and was always

dealt with in the Courts of Equity. This was in the exclusive jurisdiction of those courts. There is no evidence that the Common Law Courts and the Courts of Equity ever had concurrent jurisdiction over the equity of redemption. Historically, it was equity that mitigated the rigours of the common law. To suggest, as some now do, that the common law (the tort of negligence) is assisting equity (by providing an enhanced remedy to a mortgagor who has been hard done by) is inconsistent with over three hundred years of understanding of the relationship between equity and the common law, namely, that equity followed and mitigated the law and not the common law supplementing and improving on the work of equity. This was recognised by Salmon L.J. in ***Cuckmere***.

45. The suggestion that the case introduced the tort of negligence arose from infelicitous language on the part of the Lord Justice Salmon and Lord Justice Cross. However, having read the judgment of Salmon L.J. I am satisfied that he was not making a deliberate effort to introduce the tort of negligence in this area. In respect of Lord Justice Cross I conclude that he was decidedly on the wrong path. The third member of the court Lord Justice Cairns, agreed substantially with Lord Justice Salmon in analysis and conclusion. I shall make some general comments about the development of the law in Jamaica with regard to mortgages before turning to the judgments in ***Cuckmere***.

46. This duty on the mortgagee arose because at common law, a mortgage involved a transfer of the legal estate from the mortgagor to the mortgagee (see for example Turner L.J. ***Marriot v The Anchor Reversionary Company*** 3 DE G. F. & J 177, 190; 45 ER 846, 851). The common law was very strict. If the mortgagor failed to pay on the appointed day, even if he was a day late, he lost his right to have the land reconveyed to him. The title of the mortgagee became absolute. Equity intervened and over time moulded the right of the mortgagee down to just a security interest. In so doing the equity of redemption, as the right to redeem the property came to be known, was elevated to a species of property. The lawyers for mortgagees responded by inserting a power of sale in the mortgage instrument. After a period of hesitation, the Courts of Equity accepted the validity of the power of sale. This power, like all other powers, had to be exercised properly and prudently.

47. Equity had its emphasis on right conduct. For this reason, equity did not require any dishonesty on the part of the mortgagee. The duty was objectively determined. So while recognising that the mortgagee had the right to realise his security, equity was concerned to see that he did not, for example, sell the property at less than the price that could be had. The practice of inserting the power of sale in the mortgage instrument or even a separate document, was so well established by the late nineteenth century, that when the Conveyancing and Law of Property Act was passed in England in 1881 (44 & 45 Vict c 41), the statute implied powers of sale in the mortgage instrument (section 19 (1) (i)) thereby relieving drafters of mortgages of the need to insert power-of-sale clauses. That Act was enacted in Jamaica without any amendment on this point (see section 22 (1) (a) of the Conveyancing Act 1889 (Jam)). The Conveyancing Act applies to unregistered land. The power of sale was a counter balance to equity's seemingly unduly favourable treatment of the mortgagor. This counter balance tilted the scales towards the mortgagee and undoubtedly explains equity's reluctance

to recognise the validity of the power of sale when it first started to make its appearance around the sixteenth to seventeenth centuries.

48. In respect of registered land, that is, land under the RTA, section 105 states that the mortgage does not effect a transfer of the legal estate. The legal estate remains with the mortgagor. The mortgage, according to the section, shall have effect as a security interest only. The RTA, unlike the Conveyancing Act, does not insert a power of sale but confers a statutory power of sale. Neither does it define or indicate the obligations of the mortgagee when exercising his power of sale. This was not necessary in 1887 because all accepted that the Courts of Equity had settled the applicable law, if it had to be determined whether a mortgagee had breached his equitable duty when exercising his power of sale. Jamaica, prior to the enactment of the Judicature (Supreme Court) Act of 1881, had a High Court of Chancery. No one thought that any new law had to be created merely because the source of the power of sale was now placed on a statutory footing. Thus despite the power being placed on a statutory basis, no new law was necessary. In fact, in the one hundred years since the RTA, there is no case indicating that the existing equitable principles were inadequate to deal with mortgagees under the RTA. No one has suggested that the Court of Chancery in Jamaica, prior to the unification of the administration of law and equity, applied a different standard to mortgagees in Jamaica. It is therefore safe to conclude that the applicable equitable principles in England prior to fusion also applied to Jamaica, specifically, the RTA.

49. The RTA, in section 106, made mandatory what was not so hitherto. That was to require that notice of the default be served on the mortgagor. Prior to this, the law was that the parties had to negotitiate for this to be in the mortgage instrument (see Spence, ***The Equitable Jurisdiction of the Courts of Chancery*** Vol. 2. (1849) page 635 - 636: *The sale may be made without notice to the mortgagor and without his concurrence, unless that be made a condition; where it is made a condition, of course it must be complied with*). This seems to be the basis on which Cooke J.A. said that persons cannot contract out of section 106 (see ***Diane Jobson v Capital and Credit Merchant Bank Ltd***). By this I mean that the learned Justice of Appeal, must have been saying that if the mortgage instrument provides for notice to the mortgagor which must be complied with by the mortgagee, then surely where an Act of the legislature prescribes a notice requirement it must necessarily be mandatory.

50. The cases show that there is one duty on the mortgagee. The duty is to act fairly, properly and prudently in all the circumstances of the case in order to secure the best possible price. This duty was the outcome of balancing a number of factors. The balance had to be found once equity (a) elevated the equity of redemption to the exalted status of property; (b) treated a mortgage as primarily a loan agreement and not a transfer of the legal estate; (c) recognised the validity of the power of sale and (d) stated that the mortgagee was not a trustee of the power of sale. The solution was that the mortgagee had to act in a business-like manner when exercising the power of sale. The supervision of this power by the Courts of Equity is similar to the supervision of the exercise of any other donee of a power; the courts would see that the power was exercised prudently and for a proper purpose. The language used by judges is the outcome of a desire to express the duty as succinctly and as

accurately as language permitted. In view of the fact that the mortgagee, when exercising the power of sale, was selling another person's property - a transfer that sold the legal estate and defeated the equity of redemption - it is hardly surprising that equity, having regard to equity's origins, demanded that he acted prudently. The mortgagee in equity's eyes was a "mere" creditor but a creditor who, because of the power of sale, was exercising a powerful and potentially devastating extra curial remedy.

51. A prudent person would always seek the best possible price at the time the power was being exercised. Proof that an attempt was made to have the best possible price at the time was often evidenced by (i) getting a current valuation if there is a sale by private treaty; (ii) advertise the property properly; (iii) seeing to it that the property is accurately described in the advertisement and (iv) where appropriate a properly conducted auction. This is by no means an exhaustive list and neither do they all apply at the same time in each case, but it captures, in my view, what the case law regards as important bench marks against which any purported sale by the mortgagee is measured. I rely on the dictum of Vice Chancellor Knight Bruce in the case of ***Matthie v Edwards*** 2 Coll. 465; 63 ER 817. He was reversed on the facts by the Lord Chancellor (***Matthie v Edwards*** 25 LJR 405 (Chancery)) but both agreed on the duty of the mortgagee. The Vice Chancellor stated the duty in these terms at page 824:

> *I apprehend that a mortgagee having a power of sale cannot, as between him and the mortgagor, exercise it in a manner merely arbitrarily, but is, as between them, bound to exercise some discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable.*

52. The Lord Chancellor did not disagree with this formulation. The discretion referred to by the Vice Chancellor is not the prudence of a trustee but neither can there be an absence of serious effort to get the best price available at the time the sale is done. The mortgagee can sell at any time, but that has never meant he can do as he pleases. He must do the best that he can in the circumstances of each case. This led Mr. George Spence, one of the leading writers on equity of the period, to state the principle in his book, ***The Equitable Jurisdiction of The Court of Chancery*** (1849) Vol. 2, pp 634 in this way:

> *The mortgagee himself cannot be prevented from using all the remedies belonging to his character of mortgagee, and exercising all the powers that are given to him, as and when he pleases; a power of sale may have been harshly exercised, and at a time when, having regard to the interests of the mortgagor, he would not have been advised to sell; but if the sale has been made in the ordinary way in which sales are conducted – and the price obtained as compared with the estimated value may be an important feature in this respect – the sale cannot be impeached.*

53. It is this idea the dicta in the various cases are expressing. The criticism of ***Cuckmere*** that I make, is that their Lordships sought, unsuccessfully, to establish that the cases were varying between saying that the mortgagee had only a duty to act in good faith on the one hand, and saying that he had a duty to seek a fair price on the other. To act in good faith meant no more than using the power of sale for its proper purpose. If the power was exercised and it operated harshly against the mortgagor, that by itself, was not a basis to say that it was not exercised in good faith. The problem in this area of law is a problem common to humanity: there is no way to gain access to a person's mind and motivation other than by external conduct. We look at the conduct and then try to determine the state of mind. There is simply no other way to find out the state of a person's mind. To say that someone acted in good faith is a conclusion one arrives at after an examination of what actually occurred. Mere verbal assertions of acting in good faith are insufficient. The law preferred the ancient aphorism: actions speak louder than words. This is consistent with equity's insistence on right conduct and not just right words. It is this insistence on right conduct that lead to persons being accused of fraud in equity even if they have no malevolent intent. The law on fiduciary duties is the classic example of equity in operation to enforce right conduct even if you are a pious soul. The accusation comes because they fail to meet an objective standard. When equity says that someone acted in good faith, it is a declaration that comes after an examination of the conduct of the person under scrutiny. It does not rest on the person's utterances. Getting a fair price is often the best evidence that one acted in good faith.

54. To illustrate the point just made I shall contrast two methods of disposition of mortgaged property by the mortgagee. Where, for example, the disposition is by auction, and there is an allegation that the mortgagee acted less than prudently in the sale, the courts looked to see whether (a) the property was accurately described; (b) the auction was properly advertised - proper advertisement may include advertising to developers if the property had any planning permission; and (c) the auction was properly and fairly conducted. If these requirements are met, then obviously the mortgagee has acted fairly, and in good faith because he has done all that was necessary to get the best price in all the circumstances. If there is a sale by private treaty, then a critical component of a proper exercise of the power is whether a current valuation was obtained and the efforts taken to get the valuation figure or as close to that as possible. Each case will turn on its facts. In both instances (sale by auction and sale by private treaty) the mortgagee must act in good faith. It is difficult to see how it can be said that a mortgagee acted in good faith if he did not take reasonable steps to obtain the best price possible at the time, that is to say, lack of evidence that the mortgagee tool reasonable steps to secure the best price may result in a finding of a lack of good faith.

55. As stated earlier, there is not one shred of evidence capable of suggesting that the Courts of Equity were applying the concept of negligence as developed in the law of tort. Further support for this can be gleaned, indirectly, from Lord Atkin's thorough review of the tort of negligence cases, when he formulated his neighbour principle in ***Donoghue v Stevenson*** [1932] A.C. 562. He never referred to single case decided by the Courts of Equity. The fusion of the **administration of law and equity** did not bring about a fusion or rather a confusion of the common law principles and equitable principles.

56. An examination of the Judicature (Supreme Court) Act (Jam) still requires, at times, the court to identify the principles of equity that Court of Equity would apply, prior to the passing of the Act and give effect to those principles. This case is one of those instances. Those who contend otherwise have not presented a compelling case. They simply say, "It is now one hundred years since the administration of both courts and there is no need to be bound by the principles that separated the courts prior to the union." The approach of those who say there has been fusion is not far removed from the image of a judge, in the dead of night, surrounded by curious onlookers, standing over a boiling cauldron, into which he has thrown a dash of evidence, a pinch of pleading, a smidgen of submissions, stirred briskly, then plunged the ladle of justice beneath and whatever came up was the appropriate legal principle. It should not be surprising that the judges in ***Cuckmere*** did not find a single common law tort case to support their formulation of legal principle. They could not, because none existed, at least not before the Judicature Act of 1873 in England. Those who contend that after 1875 (when the 1873 Act came into force) in England and 1880 in Jamaica there was a fusion of law and equity such that it does not matter anymore whether the applicable law to a given case had its origins in either equity or the common law would do well to explain the opening words of sections 48 and 49 of the Judicature (Supreme Court) Act (Jam) which correspond with sections 24 and 25 of the Judicature Act 1873 (UK). The Jamaican statute is predicated on the existence and continued difference between the two systems of law albeit administered by one court. This does not mean that the law in both systems are incapable of development, but the development must be consistent with the internal logic and underlying philosophy of both systems of law. This is the role of the judge today who administers both systems even during the same case. He is required to identify the principles in each body of law and apply those principles independently of each other albeit concurrently. If this is so, it is difficult for a judge to ignore the historical development, principles and philosophies of each system and do what is just in the circumstances. Equitable rights are to be dealt with by the application of existing equitable principles and where necessary, an expansion of those principles firmly anchored not in the common law or the judge's notion of what seems just, but by careful analysis of existing equitable principles which may be refined to meet new circumstances. That has always been the way of case law systems of justice. Equity has not failed to meet the challenge and neither has the common law. To eliminate the distinction as some would have judges do, would be judicial ukase. If the law is to proceed on a new philosophical basis after several hundred years, then that cannot be just for judges and lawyers but should include the rest of the population, the elected representatives and civic groups.

57. To put the matter beyond all reasonable and legitimate doubt that, in Jamaica, when there is accusation against a mortgagee wrongfully exercising the power of sale, and that the law applicable must be the principles of equity and not the common law tort of negligence, I shall refer to section 27 of the Judicature (Supreme Court) Act (Jam) which states that the Supreme Court shall have all jurisdiction, power and authority of the courts listed in that section. Among them is the High Court of Chancery. There is no evidence that the High Court of Chancery in Jamaica did not have exclusive jurisdiction over mortgages. That this position

was expected to continue after the passage of this Act is not capable of dispute on a proper reading of section 48. It reads:

> *With respect to the **concurrent administration of law and equity in civil causes and matters in the Supreme Court** the following provisions shall apply:*
>
> *(a) If a plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against a deed, instrument or contract, or against a right title or claim asserted by defendant or respondent in such cause or matter, or to relief **founded upon a legal right which before the passing of this Act could only have been given by a Court of Equity,** the Court and every Judge thereof shall give him such and same relief as ought to have been given by the Court of Chancery before the passing of this Act.*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) The Court and every Judge thereof shall take notice of all equitable estates, titles and rights and all equitable duties and liabilities, appearing incidentally in the course of any proceeding, in the same way as the Court of Chancery would have done in any proceeding instituted before the passing of this Act.*
>
> *(e) ...*
>
> *(f) Subject to the aforesaid provisions for giving effect to equitable rights and matters of equity, and to the other express provisions of this Act, the Court and every Judge thereof shall give effect to all legal claims and demands, and all estates titles, rights, duties, obligations, and liabilities, existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been given effect to if this Act had not been passed by any of the Courts whose jurisdiction is hereby transferred to the Supreme Court.* (My emphasis)

58. This provision could not be more clearly drafted. It wears the implications on its face. The section is predicated on the well established and undisputable fact that until the Judicature System was enacted there were a number of superior courts, each administering its own body of law. The provision requires Judges of the Supreme Court to continue to make the distinction between law and equity, and where equitable rights, duties and liabilities appear in any case, the Judges are to give effect to them in the same way a Court of Chancery would have before the Act was passed. It seems to me that even if an action was begun against a mortgagee for wrongful exercise of his power of sale under the tort of negligence,

when the matter comes up for trial, a Judge of the Supreme Court must give effect to section 48 (d), and apply the principles of equity because that was the law applicable before the Act was passed. Sections 48 (f) and 49 (j) expressly subordinates principles of the common law to the principles of equity, if in relation to the same matter, the rules of common law and equity conflict. These are additional reasons why I say that Lord Justice Cross was clearly in error if he is understood as saying that the tort of negligence now has concurrent jurisdiction over a mortgagee who is accused of wrongful exercise of his power of sale. I shall let Sir George Jessel M.R. in ***Salt v Cooper*** (1880) 16 Ch. D. 544, 549 - 551 light our path:

> *Then we are thrown back upon the Act itself, and we must recollect, first of all, what the main object of the Act was. It is stated very plainly that the main object of the Act was to assimilate the transaction of Equity business and Common Law business by different Courts of Judicature. It has been sometimes inaccurately called "the fusion of Law and Equity"; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. Then, as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail. That was to be the mode of administering the combined jurisdiction, and that was the meaning of the Act. To carry that out, the Legislature did not create a new jurisdiction, but simply transferred the old jurisdictions of the Courts of Law and Equity to the new tribunal, and then gave directions to the new tribunal as to the mode in which it should administer the combined jurisdictions.*

59. Lord Justice Cotton in ***Joseph v Lyons*** (1884) 15 Q.B.D. 280, 285-286:

> *It has been argued before us that the difference between legal and equitable interests has been swept away by those statutes [The Supreme Court of Judicature Acts, 1873, 1875]. But it was not intended by the legislature, and it has not been said, that legal and equitable rights should be treated as identical, but that the Courts should administer both legal and equitable principles.*

60. Brett L.J. (later Lord Esher) said in ***Britain v Rossiter*** (1879) 11 Q.B.D. 123, 129 continued:

> *I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the Courts either of Law or Equity; if they did more they would alter the rights of parties, whereas in truth they only change the procedure.*

61. These passages are equally as plain as the statute. There is no evidence in the contemporary writings of those involved in the passing of the Judicature Act of 1873, that administering law and equity in one court meant that principles of equity and the common were suddenly set free to roam as they please. The judges were still expected to apply the principles of equity in the same manner as they did before the Judicature Acts in England. The same applied to common law principles. If this were not so then it is impossible to explain section 25 (11) of the UK Act and section 49 (j) of Jamaican Supreme Court legislation. These specific provisions must be based on the continued separation of law and equity as distinct bodies of law. In light of this history, Lord Justice Cross' introduction of the common law tort of negligence in an area which was within the exclusive jurisdiction of the Courts of Equity prior to the Judicature Acts is not sustainable. All of this leads to the inevitable conclusion that, in Jamaica, complaints about the conduct of a mortgagee was not, is not, and cannot be dealt with by applying the common law tort of negligence. Any attempt to do so would require a complete rewriting of legal history an option no longer open to us unless the Judicature (Supreme Court) Act is repealed or amended in such a manner that makes it permissible for judges to embark on the task of fusing the two principles of law. This does not mean that the principles of the common law and equity could not be developed to meet new situations. The new court was expected, as the previous courts had done, mould and adapt the principles and make modifications, incrementally. The common law method has always been an inductive and deductive analytical method that seeks to derive the underlying principle from decided cases in order to develop a major premise that in then applied deductively to the facts as found by the court. This is what was expected after the fusion of administration of law and equity. That is not the same thing as saying because that the administration of law and equity is in one court, then judges are free to conjure up a pot-pourri of the law in order to arrive at the 'just result'.

62. I commence the examination of the judgments in ***Cuckmere***. At page 643e-f in Salmon L.J. said:

> *I will now turn to the law. It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.*

63. This expression of the duty by the Lord Justice is consistent with over one hundred years of case law and academic writings on the subject. He clearly recognised the duty of the mortgagee when exercising his power of sale, and in this next passage, expressly concluded that the Courts of Equity had developed the law relating to the mortgagee's duty. At page 644h he said:

> *It would seem, therefore, that many years before the modern law developed the law of negligence, the courts of equity had laid down a doctrine in relation to mortgages which is entirely consonant with the general principles* ***later*** *evolved by the common law.* (My emphasis)

64. Having come to this correct recognition of both the law and its origins it is regrettable that at page 643j - 644a the Lord Justice spoke of the "proximity between them [i.e. mortgagee and mortgagor] could scarcely be closer" and that "they are 'neighbours'". I do not think that he was introducing the tort of negligence in this area of law. I believe he was showing how the common law had developed along similar lines. I fear that too much significance has been attached to these throw away expressions and have served to mislead many into thinking that the Lord Justice was slipping in the tort of negligence.

65. Turning now to the judgment of Cross L.J. in ***Cuckmere***, we find this unfortunate passage at page 649:

> *Approaching the problem in that way, I have no hesitation in saying that I prefer the latter. There is no doubt that a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property between the date of his taking possession of it and the date of the sale, including, as in the McHugh case, steps taken to bring the property to the place of sale. It seems quite illogical that the mortgagee's duty should suddenly change when one comes to the sale itself and that at that stage if only he acts in good faith he is under no liability, however negligent he or his agent may be.*

66. Lord Justice Cross apparently thought that the mortgagee could escape liability if he acted in good faith even though the agent acted badly in the sale. If this is correct, then this may explain why he looked favourably on extending the tort of negligence to this area of equity. This view, I believe is based ultimately on the fusion fallacy that has gained ground since the early pioneering efforts of Lord Denning M.R. This movement has become quite vocal and has gained ground particularly in the latter stages of the twentieth century. If my earlier exposition concerning good faith and getting a fair price is correct, then Lord Justice Cross' anxieties have been addressed. It is my view that Lord Justice Cross mischaracterised what Vice Chancellor Stuart was getting at in the case of ***Wolff v Vanderzee*** (1869) 20 LT 353 where the Vice Chancellor held a mortgagee accountable when there was a loss in purchase price because the auctioneer was negligent by stating that the property was let at a lower

rent than was in fact the case. Equally, Kekewich J. was misunderstood by Cross L.J. when he (Kekewich J.) held a mortgagee liable for negligent misdescription of property in ***Tomlin v Luce*** (1888) 41 Ch D 573. These cases do not support the idea that the mortgagee escapes liability if he acts in good faith regardless of how badly his agent acts. On the contrary, the cases actually support the point I have been making, namely that a conclusion that a mortgagee exercising the power of sale acted in good faith is objectively determined. The judges in both cases were using good faith to mean that the mortgagee need to take all reasonable steps to secure a fair price. In these two cases, there was no evidence that the mortgagees deliberately hired incompetent auctioneers. There was no evidence that there was collusion between the auctioneers and the mortgagees. There was no evidence of moral turpitude in the mortgagees. Their liability arose from the objective fact that the auctioneers did a bad job. This development should not be astonishing having regard to the origins and development of equity. The Vice Chancellor and Kekewich J. were simply saying that the mortgagee did not act in a business like manner in ensuring that accurate information was given about the mortgaged property, which resulted in less than the optimum price possible being obtained. The fact that this was caused by the mistakes of the agent was of no moment.

67. By contrast Salmon L.J. understood this very important point at page 644e-h:

> *In Tomlin v. Luce (1889) 41 Ch.D. 573, (1889) 43 Ch.D. 191, the first mortgagees by mistake misdescribed the property being offered for sale. It was knocked down for £20,000. When the buyers discovered the mistake they refused to complete unless they were allowed £895 off the purchase price. This allowance was made and the price accordingly reduced to £19,105. The second mortgagees, who can be treated as in the same position as mortgagors, brought an action against the first mortgagees claiming that those mortgagees were responsible for the mistake of their auctioneer, that as a result of this mistake £895 had been deducted from the purchase price, and that this deduction ought not to be allowed in taking the account between the first and second mortgagees. The trial judge found in favour of the plaintiff and disallowed the whole of the £895. This was obviously wrong because the first mortgagees could only be answerable for any loss occasioned by the misdescription. The question should have been: but for the misdescription, would the land have sold for anything and if so how much more than £19,105? The judge's order was accordingly varied in the Court of Appeal. Cotton L.J., after pointing out the judge's mistake, said at p. 194:*
>
> > ***"The defence seems really to have been ... 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. ... What we think is this, - that the first mortgagees are answerable for any loss which was occasioned by the blunder made by their auctioneer at the sale."***

Bowen and Fry L.JJ. concurred. Although the point was not argued in the Court of Appeal, the passage in Cotton L.J.'s judgment which I have read must be treated with the greatest respect. He was a master in this branch of the law, and he and the other members of the court as well as counsel treated the point as too plain for argument. Indeed it had long been so regarded by the courts: see Wolff v. Vanderzee and National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co. in which the Privy Council expressed the clear view that a mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an undervalue. It would seem, therefore, that many years before the modern development of the law of negligence, the courts of equity had laid down a doctrine in relation to mortgages which is entirely consonant with the general principles later evolved by the common law. (My emphasis)

68. The last sentence of this passage has already been quoted but bears repetition. The full passage now makes it impossible to argue that Salmon L.J. was embracing any idea that the tort of negligence was now to be imported in this area of equity in which the common law courts never ever exercised any jurisdiction concurrent with the Courts of Equity or otherwise. Cairns L.J., for his part, rested his case on the dictum of Kekewich J. and the Court of Appeal in ***Tomlin v Luce*** as well as the Privy Council decision in ***McHugh v Union Bank of Canada*** [1913] A.C. 299. He (Cairns L.J.) too, used unfortunate language that silhouettes the tort of negligence but at the end of the day I am satisfied that he was relying on equitable principles to resolve the case. Thus the majority of the court in ***Cuckmere*** resolved the case by the use of orthodox principles of equity.

69. It is interesting to note that the High Court of Australia was not misled and as early as 1906 deduced the correct principles from the decided cases. The duty of the mortgagee is accurately summarised in the headnote of ***Barnes v Queensland National Bank*** 3 C.L.R. 925, a decision of the High Court of Australia which reads:

In the exercise of his power for sale under a mortgage, the mortgagee is under a duty towards the mortgagor to realize his security in good faith, and with reasonable precautions to obtain a proper price; he must not wilfully or recklessly deal with the property in such a manner that the interests of the mortgagor are sacrificed. A power of sale under a mortgage, like any other power, must be exercised honestly for the purposes of the power, not for the purpose of carrying out some sinister object-i.e. beyond the purpose and intent of the power.

70. If this headnote is kept in mind, then dichotomy implied by Cairns L.J. when he posed this question, "Does the duty of a mortgagee to a mortgagor on the sale of the mortgaged property include a duty to take reasonable care to obtain a proper price or is it sufficient for the mortgagee to act honestly and without a reckless disregard of the interests of the mortgagor?" does not and has never existed (see page 652j - 653a). As the headnote makes

clear, the duty to act in good faith is simply equity's insistence that all powers be exercised for their proper purposes and in the case of mortgagees, acting honestly is not enough. He must also act in a business-like manner.

71. At the end of the day, what good faith means, based on my reading of the authorities is that the mortgagee must exercise the power for the purpose it was given. This is nothing more than equities insistence that any power given to a donee must be exercised for the purpose for which it was granted. The purpose of the power of sale is to enable the mortgagee to recover his money once the mortgagor is unable to repay the loan. This does not mean that the mortgagee's exercise of his power of sale can be challenged on the basis that he should have waited for a better time to exercise the power of sale, if for example, there was a rising market. This is so because the mortgagee is not a trustee of the power of sale. Were he a trustee he could be held liable because he failed to exercise the diligence to secure the best price in a rising market. For this reason, Mr. Spence stated in the passage cited earlier from his text, that there is no complaint if the power is exercised harshly. Based on this understanding it would be helpful if pleadings refrained from using words such as fiduciary to describe the alleged improper sale by the mortgagee, unless there is evidence that the mortgagee assumed duties in relation to the mortgagor incompatible with his status as a creditor and those duties are of the nature that equity would label, fiduciary.

72. The Judicial Committee of the Privy Council, through Lord Templeman, strove mightily to strip ***Cuckmere*** of its excesses. He stated the principle accurately in ***Tse Kwong Lam v. Wong Chit Sen and Others*** [1983] 1 W.L.R. 1345, 1355 (Privy Council Appeal from Hong Kong):

> *The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time.*

73. It is to be observed that Lord Templeman's formulation is not very different in meaning from the headnote of ***Barnes v Queensland National Bank***. That case was cited to the Board. In effect, the Privy Council has approved the ratio of this decision of the High Court of Australia.

74. When Lord Templeman spoke of good faith in the passage just cited he was not saying that good faith and taking steps to obtain the best price are mutually exclusive. By good faith he simply meant that the power of sale, like all powers supervised by the Courts of Equity, must be exercised for a proper purpose.

75. Ten years later Lord Templeman in the case of ***Downsview Nominees Ltd v First City*** [1993] A.C. 295, 315 (Privy Council Appeal from New Zealand), placed ***Cuckmere*** on its proper footing:

> *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. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins L.J. in In re B. Johnson & Co. (Builders) Ltd. [1955] Ch. 634, 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. ***The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company.*** (My emphasis)

76. This passage from Lord Templeman explains why it is difficult to analyse the duty owed by a mortgagee to the mortgagor through the prism of negligence.

77. When we come to ***Moses Dreckett*** I am satisfied that Carberry J.A. who conducted his now well known thorough analysis of the law was not introducing any notion of the tort of negligence. He was distilling the principles developed by the Courts of Equity, not the Common Law Courts. The other members of the court did not disagree with Carberry J.A. Consequently, it is not accurate to say that in Jamaica, the law of negligence is now operating either solely or concurrently with equity when considering the liability of the mortgagee to the mortgagor. It may be, as said earlier, that the mortgagor may also have a cause of action against the agent of the mortgagee. This latter point is not before me and will have to await another day.

78. Cooke J.A. in ***Diane Jobson v Capital and Credit Merchant Bank Ltd*** was not introducing the tort of negligence in respect of the liability of the mortgagee to the mortgagor. At paragraph 14 said:

Therefore the guiding principle is that a mortgagee in exercising the power of sale owes a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell.

79. This expression of principle by Cooke J.A. is shorthand for the headnote of ***Barnes***. When one speaks of taking reasonable precautions to obtain the true market value that in and of itself does not identify whether what was done in any particular case was reasonable. Mr. Kelman submitted that the fact that the bank did not manipulate the auction is proof in and of itself that the mortgagee acted properly. That proposition is unsupportable. In ***Cuckmere*** there was no complaint that the mortgagee manipulated the auction. The complaint was that the mortgagee failed to give all the relevant information to the potential buyers. Specifically, the mortgagee failed to let it be known that the mortgaged property that was being auctioned had received permission for the development of flats as well as for houses. The evidence in the case showed that land which was suitable for development of flats was much more valuable with planning permission for flats than it would be if it had only planning permission for houses. The property had planning permission for both flats and houses but the literature only mentioned planning permission for houses. This was a misdescription.

80. The principles applicable to the instant case are succinctly stated in the headnote of ***Barnes***. There is no basis for the idea that a mortgagee is in a fiduciary relationship with a mortgagor only by reason of a debtor/creditor relationship. It has become fashionable these days to speak very glibly of fiduciary duties owed by a mortgagee to the mortgagor. There is no legal basis for this approach unless there is some evidence that the mortgagee assumed some duty in relation to the mortgagor over and above a creditor. With all this law behind us, we can now look more closely are the facts before me in order to determine whether the bank acted in accordance with the law.

81. In this particular case there is evidence that the property was advertised for auction on three occasions in *The Gleaner*, a newspaper with island wide circulation. The first was July 14, 1993. The second and third were on December 14 and 22, 1994. The first advertisement described the property in this way: *"All that parcel of land part of Exchange in the parish of St. Ann containing by estimation One Square Chain be the same more or less comprised in Certificate of Title at Volume 1022 Folio 570 with an uncompleted residential building erected thereon."* The second and third advertisement described the property, after citing the volume and folio number of the Register Book of Titles, in this way: *"with foundations for building area approx 1,330 sq ft (123.5m ^{2})."* There is no evidence that Mr. Daley was informed orally or in writing that the bank intended to sell the property before it was advertised in July 1993. The evidence concerning any posting of a notice of default and the statutory notice is that the bank sent these to the wrong address in January 1994.

82. I have accepted the evidence of Mrs. Walters and rely mainly on her evidence when she says that work on the house began on or about January 1993. I also accept her evidence that the family moved in completely in December 1993. I also accept her evidence that the family started moving in the newly built house on or about July 1993. There is one document that may cast doubt in my finding that the family began moving into the property in July 1993. This is the valuation of Mr. Theo Dixon who prepared a valuation report and he said that he inspected the property June 3, 1993. He claims that he found a building which he described as an

"incomplete neglected building" without "roof, ceilings, floors, windows, doors, plumbing, electrical nor kitchen fixtures affixed to the building". He said that the building was twenty two years old with thirty years useful life left. He placed the value at $200,000. The report does not mention any sign of building activity. It seems that this report might have been the basis for the sale price of $200,000 that was agreed with Harley Corporation. If this is so, it may be said that the bank did indeed obtain a current valuation, at least at the time of the July 1993 advertisement and so did not act in an unbusinesslike way with regard to the eventual sale to Harley Corporation in 1995. This conclusion is not sustainable in light of what is said below.

83. Mr. Dixon was not called to give evidence. If Mrs. Walters' testimony is correct as I have held it to be, then Mr. Dixon could not have found a twenty two year old neglected building when he went there in July 1993. Mr. Dixon's description seems more consistent with the previous structure that was there before the Walters began making their house. Mrs. Walters, at paragraph six of her witness statement, described the structure and work done in these terms: *"It took a lot of money and work to clean and remove tree stumps, garbage, weeds and shrub from the old unfinished building. We had to destroy the majority of the old building and add several columns so as to sustain the strength of the remaining building."*

84. There is report of another valuator, Mr. Barry Wharmann, about whom I shall speak in more detail later. He did a report dated January 23, 1995 in which he described the buildings he saw as approximately two years old. He saw a finished house and a shop. It seems to me and I so find that Mr. Dixon's visit is unlikely to have taken place in June 1993. His description is more in keeping with Mrs. Walters' description of the property before she began working on it. I therefore find that Mr. Dixon's visit to the property would necessarily have to be before the work began which would place his visit there in 1992 and not 1993.

85. When the bank chose to exercise the power of sale in 1994/1995 there is no evidence that it visited the property or caused it to be visited. As the case law makes clear, the duty on a mortgagee when exercising its power of sale is to act in a businesslike manner and not throw away the property even though the mortgagee is not a trustee of the power of sale. Acting in a businesslike manner includes the duty of taking reasonable steps to see that a fair market price is obtained. I have already identified some of the criteria the courts use to determine this question. For ease of reference I summarise them again. One way of doing this is a properly advertised and properly conducted auction (assuming of course that the property is correctly and adequately described in the auction documents). Where there is to be a sale by private treaty, as in this case, it seems that anything less than a current valuation by a reputable valuator is extremely unlikely to meet the test established by equity. The bank cannot escape this responsibility by relying on the description which was apparently lifted from Mr. Dixon's report dated July 1993. We now know that the description, if correct in the past, was certainly grossly inaccurate by the time of proposed auction (December 1994) and the sale by private treaty. It seems that the bank relied on Mr. Dixon's description of the property for its advertisements in the newspaper. Mr. Dixon's description, if accurate, was only accurate in 1992 or the latest, early 1993 but not in February/March 1995 when the

property was sold to Harley Corporation. The bank therefore entered into a sale based on an erroneous description - a description that led persons to believe that the property was worth less than the real value. In this area of law the source and cause of the erroneous description is irrelevant. In the case before me, it cannot be said that the sale of the property, in the absence of a current valuation, was conducted in the way that sale by private treaty is ordinarily conducted in a supposedly arms length transaction.

86. The bank failed in its duty to act as a mortgagee should, when exercising the power of sale. The absence of a current valuation in the context of sale by private treaty is powerful evidence that the bank failed *to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell* (per Cooke J.A. in ***Jobson*** at paragraph 14).

87. In deciding on the remedy in this case, I had erred during my oral judgment when I awarded damages and also setting aside the sale to Harley Corporation. Mr. Kelman, Miss Smith and Mr. Batts, indicated, quite politely, that it was not usual for the court to award both. The rationale, was that if the sale was set aside then the mortgagor would have his equity of redemption restored to him but if the sale was not then he received the difference between the market value and the sale price at the time when the power of sale was exercised. This position is supported by authority. Lord Templeman in ***Tse Kwong Lam v. Wong Chit Sen and Others*** at page 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. In the present case it is submitted on behalf of the mortgagee and the company that the borrower is debarred by the terms of his mortgage from any remedy save damages. Alternatively the mortgagee and the company submit that the delay on the part of the borrower in pursuing his counterclaim has rendered it unjust for the building to be restored to the borrower.*

88. The opening sentence of this passage does not alter the applicability of the principle outside of what is contained in the first sentence. That occurred because in that case the mortgagee had indeed sold the property to one of its companies. The Board held that there was no principle or law that prohibited such a sale. The principle of law applicable to mortgagee who exercised his power of sale applied to the situation before the Board. Once this is understood, the principle is quite clear. In the case before me the sale has been set aside on the ground of fraud. This means that the equity of redemption has been restored to the Estate of Mr. Daley. Mr. Walters if he pays the balance of the purchase price would be

entitled to the declaration that he is the beneficial owner.

89. What has been said in the immediately preceding paragraph leaves over the question of the debt owed to the bank. The Estate of Rudolph Daley should pay the balance outstanding

90. In this particular case because of the conclusion I have come to on the question of fraud, the estate has not suffered any loss. The setting aside of the sale to Harley Corporation operates to put the parties back in the position they were before the property was transferred to the bank.

Fraud under the Registration of Titles Act

91. Mr. Morris has submitted on behalf of the company that it was a bona fide purchaser for value without (a) notice of the interest of Mr. Walters and (b) any fraudulent intent. He submitted that the company bought the property from a mortgagee exercising its power of sale. He added that under section 106 of the RTA, the purchaser is not bound "*to see or enquire whether such default as aforesaid shall have been made or have happened, or to have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; .... and any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power*". Mr. Morris further submitted that the company was not dishonest and so is fully protected by law. This meant that the Walters' remedy was against the bank since they were the ones exercising the power. For him, fraud meant a collusive sale between the mortgagee and the purchaser. He concluded by submitting that since there was no evidence of a collusive sale, it necessarily meant that the company was not guilty of fraud. This submission is inconsistent with authority.

92. It is said that in this case before me even if Harley Corporation knew that Mr. Walters had indeed purchased the property that knowledge could not by itself be treated as fraud. This follows, according to Mr. Morris, from the wording of section 71 of the RTA. Let me digress a bit to explain why section 71 is relevant when the sale was made by the mortgagee. We get to section 71 because section 114 of the RTA gives the mortgagee the same rights in law and equity, as if the legal estate were vested in him. Thus when he exercises his power of sale he is treated as if he were the registered proprietor at the time of the exercise of the power. Section 108 enables the mortgagee to pass an unencumbered title to the purchaser. Because of this Harley Corporation is saying that it purchased the property from the bank and therefore is entitled to the benefit of all the provisions that facilitate an unencumbered title being transferred to a purchaser, and in addition there is no evidence that it acted dishonestly.

93. Mr. Kelman made submissions on the other side of the coin. He submitted that the bank was not fraudulent and so the sale to the company was good and immune from challenge. The conclusion that the sale is immune from challenge if the bank was not dishonest within the meaning of the RTA, is equally as erroneous as the submission made by Mr. Morris. The resolution of these submissions depends on the meaning of fraud under the RTA, and in whom

should the fraud exist.

94. The submissions of Mr. Kelman and Mr. Morris have their roots in the concept of indefeasibility of title of a registered proprietor. There are a number of provisions that operate, cumulatively, that point in the direction of indefeasibility. These provisions are sections 63, 68, 69, 70, 71, 76 and 161 of the RTA. These provisions have built a fortress around the registered proprietor which can only be breached when there is fraud - an undefined term used in the statute. Harley Corporation is now the registered proprietor. Let me say that the fraud that is relevant here is that of Harley Corporation, and not that of RBTT.

The indefeasibility principle

95. Section 70 provides in the relevant parts:

> *Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or any estate or interest in land under the operation of this Act shall* ***except in the case of fraud****, hold the same as the same may be described or identified in the certificate of title, subject to any qualification as may be specified in the certificate, and to such incumbrance as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title,* ... (My emphasis)

96. Section 71 reads:

> ***Except in the case of fraud****, no person contracting or dealing with or taking or proposing to take a transfer, from the proprietor or any registered land, lease, mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which such proprietor or any previous proprietor was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding;* ***and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud****.* (My emphasis)

97. Section 161 of the RTA says that no action of ejectment, suit or action to recover land shall lie against a registered proprietor except in the instances specifically mentioned in the section. Fraud is one of them.

98. The principle of indefeasibility is buttressed by other sections such as section 63 of

the RTA (once land is brought under the RTA no transfer of any interest or estate in land is effective until the instrument doing same is registered); section 68 (no title issued under the Act shall be impeached by reason or on account of any informality or irregularity in applying for the title and anything contained in the title shall be accepted in all courts as proof of what it contains); section 69 (in action for specific performance the content of title is conclusive evidence of the interest of the registered proprietor) and section 76 (certified documents from the Office of the Registrar of Titles is admissible in every court as prima facie proof of their contents).

99. Learned counsel for the company and the bank are indeed correct, when they speak of indefeasibility of title conferred by the legislation but they have overstated the consequence of that concept. The error they have made is to give fraud under the RTA a restricted meaning and ignoring the fact that fraud under the RTA includes the concept of wilful blindness, or, as the Americans say, contrived ignorance. The other error made which is peculiar to Mr. Morris, is to think that before fraud can be found, it is necessary to find that both parties to the transaction were dishonest. This is not and has never been so. If the person who becomes the registered proprietor acted dishonestly it is his dishonesty that may result in his title being set aside even if there was dishonesty on the part of the previous registered proprietor. Of course, if both the previous registered proprietor and the current registered proprietor were dishonest in the same transaction that led to the current registered proprietor becoming the registered proprietor then it only means that there is a stronger evidential basis for challenging the current proprietor's title.

100. As noted the RTA does not define fraud. One of the questions that had to be resolved when the Torrens System of land registration was introduced, was whether *fraud* included all forms of equitable fraud. To put the matter another way, was there any limitation on the word *fraud* as used in the Torrens System? Yes, there was a limitation. Under the Torrens System *fraud* meant *dishonesty*. This answer is beguiling, because it does little to reveal, that even within the limitation set by the word *dishonesty*, there is uncertainty in where the boundaries are. In cases of conduct that is clearly dishonest, such as forging an instrument of transfer, there is not much difficulty. What about cases in which the purchase is made with some knowledge of a prior adverse claim? How much knowledge is required to cross that threshold from a state where knowledge by itself is not fraud to a state where completing the transaction with the knowledge becomes fraudulent? These are not easy questions to answer but when they are presented they must be answered.

101. There are strong, consistent dicta from eminent courts and judges that deliberately refraining from making enquiries that an honest person would make when one's suspicions are aroused also amounts to *fraud*. This is wilful blindness or contrived ignorance. When we are dealing with wilful blindness or contrived ignorance, there are even further difficulties that are concealed in the word *dishonesty*. The inquiry is whether the person must have his suspicions actually aroused or is it sufficient that an honest, reasonable man similarly placed, would have suspicions aroused even if the particular person under scrutiny had no suspicions. The uncertainty is further exacerbated, because it is indeed a fine line between contrived

ignorance amounting to fraud, and knowledge that is not of itself imputed as fraud. One would have thought that having regard to the wording of the statutes, wilful blindness was excluded from the judicial definition of fraud under the Torrens System, but alas, this is not the case. This position is all the more remarkable when the provisions in the cases from the Judicial Committee of the Privy Council which I am about to examine, had these words: *"and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud"*, an independent clause which its natural and ordinary might well have been interpreted to exclude contrived ignorance. The effect of this development is that *fraud* under the RTA can be committed, even if there is no actual knowledge. Wilful blindness or contrived ignorance is a secondary degree of knowledge that is imputed to the person, and said to be as good as actual knowledge. The decisions beginning with Lord Lindley in ***Asset Company Limited v Mere Roihi*** [1905] A.C. 176 incorporate the principle of wilful blindness or contrived ignorance. Salmond J. of the Court of Appeal of New Zealand spelt this out quite clearly shortly after the decision of ***Asset Company***.

102. Let me be clear. This second degree of knowledge is not a reintroduction of the equitable doctrine of notice - actual, constructive or imputed. The focus in this second degree of knowledge is on what information the registered proprietor actually had before him prior to the transaction. When that is established the issue becomes whether an honest man similarly placed would have been impelled to make further enquiries. This way of formulating the matter has both a subjective and objective component. The reasons for this are given later in this judgment when I refer to the judgment of Lord Hutton in ***Twinsectra Ltd v Yardley and others*** [2002] 2 A.C. 164. My focus in this case is on contrived ignorance.

103. The starting point of any analysis has to be the passage from Lord Lindley in ***Asset Company Limited v Mere Roihi*** [1905] A.C. 176, 210 where he said:

> *Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189, and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud--an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out the fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part.* ***But if it be shewn that his suspicions***

were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. *A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.* (My emphasis)

104. This passage has been accepted as correct by the Court of Appeal of Jamaica, and has consistently been applied in Jamaica to cases under the RTA which is based on the Torrens System (see ***Enid Timoll-Uylett v George Timoll*** (1980) 17 J.L.R. 257, 261D; ***Willocks v George Wilson and Doreen Wilson*** (1993) 30 J.L.R. 297). The Judicial Committee of the Privy Council has reaffirmed its adherence to the ***Asset Company*** interpretation in the case of ***Gardener v Lewis*** (1998) 53 W.I.R. 236 (an appeal from Jamaica), expressly approved ***Frazer v Walker*** [1967] 1 AC 569, another Privy Council decision (an appeal from New Zealand), in which Lord Wilberforce accepted (see pp 584 - 585) that ***Asset Company*** accurately expressed the law as it relates to indefeasibility of title, under the Torrens System of title by registration.

105. When Lord Lindley said that fraud under the Torrens System was actual fraud and not equitable fraud, he was seeking to exclude those instances which would be classified in equity as fraud, even though there was no deception or sharp practice. Such cases, that is to say, cases where there was no deception or conscious dishonesty, which would be equitable fraud because of the high standards of equity, were excluded from the definition of the fraud under the Torrens System of land registration. However he did not mean, and could not have meant, that those types of equitable fraud where there was actual dishonesty were excluded from his concept of fraud under the Torrens System, merely because the liability sounded in equity's exclusive jurisdiction. What Lord Lindley was doing was making sure that cases which were classified as equitable fraud were not brought under the umbrella of fraud in the Torrens System, unless, and until, there was a finding of dishonesty. In short, where there is dishonesty there is fraud.

106. When Lord Lindley was analysing the facts in ***Asset Company***, he made an observation about the facts that puts the matter beyond doubt that he felt that wilful blindness is fraud. He said at page 212:

> *[t]heir Lordships cannot help thinking that the equitable doctrines of constructive fraud have weighed too much with the Court of Appeal and have induced it to impute fraud to the Assets Company,* ***although no dishonesty by the company or its agents, or by the liquidators of the City of Glasgow Bank, was really established*** [actual dishonesty]. *Nor is there any proof whatever that the liquidators* ***or the Assets Company dishonestly refrained from making inquiries which an honest purchaser would have made*** [wilful blindness or contrived ignorance]"(My emphasis).

107. The Judicial Committee of the Privy Council in the later case of ***Waihima Sawmilling Company v Waione Timber Company Ltd*** [1926] 101 A.C., 106 (per Lord Buckmaster) accepted the correctness of Lord Lindley's observations. The crucial and fundamental point arising from Lords Lindley and Buckmaster is that in both ***Asset Company*** and ***Waimiha Sawmilling*** the relevant provisions in the statutes (section 119 of Land Transfer Act of New Zealand 1870 as amended by subsequent Acts in ***Asset Company*** and section 197 of the Land Transfer Act of New Zealand 1915 in ***Waimiha Sawmilling***), were identical to section 71 of the RTA in language, meaning and effect. Specifically, the sections in those cases like section 71 of the RTA had these words: *"knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."* Therefore what we have from ***Asset Company*** case in 1905 to ***Gardener v Lewis*** in 1998, is an unbroken line of decisions from the Judicial Committee of the Privy Council, holding fast to the idea that the fraud in the Torrens System includes contrived ignorance.

108. I shall refer, at this point, to a decision of the High Court of Australia. The High Court in ***Bahr v Nicolay [No. 2]*** 164 C.L.R. 604 was asked to construe sections 68 and 134 of the Land Transfer Act 1893 of Western Australia, which are similar in terms and effect to sections 70 and 71 of the RTA. A study of the joint judgment of Wilson and Toohey JJ. will prove profitable. I concentrate on the joint judgment of Mason C.J. and Dawson J., particularly pp 613 - 615. At pages 613 - 615, both judges analysed the judgment of Lord Moulton in another Privy Council case of ***Loke Yew v. Port Swettenham Rubber Co. Ltd*** [1913] A.C. 491. In that case Lord Moulton gave an example of what would be considered fraud for the purposes of the Torrens System which the Chief Justice and Justice Dawson readily agreed was fraud, even though the fraud existed only in the dishonest agent. There is no suggestion in the example that the vendor of the land was a party to the fraud. I make this point because Mr. Morris submitted that fraud necessarily means that the mortgagee and the purchaser from the mortgagor must be dishonest. I agree with the analysis of Mason C.J. and Dawson J. and I further hold that it is applicable to the case before me.

109. I now come to the judgment of Salmond J. He revealed what might have been concealed by Lord Lindley in ***Asset Company***. When the ***Waimiha Sawmilling*** [1923] N.Z.L.R. 1113 case was in the Court of Appeal, we find this passage of Salmond J. at, 1174 - 1177. I regret the length, but it captures the essence of the problem with which the courts have to grapple whenever there is a challenge to a registered proprietor's title on the basis of fraud in circumstances where there was no caveat or court order barring the transaction that is now under in question. It is my view that Salmond J.'s position is consistent with all the Privy Council decisions that have considered fraud under the Torrens System. The passage reads:

> *Where a purchaser actually knows for certain of the existence of an adverse right which will be destroyed by his purchase he is, as already indicated, guilty of fraud. Where, on the contrary, he has no knowledge that such a right exists or is even claimed he is a purchase in good faith. In between these two extremes there lie those intermediate cases in which, although there is no certain knowledge of the existence of an adverse right, there is knowledge of*

a claim and of the possibility of that claim being well founded. The purchaser does not actually know that the right exists, but he knows that it may exist, or fears or suspects that it exists, or doubts whether it exists or not. If in such circumstances and in such a state of mind he acquires the property intending to hold it for an unencumbered title and to destroy the right in question if it does exist, is the case one of fraud or one of bona fides within the meaning of the Act? An extreme view, which cannot be supported, would place all cases of this kind within the sphere of fraud. According to this view, knowledge of the existence of an adverse claim, coupled with an intent to defeat that claim by a purchase of the property, is always inconsistent with good faith, even though the claim is not known or believed to be well founded. This view, however, is not in conformity either with the spirit and purpose of the Land Transfer Act or with any reasonable standard of good faith and honest dealing. One of the main objects of the Land Transfer Act is to facilitate the alienation of land by eliminating the encumbering influence of unregistered interests, and by relieving purchasers from the necessity of inquiring into the existence and validity of adverse equitable claims and interests. Moreover, a proper standard of honesty and good faith regards the interests of the owner no less than those of the adverse claimants. An owner of land is not necessarily bound to abstain from alienating his property because of the existence of some adverse claim which he does not know or believe to be well founded, and because he knows that the effect of such alienation under the Land Transfer Act will be to destroy that claim. Nor is a purchaser necessarily bound to abstain from acquiring the property for the same reason. Good faith requires that due consideration be given to the conflicting interests both of the owner and of the claimant in such a case, and not that exclusive consideration be given to the interests of one of them only. Knowledge, therefore, that an adverse claim exists, that it may possibly be well founded, and that it will be destroyed by an alienation of the property, is not in itself sufficient to stamp the transaction as fraudulent within the meaning of the Land Transfer Act.

An equally extreme and equally unfounded view is that cases of this kind never amount to fraud, and that fraud necessarily involves actual knowledge or belief that the adverse right exists. According to this view, a purchaser would always be entitled to say to the claimant: "I knew when I bought the property that you claimed a right over it; I feared and suspected that your claim was well founded. I bought the property with intent to destroy your right if it did exist; but although I thought that you probably had the right which you claimed, I did not actually know it for a certainty, and I was not bound to make any inquiry. I was therefore guilty of no fraud, and I now hold the property accordingly unencumbered by any right of yours."

The authorities show, I think, that such an attitude on the part of the purchaser will not be sanctioned, and that fraud is not limited to cases of

actual and certain knowledge. ***The true test for fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand and either to make further enquiries before purchasing or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further enquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.*** [His Honour then quotes from Lord Lindley at pages 210 (see above) and 212 (see below) of **Asset Company** and continued]:

...

In view of these authorities it seem clear that a purchase in destruction of an adverse equitable interest may be fraudulent within the meaning of the Land Transfer Act even though the purchaser had no actual and certain knowledge of the existence of that interest. It is sufficient that he had such means of knowledge as it was in the circumstances of the case the duty of an honest man to make use of. A failure to use such means is not mere want of care, but is want of good faith. His ignorance is willful and dishonest ignorance, and is therefore imputed to him as knowledge.

110. On the facts of ***Waimiha Sawmilling*** the defendant was held not to have acted fraudulently, because he acted in accordance with judicial decisions in his favour in his various legal battles. The defendant was found to have honestly believed that he was entitled to act in the way that he did. There is not much to choose between Lord Lindley's formulation and that of Salmond J.

111. From the examination of ***Asset Company*** and Salmond J. in ***Waimiha Sawmilling*** it seems clear that the legal position is that defendant's suspicions must have been aroused before the question of fraud can arise. It is not sufficient to say that a reasonable man in his position would have had his suspicions aroused. At this first stage of the analysis, that is, determining whether the person's suspicions were aroused the role of the reasonable man is this: the more obvious the circumstances are then the more likely it is that a reasonable man's suspicions would have been aroused and the easier it is to infer that the defendant's suspicions were in fact aroused. Conversely, the less likely it is that a reasonable man's suspicions would have been aroused the less likely it is that the defendant's suspicions were aroused. In short, the reasonable man at this point is an evaluative tool. What this means is that the search is for the evidence that the defendant's suspicions were aroused. In this regard the court has to look at what the defendant actually knew. This method of analysis gets around the suggestion that all the defendant has to do is simply deny that his suspicions were aroused and that is the end of the matter. As explained in more detail below, once there is evidence that the defendant's suspicions were aroused the next stage is to examine his

conduct and then make an evaluation of whether the conduct of the defendant in light of his now aroused suspicions amounts to dishonesty.

112. To some, it is indeed amazing that despite the presence of these words, "*knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud*", there has been universal acceptance that some kinds of knowledge are to be treated as fraud. In the New Zealand Court of Appeal in ***Waihima Sawmilling*** case Hoskins J. at page 1157 observed:

> *The claim, or the estate or interest the subject of the claim, may therefore be destroyed by a transfer taken bona fide from the registered proprietor. If the claim is founded on some estate or interest in the land it is open to the claimant by caveat to prevent adverse dealings. If adverse dealings are not so prevented and there is no order of the Court by way of injunction or otherwise to the contrary, then, putting aside cases of mistake, the registration can only be vacated on the ground of actual fraud on the part of the transferee, of which notice of the adverse claim is in most, if not all, cases the common ingredient.*

113. It appears that courts have predicated their position on the notion that a person must be honest in his dealings and there is something in the judicial temperament that revolts at the idea that a dishonest person can hide behind a statute. This area of law is no exception. Hoskins J. implies that failure to lodge a caveat cannot sanitise dishonest conduct. The dishonest person cannot be heard to say, "Tut-tut, never mind my dishonesty, you ought to have protected yourself by a caveat." I make this point to refute the submission by Mr. Kelman that Mr. Walters ought to have protected himself by a caveat and his failure to do so deprives him of a remedy. Mr. Kelman submitted that his failure to do so was negligent or careless, and he must live with the consequences of his unwise conduct. My view is that the stain of dishonesty is not cleansed and washed away by the waters of carelessness or negligence flowing from the person making the adverse claim. It is true that Mr. Walters knew of the mortgage but there is no evidence that he knew that the sale to him was a breach of the mortgage agreement. Mr. Kelman's invocation of the expression, he who comes to equity must come with clean hands, is misplaced. It has no application to Mr. Walters. It has not been suggested that the transaction between Mr. Walters and Mr. Daley was a sham designed to defraud the bank of its security.

114. If Lord Lindley, Lord Buckmaster and Salmond J. are correct, there is indeed difficulty "in the demarcation of the line between knowledge or notice that is not to be treated as fraud and notice that under particular circumstances must be treated as fraud" (see, Butt, Peter, ***Notice and Fraud in the Torrens System: A Comparative Analysis***, University of Western Australia Law Review, vol. 13 (1977-1978), p. 354, 357, footnote 13 citing *Hogg,* ***Registration of Title to Land throughout the Empire*** *142,* (1920)). What these judges confirm is that the line does exist and in each case the judge must identify the line. To some, this may be an

unhappy state of affairs but that is the law as I find it. I now examine dishonesty more closely.

115. Lord Hutton in ***Twinsectra Ltd v Yardley***, a case in which the dishonesty was examined in the context of a Quistclose Trust, said at page 171 - 172:

> *Whilst in discussing the term "dishonesty" the courts often draw a distinction between subjective dishonesty and objective dishonesty, there are three possible standards which can be applied to determine whether a person has acted dishonestly. There is a purely subjective standard, whereby a person is only regarded as dishonest if he transgresses his own standard of honesty, even if that standard is contrary to that of reasonable and honest people. This has been termed the "Robin Hood test" and has been rejected by the courts. As Sir Christopher Slade stated in Walker v Stones [2001] QB 902, 939:*
>
> > *"A person may in some cases act dishonestly, according to the ordinary use of language, even though he genuinely believes that his action is morally justified. The penniless thief, for example, who picks the pocket of the multi-millionaire is dishonest even though he genuinely considers the theft is morally justified as a fair redistribution of wealth and that he is not therefore being dishonest."*
>
> *Secondly, there is a purely objective standard whereby a person acts dishonestly if his conduct is dishonest by the ordinary standards of reasonable and honest people, even if he does not realise this. **Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.** I will term this "the combined test".* (My emphasis)

116. It is important to note that Lord Hutton was setting forth the several ways *dishonesty* is used in the civil law. He was not restricting his exposition, at this point in his judgment, to the specific issue that arose for determination. After he stated the different meanings of *dishonesty* in the civil law, he then selected one that he felt was appropriate to the area of law before him. Of these three types of dishonesty, it is my view that the third type is the one that is appropriate for determining whether there is fraud under the Registration of Titles Act. I do not accept the first test for the reasons given by Lord Hutton. One cannot have a dishonest person setting the standard by which he is to be judged despite whatever sympathies we might have for Robin Hood and his fellow denizens of Sherwood Forest and his loyalty to King Richard. The second test is not applicable because it would include types of fraud in which there is no conscious act of deception but in the eyes of equity would be fraudulent because the person failed to meet the high objective standard set by equity. The third test is the applicable one because it is consistent with Lord Lindley's dictum that actual

dishonesty is what is meant. Actual dishonesty, which we now know includes contrived or wilful ignorance, can only mean that the person whose conduct is under scrutiny knew that his conduct was dishonest when assessed by the standards of a reasonable and honest man similarly placed as he was at the time he did the act that is now called into question. The third test is what I believe Salmond J. had in mind in the highlighted passage cited from his judgment.

117. As helpful as Lord Hutton's exposition is, a close reading reveals that is has a tinge of circularity. His Lordship said that *"a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest."* The tinge of circularity is this, a man may be held to be dishonest if his conduct was dishonesty by ordinary standards of reasonable and honest people. The passage and indeed the judgment did not indicate how the judge knows that he has found *the ordinary standards of reasonable and honest people.* It is not easy to get at what is meant by *reasonable and honest* from the cases. The explanation is that judges have not done a very good job by making explicit that reasonable and honesty, are words that express a norm - a norm whose contents are determined by the particular society and the task of the judge is to identify the content of the norm. It cannot be his personal opinion. When judges pronounce on what is reasonable and honest, the judge is not imposing his personal opinion. Lord Hutton admits this much by saying that the standard is that of reasonable and honest people, and not a reasonable and honest judge, unless it is going to be said that a judge, just by being a judge, without more, is the embodiment of reasonable and honest persons. Admittedly, the judge does not conduct a poll or canvass public opinion in other ways. This may lead some to say that at the end of the day I am not referring to anything other than the judge's personal view. Reasonable means having sound judgment. Sound judgment describes the outcome of the process involved in identifying the relevant values and weighing them appropriately in the specific context. Honesty is conduct that is appropriate, decent, honourable and without disgrace. The task of the judge at this point is not easy, but the judge cannot avoid this duty. I am therefore required to identify the norm of reasonable and honest that exists in Jamaica and to apply it to this case. This reinforces the point made by Lord Hutton that the defendant cannot set his own standard of honesty.

118. I have now established that under the RTA contrived ignorance or wilful blindness is sufficient for a finding of dishonesty. Although there are dicta that suggest that fraud is not confined to the obtaining of the transfer or in securing registration, it now seems well established that fraud committed in securing registration is included (see ***Bahr v Nicolay [No. 2]***. per Wilson and Toohey JJ. at 633 "*the fraud to which ss. 68 and 134 refer is fraud committed in the act of acquiring a registered title*" and Mason C.J. and Dawson J. at page 615 "*[f]or our part we do not see the illustrations given and the statements made in the cases as amounting to definitive pronouncements that fraud is confined to fraud in the obtaining of a transfer or in securing registration*").

PART THREE

The analysis of the facts

119. At the beginning of this judgment I summarised those parts of the case which were undisputed or where there was a conflict, the conflict was quite easily resolved. We have evidence before the court from two sources that has not been tested by cross examination, namely, Mr. Rudolph Daley and Mrs. Joy Traille. I bear in mind the dangers and deficiencies of such evidence and I therefore recognise that it must be examined with special care. In this section of the judgment I have examined the evidence of each witness and that has led to some overlap in the discussion.

The evidence of Mr. Etal Walters

120. One of the critical issues in this case is whether there was a meeting between Mrs. Joy Traille and Messieurs Daley and Walters at the bank's premises in the middle of 1994. The significance of this alleged meeting is that both gentlemen assert that at this meeting, Mrs. Joy Traille was told that Mr. Walters purchased the property from Mr. Daley. They assert that the bank, through Mrs. Traille, raised no objection to the sale. The implication being that the bank cannot now resile from the position that it knew and encouraged the parties to believe that the bank had no objection to the sale.

121. Mr. Kelman launched a massive assault on the credibility of Mr. Walters. He submitted that in paragraph 17 of Mr. Walters' witness statement, he said that he relied on the representation of Mrs. Traille that the property would ultimately be transferred to him (Walters) and this representation induced him to complete the house and shop. Mr. Walters also said in the same paragraph that he completed construction in 1993. According to Mr. Kelman this gave the impression that the house and the shop were completed after the meeting with Mrs. Traille whereas in evidence before the court, Mr. Walters admits that the house and shop were completed before the meeting with Mrs. Traille. It is indeed fair to say that Mr. Walter's under cross examination accepted that he met Mrs. Traille for the first time in 1994. This viva voce evidence, submitted Mr. Kelman, is in sharp contrast with his witness statement and indicates that he should not be believed. This is a fair point to make. However, I have the benefit of examining the witness statement and listening to his cross examination. I have looked at paragraphs 7, 8, 9, 10, 23 and 26 of his witness statement. I take into account that when he appeared before me he did not appear to be a man of wide vocabulary and had great facility of self expression. What he is saying is that he did not meet Mrs. Traille until 1994. The assurance that he was speaking about from Mrs. Traille was that the property would be transferred to him at some future date. Paragraph 12 taken by itself may be misleading but when looked at in the full glare of cross examination he has never taken the position that he met Mrs. Traille in 1993. I accept that this position is at variance with the pleadings that refer to 1993 and that in reliance on the assurances of Mrs. Traille he completed the house and the shop. I take into account that the trial is now taking place a decade after the events. What is undeniable is that Mr. Walters still maintains that he purchased the land. This was before the meeting with Mrs. Traille. I conclude that the house was completed before he met Mrs. Traille and so he could not have completed the house because of what Mrs. Traille said to him. Mrs. Walters' evidence which I accept and which is

consistent with the contemporaneous documents before me makes it more probable that the construction was completed in 1993. The critical fact I have to determine, is whether Mrs. Traille was told at any time, after the purchase by Mr. Walters, that he purchased the land from Mr. Daley.

122. Both Mr. Kelman and Mr. Morris attached much significance to the statement of Mr. Walters that the shop was complete and yet the shop needed rendering and painting. This, they say, indicates that Mr. Walters is not to be believed. The sense of the evidence I got was that, but for rendering and painting, the shop was completed. There is no evidence that the shop was unusable in its current condition of being unrendered and unpainted. The pictures tendered in evidence show why one person may say that the shop was complete and another might not. It is a question of degree. The photographs show a building with four walls, a roof, a door and windows. It was unpainted and unrendered. I do not see that this difference in Mr. Walters' evidence makes it unreliable to the extent that I should reject the substance of his testimony.

123. Mr. Kelman also submitted that in evidence Mr. Walters said his lawyer lodged a caveat but later said he did not know what a caveat was. This must be put in context. The evidence is that Mr. Walters did not retain counsel until after the property was transferred to Harley Corporation. Undoubtedly when dealing with registered land it is unlikely that his counsel might not have discussed the various possibilities including the lodging of a caveat. In any event Mr. Walters' knowledge would be based on what he was told by the lawyer and cannot be used to determine whether or not a caveat was lodged. Thus the statement about lodging of a caveat and then not knowing what a caveat is, is valueless from an evidential standpoint, if it is being said the he ought not be believed. At best it establishes what he thought his lawyer had done but that does not advance the case one way or the other. I conclude that the factors identified by Mr. Kelman as bases to reject Mr. Walters as completely and utterly unreliable do not have that effect.

124. The bank has admitted that there was some discussion between Mrs. Traille and Mr. Walters. The witness statement from Mrs. Traille does not indicate the date of this meeting. She says at paragraph 16, *"The first time I met Etal Walters was when he came to the Ocho Rios Branch and indicated to me that he had purchased the property from Mr. Daley and that a man has turned up at the property saying that he purchased the same property from the bank."*. At paragraph 19 she says, *"At no time was I advised by Mr. Daley or anyone that a building had been constructed on the property."* From this evidence and the other evidence in the case, the meeting at which she says she met Mr. Walters could only have been the meeting that was precipitated by Mr. Harley's visit to the property in late 1994. She denies that she was told that buildings were constructed on the property. That is not Mr. Walters' case. Mr. Walters is not saying that he told her that he built anything on the property. Even on Mr. Kelman's analysis the position is the same. Mr. Walters, according to Mr. Kelman, completed the house or built the house based on the assurance given to him. The assurance, on Mr. Kelman's analysis, is that the property would be transferred to Mr. Walters.

125. In determining whether there was one meeting or two and the time of such meeting or meetings I need to refer to the visit of Mr. Harley to the property. It is now common ground that Mr. Harley turned up at the property and spoke to Mrs. Walters. Mr. Walters, according to Mrs. Walters, was not present at the home at the time of this visit. I shall not deal with the contents of this particular conversation at this point. The point is that Mrs. Traille is saying that Mr. Walters told her that a man turned up at the property claiming to have purchased the property from the bank (see paragraph 16 of Mrs. Traille's witness statement). This man, based on the evidence, could only have been Mr. Harley. If Mrs. Traille is saying that Mr. Walters told her about the visit of Mr. Harley, and we know that Mr. Walters was not at the home at the time of Mr. Harley's visit, this can only mean that Mrs. Walters told her husband about the visit. It was this visit, according to Mr. Walters, that led to the communication with Mrs. Traille in late 1994.

126. There is some dispute about the precise date of Mr. Harley's visit. Mr. Harley said it was December 31, 1994. The Walters place the visit sometime around October/November 1994. What is agreed is that Mr. Harley visited the property only once in 1994. Mrs. Traille does not give the date or year of her conversation with Mr. Walters. I believe that the visit quite likely took place in middle to late December 1994 or at latest January 3, 1995. I say this for these reasons. We know that the property was advertised in the newspaper on December 14 and 22, 1994. Although it was first advertised in July 1993, it is unlikely that Mr. Harley visited the property in response to that advertisement. The balance of probabilities supports the conclusion that Mr. Harley was responding to either the December 14 and/or 22 advertisements. December 31 fell on Saturday. Sunday, January 1, 1995, was New Year's Day, which is a public holiday in Jamaica. In Jamaica the practice is that if the public holiday falls on a Saturday or a Sunday then the holiday is taken on the very next working day, which in this case would be January 2, 1995. The first working day would have been January 3, 1995. This was the day on which the company paid the deposit to the lawyers of the bank. If Mr. Harley's visit was on December 31, 1994, then the earliest Mr. Walters could have gone to the bank would be January 3, 1995. On the other hand if Mr. Harley's visit was about the middle of December after the first advertisement of December 14 or towards the end of December then it is possible that Mr. Walters spoke to Mrs. Traille in late December. I find that the Walters are not accurate that the visit occurred in October/November 1994 because the evidence makes it more probable that Mr. Harley was responding to the December 1994 advertisements. But that does not necessarily mean that the visit was as late as December 31. It may well have been some time between the first and second advertisement in December 1994 or after the second advertisement but before December 31. In any event it seemed to have occurred before the sale agreement was signed because Mr. Daley's lawyers were enquiring about the sale. Mr. Daley's lawyers wrote to the bank in January 1995. The only sale Mr. Daley's attorneys could have been referring to was the possible sale to the company. It seems more probable that Mr. Daley received this information about the possible sale to Mr. Harley after Mr. Harley's visit and it is this information that he passed on to his attorney which led them to writ to the bank's lawyers. Thus while I cannot pin down Mr. Walters' meeting with Mrs. Traille with the precision I would have liked, I hold, on a balance of probabilities that it took place not later than January 3, 1995.

127. I ask why would Mr. Walters go to the bank and speak to Mrs. Traille specifically about the visit of Mr. Harley? The evidence from Mr. Daley and him is that they met Mrs. Traille earlier in the year and at that time she was told that the property was sold by Mr. Daley to Mr. Walters. There is no evidence that Mr. Walters knew of or knew Mrs. Traille before he went to the bank earlier in the year. I cannot speculate. I have to draw inferences from the evidence presented. This earlier visit, to my mind, provides the best explanation for Mr. Walters going to the bank either late December 1994 or early 1995 to tell Mrs. Traille about the visit of Mr. Harley. Mr. Kelman says that Mr. Daley said the visit took place in the middle of 1994 while Mr. Walters says it took place earlier. This is not necessarily an indication of a lying witness. The fact that both men agree on the witness does not necessarily mean that they are reliable about the time of the first meeting. I have to look at objective facts, that is, facts which can be established with reasonable certainty independent of witness's memories, especially since we are trying the matter ten years later.

The evidence of Mrs. Veronica Walters

128. I now come to the testimony of Mrs. Walters. She was assailed as being untruthful and unreliable. Mr. Kelman said that she is not to be believed because she said that she was present at the meeting in late 1994 and this fact is not supported by her husband or Mr. Daley. This submission by Mr. Kelman is unfounded. Mrs. Walters did not explicitly say that she was at the meeting in late 1994. What she said was that after the visit of Mr. Harley "we contacted Mr. Daley", then "we spoke to Mrs. Traille" and "Mrs. Traille told us" (see paragraph 13 of her witness statement). No one asked her whether she was actually present or whether she was identifying with what her husband did because he was acting for himself and her. Her witness statement was not drafted with the care that one would expect so as to make clear whether she was present or she is reporting what she was told. It has been quite common for witness statements to contain much that is hearsay. Sometimes it is patent but more often it is disguised. Nonetheless she uses the pronoun "we" throughout her statement and in many instances it is not clear whether she is referring to her acts alone, her husband's or both. In light of this and in light of the failure by counsel to cross examine her on the point it is not quite fair to use paragraph 13 to say her evidence is self-serving. Had counsel wished to make this submission it was his obligation to confront her directly so that she would have had an adequate opportunity to respond. Thus the basis put forward by Mr. Kelman on which he says Mrs. Walters' credit has been impugned has no certain foundation.

129. Mr. Kelman further submitted that neither Mr. Walters' evidence nor Mr. Daley's affidavit supports the view that Mrs. Walters was present at the late 1994 meeting. The first point to note is that no one asked Mr. Walters whether his wife was present at the meeting. The second is that Mr. Daley's affidavit does not address the point at all. This is not surprising since the purpose of the affidavit was to secure an injunction barring the sale. Thus while the affidavit might have said that he spoke to Mrs. Traille, there would be no reason to say specifically that Mrs. Walters was present. This is quite unpromising material on which to base such a submission. Why would Mr. Daley in an affidavit to support an application for an injunction speak to the presence of Mrs. Walters at the meeting when her presence was not

an issue before the court at the time of the application for the injunction? In the course of this trial, Mr. Walters testified before his wife. If such a point was intended to be taken, why not ask him about it and provide him with an opportunity to confirm or deny her presence? Mr. Kelman's attempt at destroying her credibility with this ammunition utterly fails.

130. In any event the most important aspect of Mrs. Walters' testimony from my perspective was the visit of Mr. Harley and the contents of the conversation he had with her. She said that Mr. Harley told her that he saw the property for sale and he came to look at the building that the bank put up for sale. She said that she told him that her husband and she had purchased the property from Mr. Daley and so this could not be the place he had in mind. She continued by saying that he asked to look inside the house and she declined. Mrs. Walters vehemently denied telling Mr. Harley that she was tenant. She added that she was quite happy with the property. In answer to the court she said that when Mr. Harley came to the property, he told her that he was from Harley Corporation and he had seen the property in the paper advertised for sale and he was there to look at the old building. She said that at the time of the visit by Mr. Harley she had already remodeled, fixed and had moved into the house. To quote from Mrs. Walters' evidence, "I was so happy moving into my house that I could not tell him I was a tenant." Anyone familiar with Jamaicans knows that home ownership is one of the greatest sources of pride and joy for anyone achieving that landmark. I find it quite improbable that Mrs. Walters would have told Mr. Harley that she was a tenant. Tenants in Jamaica are known to be so haughty that one could easily mistake them for the owner. In this cultural setting I find it impossible to accept, short of divine revelation that Mrs. Walters, a land owner is going to say that she is a tenant. Mr. Harley gave evidence about the visit. I now examine his evidence.

The evidence of Harley Corporation

131. In this section I shall refer to Mr. Harley and the company interchangeable since it is obvious that his knowledge and conduct is to be attributed to the company. Let me state at the outset that I found him a thoroughly unconvincing witness. Mr. Harley admits going to the property. He admits speaking to Mrs. Walters. According to him he told her that he understood that she was a tenant. When he told her this, she looked surprised. Mr. Harley gave this unbelievable evidence: "Mrs. Walters never said she was a tenant. She did not respond to that question." I do not accept Mr. Harley's evidence on this point. It is stretching the credulity of the court too far to ask it to accept that a purchaser of a property when told by a stranger that he is buying the property would fail to tell the stranger that they are already owners. I cannot think of any reason why Mrs. Walters would want to lower her status as property owner where there is no evidence that she or her husband knew that Mr. Daley had sold the property without the bank's permission. There is simply no motivation for saying something to her detriment.

132. There is in evidence a valuation report dated January 23, 1995 which was done by Mr. Barry Wharmann. Mr. Wharmann said that that report was done at the request of Mr. Harley. The name of the client on the valuation is that of a company and it is not Harley Corporation. I readily accept that there is a distinction between Mr. Harley, the person, and Harley

Corporation. Mr. Harley denies ever asking Mr. Wharmann for that report. If Mr. Harley never asked for that report, on what basis then could Mr. Wharmann have prepared the report? That report places the value on the building at over $2,367,600.00. Mr. Harley swore under oath that the building he saw on his December visit was not worth more than $200,000.00. He was attempting to say that the building was not far removed from the description in the advertisements. This is another demonstration of Mr. Harley making up evidence to benefit his case. I so conclude for this reason. Mr. Harley agreed that Mrs. Walters ran into the house and closed the door. The advertisements spoke to a house with just foundations. If Mr. Harley saw a house with just foundations or an incomplete house it is unlikely that the house would have had any door and window for Mrs. Walters to have closed. The fact that he admits that she ran inside the house and closed the door makes it more probable that the house was indeed complete and fully occupied at the time of his visit.

133. There is no evidence that any work was done on the building between Mr. Harley's visit (using his date of December 31, 1994) and January 23, 1995, (the date of Mr. Wharmann's report) that would have transformed a $200,000.00 broken down building in to $2,367,600.00 edifice. I find as a fact that Mr. Wharmann did the January valuation at the behest of Mr. Harley and that Mr. Harley knew at some point in January 1995 the property was valued at the sum stated in the report. The report also stated that the forced sale value would be approximately $2,000,000.00. This knowledge would have been further evidence of the accuracy of Mrs. Walters' statement to Mr. Harley that the property was now occupied by owners who had improved the property. The advertisements in the press had described the property with a building with foundations only (the December 1994 advertisements) or uncompleted (the July 1993 advertisement). The undeniable fact is that Mr. Harley found something incongruous with the advertisements.

134. The effect of this finding is far reaching on the issue of fraud. While there may be some dispute about the precise date house was completed, on the totality of the evidence I find that the house was completed before the visit of Mr. Harley. He admitted that Mrs. Walters ran inside the house and closed the door. He admitted that he saw a roof on the house. All these are signs of occupation. What he saw when he visited and the report he received from Mr. Wharmann would be at variance with the description of the property he saw in the newspaper advertising the property for sale. Mr. Harley tried to say that he saw no difference between the newspaper description and what he saw on his visit. His testimony on this point is simply untrue. The report from Mr. Wharmann in January 1995 said that the house was built two years before. Is this not a case of the company, through Mr. Harley having knowledge not just of a possible adverse claim but actual knowledge of (a) a two-year-old house; (b) the house being occupied by someone; (c) the occupant claiming to be a purchaser from the previous registered proprietor, the very person who to Mr. Harley's certain knowledge was the registered proprietor at the time of his visit; (d) the house was different from the description in the newspaper; (e) the property was valued at $2,367,600.00? This knowledge the company had before the execution of the sale agreement on February 20, 1995. Applying my first stage analysis stated earlier in this judgment I find that these facts were sufficient to arouse suspicion in the mind of an honest and reasonable

man similarly placed as Mr. Harley. I find that this evidence is so strong so as to arouse suspicion in the reasonable man that it is inconceivable that Mr. Harley's suspicions would not have been aroused if he is an ordinary person capable of reason. The denial of knowledge of the January 1995 Wharmann valuation is strong evidence that Mr. Harley realised that the house was not just more valuable than he was led to believe by the advertisement but also evidence consistent with what he say, namely, a house completed and occupied. If is also evidence that the property was purchased and occupied by someone who was not the registered proprietor. Mr. Harley knew that by the standards of the reasonable and honest man, further enquiries should have been made. Further evidence that he knew that what he was doing was dishonest by the standard of the reasonable and honest man comes from the lie he told when he said that Mrs. Walters did not answer his queries as to whether she was a tenant of Mr. Daley. When he referred to the Walters being tenants of Mr. Daley he was betraying the fact that he had certain knowledge that Mr. Daley was indeed the registered proprietor at the time of his visit. He had to do this in order to try to establish his case that he did not know of the prior sale of the property. Mr. Harley deliberately refrained from making the enquiries an honest and reasonable man would have made when confronted with the facts I have found because he wanted to maintain "deniability", a term coined after the ill-fated Bay of Pigs Invasion, made famous by the Watergate Hearings; and passed in the lexicon of the common man after the Iran/Contra Hearings.

135. I take into account that Mr. Harley told the court that he is a business man who has purchased property in the past. He is not neophyte in land purchases. He can be taken to appreciate the significance of a person telling him that they have already purchased land that the company may be interested in purchasing. Mr. Harley has not been open with the court and the reason for his lack of candour is that he realised the possible implication of a finding that the company, through him, knew of the adverse claim made by the Walters. I therefore find that Harley Corporation's suspicions were thoroughly aroused. It failed to act as a reasonable and honest person (natural or juridical) would in the circumstances. This failure was known to the company. The ignorance of the company was contrived or wilful. Can it be honest for a purchaser from a mortgagee to go ahead with the purchase when his suspicions must have been aroused because of five factors listed in the immediately preceding paragraph? I have concluded that it could not possibly be honest for the purchaser to go through with the sale with this kind of information without making further enquiries. An honest purchaser would have made further enquiries in the face of information thoroughly and wholly at variance with the information in the advertisement. An honest purchaser would have done the following: (a) gone back to the bank and say that there might have been some mistake because the property is occupied by persons who claim to be purchasers; (b) inform the bank that the property now has two buildings, a shop and a house, and that the description in the advertisement is inaccurate; (c) have further dialogue with the alleged purchaser in possession in order to find out more details about the purchase; (d) contact Mr. Daley to confirm the sale because Mr. Harley said that he was told by citizens in the area that the Walters were tenants of Mr. Daley. I therefore find that Harley Corporation acted dishonestly in this purchase and consequently acted fraudulently within the meaning of the RTA.

136. I now refer to another aspect of the evidence that further destroys the credibility of Mr. Harley. Harley Corporation is relying on several reports of rental income done by Mr. Wharmann to ground its claim for mesne profits. These valuations are dated May 25, 2004, May 31, 2004, August 9, 2005 and December 20, 2005. All these reports are predicated on the property valued at $3,917,600.00 as of February 1, 1995. It will be recalled that in a valuation dated January 23, 1995, Mr. Wharmann reported that the property was valued at $2,367,600.00. Mr. Wharmann was hardpressed to provide a satisfactory explanation for this large difference in value between January 23, 1995, and February 1, 1995. When Mr. Harley was confronted in cross examination with this difference he said that he did not ask Mr. Wharmann to do any valuation in January 1995. He even went as far as saying that he did not see the valuation of January 23, 1995, until he began giving evidence in this trial. I find that hard to accept.

137. One may ask how is it that I can rely on Mr. Wharmann's report of January 23, 1995 but cast doubt in his further reports. The point of the reports is this. The January 1995 report goes primarily to Mr. Harley's state of knowledge at the time of his purchase and whether the company through him was acting dishonestly. The January report I accepted as substantially accurate in its description of property because it coincided with Mrs. Walters' testimony about the state of the house. When dealing with the mesne profits, it appears that Mr. Wharmann overlooked the value that he gave the property in January 1995. He explained that he did not have the January valuation when he prepared his mesne profit reports. Whether that is so or not I need not resolve. The point I am making here is that both sets of reports would have been given to Mr. Harley and he would have been aware of the significant difference in the valuations of the property. The valuations were separated by just eight days.

138. Another issue that arose that undermined the credibility of Mr. Hartley was in relation to the presence of persons at the property. He said in witness statement and in cross examination that he specifically told the lawyers for the bank that he wanted the property with vacant possession. When it was pointed out to him that the agreement for sale between the company and the bank did not include such a term he said that the signed agreement was incomplete and did not reflect what he stated to the bank. Under the pressure of cross examination Mr. Harley said that he saw the term about vacant possession in another document which is not before the court. This is another example of Mr. Harley altering his testimony according to the exigencies of the moment.

139. In examining the evidence of Mr. Harley I took into account that because the lapse of time; memories may not be as sharp. However, I am satisfied that Mr. Harley made no serious effort to speak the whole truth as best as he could recall. He was prepared to fabricate evidence at every turn if he thought it would assist his case. He fabricated the evidence in the following areas: (a) denying that he asked to conduct a valuation of the property which was captured in Mr. Wharmann's report dated January 23, 1995; (b) the response of Mrs. Walters when he told her about his interest in purchasing property; (c) that he told the bank that he wanted property with vacant possession; and (d) he saw the term about vacant possession in a previous document which was not put before the court.

140. Mr. Morris made his final rescue attempt to save Mr. Harley's credibility by submitting that the buildings were not completed until after Mr. Harley visited the property in late 1994. He derived some possible support for this from a report of Mr. Theo Dixon a valuator whose report is dated June 3, 1993. He places the value on the property at $200,000. This is the description of the building at the date of this report:

> *Erected on the site is an incomplete neglected building up to the height of belcose of reinforced concrete block and steel. There is no roof, ceiling, floors, windows, doors, plumbing, electrical nor kitchen fixtures affixed to the building. On completion accommodation will consist of three bedrooms, one bathroom, passage, living and dining areas, a kitchen and a front porch.*

141. I have dealt with Mr. Dixon's report under part two and need not repeat it here.

The evidence of the bank (Mrs. Traille's evidence)

142. Her evidence assumes great importance because she is the only witness for the bank that provided any information about the loan to Mr. Martin, the arrears and the enforcement of the loan. She is also the only witness from the bank who spoke to the nature of the discussions with Messieurs Daley and Walters. I have concluded that her reaction or more accurately, her silence in her witness statement when she was told about the sale of the property is not consistent with being told the first time about the sale.

143. Mrs. Traille in her witness statement sets out her functions as a loan officer or credit assistant. She said that she had responsibility for (a) interviewing customers, gathering information relevant to determine eligibility for loans based on the bank's criteria and upon discussion with the Branch Manager, deciding whether a loan should be made to that customer; (b) monitoring loan payments and where necessary, following up delinquent borrowers or their guarantors by telephoning them or writing to them; (c) liaising with the legal department on a monthly basis in respect of loan arrears. The bank's legal department was located at its head office in Kingston. The branch had to submit a monthly report to head office in respect of the loans in arrears. She also indicated that the bank would generate a loan arrears report every day and this report would show the previous day's activities. The report would be sent to the branch manager and the credit assistant. The manager and loan officer would meet daily to go through the report. Mrs. Traille says that the reports "would have included the loan account for Mr. Martin" (see para. 7 of witness statement). She had meetings with the branch manager about Mr. Martin's account as well as other accounts and she had the specific responsibility of following up accounts highlighted in the meetings. Mrs. Traille is not saying that she recalls definitively that Mr. Martin's account was included in the loan report. What she has said is that that would be the case, not that that was in fact the case. This way of giving evidence becomes important when looking at the rest of her evidence.

144. Mrs. Traille stated that she had come to know Mr. Rudolph Daley "very well in connection with Mr. Martin's loan" (see para. 4 of witness statement). According to this

witness, "Mr. Martin's loan was serviced very poorly and on many occasions I had to call, write, and even walk over to Mr. Daley's office to remind him of late payments" (see para. 4 of witness statement).

145. Before going on I observe that Mrs. Traille makes no attempt here or at any other point in her witness statement to indicate when she began speaking to Mr. Daley about the loan and over what period this constant dialogue occurred. She did not make clear whether during this time Mr. Martin was servicing the loan but doing so poorly or was it that Mr. Martin had dropped out of the picture and the bank was now looking to the guarantor to repay the loan. Was she reminding Mr. Daley to remind Mr. Martin of the payments or was she reminding Mr. Daley that he (Daley) needed to service the loan? In any event she has not asserted that at any time Mr. Daley was informed that she or the bank intended to sell the property either by auction or private treaty even though she said that she followed up delinquent borrowers by calling or writing to them.

146. The evidence is that the property was first advertised for sale in 1993. There is no evidence that Mr. Daley was served with the statutory notice. In this case, the bank has not emerged as an institution that exercised scrupulous care in relation to this mortgage. The evidence is that it (a) accepted Mr. Daley's property as security for the guarantee despite the absence of a valuation report of the property at the time the mortgage was executed; (b) wrote a misleading letter to Mr. Daley's lawyers when they had written to ask whether the property had been sold; (c) wrongly described the property when it was put up for auction; (d) advertising the property for sale in 1993 without any evidence that the section 106 notice was served on Mr. Daley; (e) sent, in 1994, the notice of default and the statutory notice to an address that was not in any of the documents executed between itself and Mr. Daley; and (f) finally admitted after ten years that it sold the property at an undervalue. This is the work of an institution in which accurate record keeping is not only necessary but indispensable. Whereas Mrs. Traille speaks of the "ought", I look at the "is". The point I am making is that it is not sufficient in this case to direct me to what the bank's policy was, as Mr. Kelman did, and expect me to accept that the bank adhered to that policy in the absence of specific evidence that it did so.

147. Mrs. Traille has stated that when there was a loan agreement the lending policy of the bank was that loans "would be secured" (see para. 11 of witness statement). At this point she is speaking of security from the actual borrower. I say this because in the very next sentence she say "[i]n this case, in addition to the Guarantee mentioned earlier, Raymond Martin's loan was also secured by a mortgaged (sic) over property that Rudolph Daley owned" (see para. 11 of witness statement). She is speaking of normal procedure of securing a loan. However there is no evidence that Mr. Martin's loan was secured by security from Mr. Martin in accordance with the bank's policy. She continues in the same vane at paragraph 14 of her witness statement, when she says "based on the Bank's standard operating procedure, not only would security for the loan been (sic) requested and obtained but a valuation of the property used as security was also commissioned" The valuation referred to here is the valuation of Mr. Dixon dated June 3, 1993. I have already indicated why I think that this date is incorrect and that

he quite likely did the valuation in 1992. In any event this valuation would be coming more than a year after Mr. Daley executed the documents (see para. 10 of witness statement).

148. If it was the bank's policy to have the valuation done before the loan disbursement then that was not followed in this case, at least in regard to the valuation of the guarantor's property that was being used to secure the loan. As I said already, there is no evidence that any security was in fact requested and obtained from Mr. Martin. In respect of Mr. Daley, the time line shown from the date of the documents and Mrs. Traille's evidence is as follows: (a) instrument of mortgage dated January 29, 1991; (b) instrument of guarantee dated January 31, 1991; (c) disbursement of loan to Mr. Martin May 11, 1992; (d) valuation on June 3, 1993. If this time line is correct, then what we have is the instruments of guarantee and mortgage being executed two years before the bank had objective evidence that the proposed security could cover the guarantee. I have set out the evidence of the bank's policy and contrasted it with actually happened or more accurately, did not happen, in this particular case. This was necessary because Mr. Kelman was asking me to accept the bank's evidence over that of Mssrs. Daley and Walters.

149. In paragraph 17 of her witness statement Mrs. Traille states that the "Bank's policy regarding sale of land used as security for a loan by the owner of that land was that the bank would first have to provide written consent to the owner before he could part with the ownership of the land". She added "the vendor's attorney would have to write to the Bank. The property would not be released unless the balance outstanding on the loan was paid in or an undertaking from an Attorney representing the vendor was received". From this Mrs. Traille undoubtedly recognises that sale of the security by the borrower or guarantor would be a serious breach of the agreement. By the time of her conversation with Mr. Walters, on her evidence, she would have already known that the loan was not being serviced. She would have "on many occasions [called] [written] and even [walked] over to Mr. Daley's office to remind him of the late payments" (see para. 4 of witness statement).

150. In light of what she says at paragraph 17 of her witness statement her conduct after being told of the sale of the security is inexplicable, unless that information was not new to her. In my view, there is no sin greater that a debtor or guarantor can commit other than disposing of the security for a loan, without the permission of the bank, before the loan is discharged. It is quite astonishing that Mrs. Traille's witness statement does not indicate any alarm, anxiety or concern about such a revelation. Mrs. Traille, a loan officer, could hardly have failed to appreciate the gravity of the situation, yet her witness statement does not speak of any conduct that would be commensurate with the disaster that had happened if this was completely new information to her. The disaster from the bank's point of view would be (a) the borrower had defaulted; (b) the guarantor had not liquidated the debt and (c) the bank's security had been sold.

151. If Mrs. Traille was being told for the first time, as she alleged, that the property was sold, why did she not say to Mr. Walters, "That cannot be! Surely you are mistaken! How can you be the purchaser of land that is subject to mortgage and as far as I know the bank has

not given Mr. Daley written permission to sell the land?" There is no evidence in Mrs. Traille's witness statement to show that she made any further enquiries of Mr. Walters. There is no evidence that she sought to verify the truth of the information. If a loan officer is told that the security for a loan has been disposed of and in that loan officer's mind that ought not to have happened, wouldn't there be evidence of strenuous efforts being made to verify the story? Her inactivity is more consistent prior knowledge of the sale. On the evidence presented to the court that prior knowledge would have come from the meeting earlier in the year. Her inertia is more consistent with Mr. Walters being assured that he need not worry about Mr. Harley's visit.

152. It is difficult to accept that when Mr. Walters met Mrs. Traille he simply told her about the visit of Mr. Harley and went his way. By the time of Mr. Harley's visit, Mr. Walters had invested much capital in the land. He had improved it considerably. It was his family home. Can it really be believed that a man faced with the possible loss of the home would not have presented this vision to Mrs. Traille at the meeting? The next round of activity we have from Mr. Walters occurs when he was served with notice to quit in April/May 1995. I ask, what is the best explanation for Mr. Walters' seemingly laid back attitude after he met with Mrs. Traille? When Mr. Walters told Mrs. Traille about the visit by Mr. Harley he would have been quite alarmed given that he had paid a substantial sum for the property and had erected two structures. It is more probable that he would have been concerned about his security of tenure. In this context it does seem more probable and I so find that Mrs. Traille did assure Mr. Walters that he need not worry about the visit and the property would not be sold to anyone else. If Mr. Daley had not met Mrs. Traille at some prior point in time why would he contact her about the visit of Mr. Harley? His conduct seems more consistent with a prior meeting than with no meeting at all. Based on all the evidence in the case, there is no other reasonable and rational explanation for Mr. Walters contacting Mrs. Traille (of all the possible persons at the bank), but for the previous contact he said he had with her earlier in the year when he went to the bank and paid over $35,000.00 and told her that he was purchasing the property from Mr. Daley. Mr. Daley was said to be present at that meeting. I therefore find on a balance of probabilities that Mr. Walters spoke to Mrs. Traille about the visit of Mr. Harley and I also find that he was assured by Mrs. Traille that no one else would get the property other than he. These findings will be reinforced as I proceed with the analysis of the evidence.

153. If my conclusion in the immediately preceding paragraph is correct and her evidence about receiving daily reports of delinquent loans is reliable, then it would mean that she would have received evidence of the 1994 and 1995 payments to the loan account. If she were doing her job properly she would or ought to have known that prior to January 1995, Mr. Daley had paid $56,000 on account. This was a shade under 50% of the sum of $113,000.00 that Mr. Daley said he was told was owing.

154. These payments become important in the context of deciding whether Mrs. Traille was informed by Mr. Daley that he intended to settle the loan. Mrs. Traille's evidence is that she "cannot recall if Mr. Daley had advised me in 1994 that he would settle the account" (see para.

18 of witness statement). In the evidence I am about to examine I find on a balance of probabilities that Mr. Daley did tell her that he would settle the loan. On January 10, 1995, the bank issues a receipt to Mr. Daley in the sum $35,000. The receipt appears to be initialled J. Traille. This payment is broken down as follows $26,292.50 on loan account number 5003549 (Raymond Martin's loan account number). Auction fees in connection with loan $8,707.50. The loan history shows the payment of $26,292.50 but does not show the additional sum as paid as auction fees. How would Mr. Daley know what the precise figure (down to the last cent) of auction fees were had he not spoken to Mrs. Traille as he asserts? There is no evidence that Mr. Daley attended the auction or contacted the auctioneer to find out his fees. Based on the evidence the most likely source of his evidence would be the bank and in particular, Mrs. Traille. Why would Mr. Daley pay auction fees and make a further payment on January 10, 1995, if he understood from Mrs. Traille that the decision about the property was beyond her remit?

155. Mr. Kelman submitted that Mr. Daley would be liable to the Walters and so he has every reason to lie about what he said to Mrs. Traille. I say that that very fact makes it more likely, as a businessman, that he would have sought the assurance from Mrs. Traille that the property would not be transferred to anyone else. He wants to pay off the bank and avoid liability to the Walters. The best way in the circumstances in which he found himself would simply be to pay off the loan secure in the knowledge that the bank would not sell it. Mr. Daley admitted that he received $135,000.00 of the agreed price of $170,000.00. In this context I am prepared to hold that Mrs. Traille knew of Mr. Daley's intention to settle the debt. But for this understanding and assurance, it is unlikely that Mr. Daley would have paid $91,000 between June 1994 and January 1995, of $113,000 debt. The following evidence supports this finding. He said in his evidence that he made three payments on the guarantee. One for $26,000; another for $30,000 and a third for $35,000.00 (the January 1995 payment). Such financial records from the bank as there are show a payment in June 1994 of $27,000. There is no receipt for this payment. There was a further payment of $30,000 in October 1994. The account records and a receipt from the bank show this payment.

156. I should point out as well that with the payment of $91,000 Mr. Daley had paid all the interest outstanding and had reduced the principal considerably. I have referred to the figure of $113,000.00. This figure of $113,000 was not plucked out of the air. Mr. Daley stated in his affidavit that the source of his information was Mrs. Traille. This information communicated to Mr. Daley coupled with his payments in 1994 makes it more probable that he was in communication with Mrs. Traille regarding his intention about the loan. The bank's records show that by January 1995 the sum owed had dropped from $113,000 to $58,089.53 - an almost fifty percent drop in the arrears.

157. The other witness who testified for the bank was Miss Nicole Roberts, an attorney at law. I have already referred to her affidavit and admissions made therein. Her testimony has another feature which is of some importance in this case. Mr. Batts has made to my mind a compelling argument derived from the available documentation in the case that Mrs. Traille and Mr. Daley had a discussion earlier in 1994. The evidence is irrefutable that between June

1994 and January 1995, Mr. Daley paid a total of $91,000.00. He submitted that in light of (a) neither the notice of default nor the statutory notice was sent to the correct address of Mr. Daley; (b) the bank has not proved that Mr. Daley in fact had received the notice and (c) Mr. Daley's visit to the bank in 1994 is evidenced by a receipt of payment of $35,000 by Mr. Daley to the bank had he not spoken to Mrs. Traille how would Mr. Daley know that the sum alleged to have been owed to the bank was approximately $113,000.00? Mr. Batts submitted and this was confirmed through the cross examination of Miss Roberts that assuming that no payments had been made by Mr. Daley, if one adds back the sums paid one arrives at the position that in June of 1994 the sum alleged to be owed by Mr. Daley was approximately $113,000. For all the reasons I reject Mrs. Traille's evidence as reliable and cogent. The internal logic breaks down under close analysis. Her lack of reaction after being told that the bank's security was sold is not consistent with being told about the sale for the first time. There is evidence that the bank's internal workings were not as they should be in this case.

158. Mr. Kelman submitted that Mrs. Traille's conduct should not be attributed to the bank. He also submits that where a contract specifies that any alteration of the contract ought to be in writing then the parties cannot vary the contract by another means. I have never known that that principle means that the parties are prohibited from acting in a manner as they see fit in the circumstance even if there is not strict compliance with the contractual provision. To escape this conclusion Mr. Kelman submits that where a written document that expressly states that any alteration to it must be in writing cannot be altered otherwise. He submitted that parol evidence and extrinsic evidence cannot vary a contract required by law to be made in writing or evidence by writing. Mr. Kelman has forgotten that doctrine of estoppel arose because any mature and fair system of justice would recognise that there would be instances where it would be unfair and unjust to allow a party to operate in a manner contrary to the written agreement and then fall back on the strict contractual provisions when things go awry. This is one of those cases. Mrs. Traille was told that the property was sold to Mr. Walters. As I said earlier, there is no more serious sin guarantor can commit than selling the security for a loan and yet she is silent about her conduct and response when she admits that Mr. Walters told her he bought the property. It cannot now be right, just or fair for the bank, in light of Mrs. Traille's representation to resile from that position. When Mrs. Traille acted, she was not acting in a personal capacity but for and on behalf of the bank. She derived no personal benefit from her conduct.

159. If a party does not operate within the strict contractual boundaries and the other party to the contract follows that lead and relies on it, then the law indicates that it would be unfair for the former party to retreat behind the wall of strict contractual interpretation if problems arise. It is obvious that Mr. Daley and Mr. Walters told Mrs. Traille about the sale, albeit some fifteen months after it occurred. There is no evidence that she raised any alarm. There is no evidence that she brought it to the attention of either the branch manager or the legal office in Kingston. Mr. Daley and Mr. Walters were clearly led to believe that although the property was sold in breach of the mortgage, the bank would not be raising any objection as long as Mr. Daley was servicing the mortgage and evinced a serious intention of so doing. He paid $91,000.00 and there is no evidence that he would not have liquidated the loan. Both men

were entitled to rely on the representations of Mrs. Traille. It would be unfair for the bank, having acted imprudently in the sale of the property, a fact now expressly admitted, to seek cover under the strict contractual provisions (see Dixon J in ***Thompson v Palmer*** 49 C.L.R. 507, 547). This is not a case of mere knowledge that the mortgagor has parted with possession as in cases where the mortgagor leases or parts with possession contrary to the terms of the mortgage.

160. Mr. Kelman cited a previous decision of mine, namely, ***Jamaica Youth Development Foundation v Portfolio International Jamaica Ltd*** Claim NO. 2004/HCV 2305 (December 10, 2004) in which I had decided that a tenant of a mortgagor who had leased the property without the written consent of the mortgagee as required by the mortgage agreement was not a tenant of the mortgagee. The point of distinction between that case and the present is that in ***Jamaica Youth*** there was no evidence that mortgagee represented to the mortgagor that the mortgagee agreed with what the mortgagor had done. The cases I reviewed then, established that knowledge only that the mortgagor had leased the property is not usually sufficient for the court to conclude that the mortgagee accepted the tenant as his tenant. The cases also established that even if the mortgagee knew of the tenant, the courts have been very reluctant to infer that the tenant became a tenant of the mortgagee simply by the inactivity of the mortgagee. The case before me is one of active dialogue between an officer of the mortgagee and the two men. At no time did Mrs. Traille make it clear to Messieurs Daley and Walters that she could not give them any assurance with regard to the property.

Other submissions

161. Mr. Kelman submitted that Mr. Daley's affidavit should be rejected outright because it was sworn in support of an application for an injunction and he failed to disclose to the court in that affidavit the specific fact that he was selling in breach of the mortgage instrument. He speaks of the well known duty of full and frank disclosure of a party applying for an injunction. This he said made Mr. Daley's affidavit untrustworthy in totality. It is true that he did not say in his affidavit that the sale to Mr. Walters was in breach of the mortgage. However the mortgage document was before the court and while the party should make the point explicitly rather than leave the court to wade through the tide of documentation it is not accurate to say that the court had no means of knowledge that the sale to Mr. Walters was in breach of the mortgage agreement. Mr. Kelman's position is not the total picture. Mr. Daley is asserting that he was told that balance was $113,000. The other parts of the picture are these. Mr. Daley asserts that he paid $26,000 in June 2004, $36,000 in August 2004 and $30,000 in January 2005. An examination of the bank's records before the court is consistent with these assertions. On the mathematics done by Mr. Batts, if one subtracts the payments made after June 2004 the balance due was indeed $113,000 - a fact confirmed by the bank's own witness. This is more consistent with a meeting with Mr. Daley at which he was told the balance by Mrs. Traille.

162. During the oral submissions, Mr. Kelman submitted that in the event that I found in favour of Mr. Daley's estate, it should be deprived interest at the commercial rate or if awarded at the commercial, it should suffer a substantial reduction. I do not agree. It is true

that Mr. Daley sold in breach of the mortgage but this was eventually told the bank which raised no alarm. In light of this finding the effective cause of this litigation is the bank's failure to act as a prudent mortgagee.

PART FOUR

Conclusion

163. The fatal flaw in Mr. Morris' submission on section 106 of the RTA is to think that because the statute states that the purchaser need not make the enquiries referred to in the section, it also means that if the purchaser in fact has knowledge of the type identified in this case and continues with the purchase, he is immune from a charge of dishonesty. All section 106 does, is to relieve the purchaser of the need to make the enquiries, but it does not say what the result is to be, if he makes the enquiries and finds out the things that he did in this case and continues with the purchase or what the position is, if he is faced with certain facts and refrains from making the enquiries an honest person similarly placed, would have made.

164. Harley Corporation is not a bona fide purchaser without notice of the claim made by the Walters. As Salmond J. demonstrated in the Court of Appeal of New Zealand in the ***Waimiha Sawmilling*** case, the basis of alleging of fraud in a registered proprietor, in the majority of cases before the courts, in the absence of a caveat or a court order prohibiting the transaction that led to the proprietor being registered, is the registered proprietor's certain knowledge of an adverse claim. When such a charge is made, it then becomes the responsibility of the court to say on which side of the thin line the registered proprietor whose title is attacked in the basis of fraud stands - the thin line that separates knowledge that does not amount to fraud and knowledge that does.

165. Contrived ignorance or wilful blindness amounts to fraud under the RTA. In this case, Harley Corporation knew (a) that the property it saw did not match the description in the newspaper advertisement; (b) the property was obviously significantly improved and occupied by persons claiming to have purchased the property from the previous registered owner; (c) that the property was valued at much more than the $200,000 it was told was the selling price. An honest man similarly placed would have made further enquiries. Harley Corporation knew that its conduct failed to meet the standards of the reasonable and honest purchaser. This makes a finding of fraud on the part of Harley Corporation inevitable.

166. The bank fell very short of its duties as a mortgagee exercising its power of sale. This conclusion is independent of the admission by Miss Roberts in her affidavit. It took the bank ten years to admit the obvious. The bank misdescribed the property such that had the auction gone through the price would have been much less than the true value. When selling by private treaty it failed to secure a current valuation. It failed to act in a businesslike manner. The bank did not act with a view to obtaining as large a price as may fairly and reasonably, with due diligence and attention, be, under the circumstances, attainable. The bank would have been liable in damages to the estate of Mr. Daley but for my conclusion on the question of fraud.

167. The sale by the bank to Harley Corporation is set aside on the ground of fraud. There is

no suggestion that the bank is unable to repay the sale price of $200,000.00 to the company.

168. Mr. Walters is entitled to the declaration sought by him once he pays the balance of the purchase price. Let me make it clear that I am not making any declaration of property rights between Mr. and Mrs. Walters and I must not be taken as saying that Mrs. Walters has or has not any rights in the property. The declaration is in this form purely on the basis that Mr. Walters is the claimant and defendant in the respective claims.

169. Harley Corporation's claim for an order of possession against Mr. Walters and mesne profits is dismissed.

170. Costs are awarded to the Estate of Rudolph Daley against the bank in claim number CL 1195/D162. This is the claim in which Mr. Daley had alleged that the bank acted in breach of its duty as a mortgagee. The bank resisted this claim for ten long years until September 2006. This concession should have been made long ago. In respect of claims number C.L. 1996/W 055 and C.L. 1997/W 369 costs are awarded to Mr. Etal Walters, however he is to recover costs only in respect of claim number C.L. 1996/ W 055 because both claims cover the same ground. Costs are to be recovered from the bank and Harley Corporation. The only difference being that Harley Corporation was not a defendant in claim number C.L. 1997/W 369. There is no evidence that the defendants incurred any expense in relation to claim number C.L. 1997/W 369. In fact no defences were filed to that claim.

171. Mr. Walters is to recover costs in claim number C.L. 1996/H 094 from Harley Corporation. This is the claim in which the company claimed an order of possession and mesne profits.

172. The attorneys are to prepare and submit an order to give effect to the reasoning and findings of this judgment. The draft should include consequential orders.