"EXERCISE OF THE MORTGAGEE'S POWER OF SALE IN JAMAICA"

A presentation to the Jamaica Bar Association
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EXERCISE OF THE MORTGAGEE'S POWER OF SALE IN JAMAICA

INTRODUCTION

The need to appreciate the extent and manner of the exercise of a mortgagee's power of sale has \become of greater relevance because of the existing economic climate in which there is an increased inability (some may say unwillingness) on the part of a number of mortgagors to meet the monetary obligations of their mortgages. It also takes on added significance in the face of the dilemmas surrounding some of our financial institutions and the consequent realization of securities.

What, therefore, is the determining factor in deciding to exercise this power? It would appear that in a volatile market there will be moves towards "shedding bad securities" in an effort to recoup the outstanding debt balances. In an article entitled "Mortgage Remedies" by Ronald Greenspan, Q.C.[1], in which he examined the use of the remedies of Foreclosure and Power of Sale in Canada. He indicated that historically the remedy of foreclosure is preferred when property values are stable or rising. But with an uncertain market exercise of the power of sale is preferred. However, within our jurisdiction, after all else fails, and particularly in an unstable economic climate, resort is had to the power of sale with foreclosure by law and practice being a last resort remedy. It may be that procedurally this is a less complicated means of securing repayment of the debt than proceeding further to foreclosure. Foreclosure, does, from a mortgagee's perspective, present advantages in terms of vesting the fee simple and allowing the mortgagee to deal with it eg. subdividing for sale as lots. However, we must remember that building societies, which are among our primary lenders, are restricted under the Bank of Jamaica (Building Societies) Regulations, 1995 from keeping land so acquired for a period in excess of three (3) years, unless the time has been extended on application to the Minister of Finance.

STATUTORY BASES OF THE POWER OF SALE

1. Within this jurisdiction land is classified as either:-
   - unregistered; or
   - registered

   For the most part, land has been registered and Certificates of Title issued to the proprietors pursuant to the provisions of the Registration of Titles Act, 1889 ("RTA"). Unregistered land is governed by the Conveyancing Act, 1889.

   Both Acts provide for and regulate the exercise of the power of sale.

   (a) <u>The Conveyancing Act</u>

   Reference may be had to Sections 22, 23 and 24

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[1] http://www.niagara.com

(b) The Registration of Titles Act

Reference is made to ss. 105, 106 and 107

"105. A mortgage ... under this Act, shall when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged ... and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage ... or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee ... or his transferees, may give to the mortgagor ... or his transferees notice in writing to pay the money owing on such mortgage .. or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged ... land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book.

106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage ... be for that purpose fixed, the mortgagee ... or his transferees, may sell the land mortgaged ... or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor ... for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage ... shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

4. The mortgagee may then give the mortgagor written notice to:

- pay the money owing; or
- perform or observe the breached covenant(s)

It is only after the mortgagor's default in payment or failure to perform/observe the covenant(s) continues for:-

- a period of one (1) month after service of a notice; or
- such other period as may be specified in the mortgage,

that the mortgagee may proceed to sell the land by public auction or private contract.

Therefore, one of the preliminary steps to be taken on behalf of a mortgagee wishing to exercise the power is to obtain details of the default and check the instrument for the required period of default.

OBJECTIVE OF SECTIONS 105 AND 106 OF RTA

5. These sections provide that the mortgagee may serve the mortgagor with written notice of the money owing and further that if the default in payment continues for one month after service of such notice or for such other period stipulated in the instrument for that purpose then the power to sell arises.

6. The relevant sections in relation to service of a notice were considered in **Zachariah Sharief v National Commercial Bank Jamaica Limited**[2]. It should be noted that this decision is shortly to be heard on appeal. Briefly, the facts are that the mortgagor was in default. Notice of demand was sent to him at an address other than that in the instrument. The civic address to which the correspondence was sent was also incorrect - 1185 Nostrand Avenue instead of 1184.

Patterson J examined the statutory requirements and held that the provisions regarding service of a notice are directory only and not mandatory. He said:

> *"The general object and paramount importance of the provisions ... must be ... to ensure that the mortgagor is notified of the mortgagee's intention to exercise his power of sale, and to allow the mortgagor time to forestall the sale."*[3]

7. In other words, if notice is given, what is important is that the mortgagee's intention is brought to the mortgagor's attention. To my mind a mortgagor must be presumed to know whether he is in arrears therefore the role of the written notice is only to remind him of his obligation and advise of the mortgagee's intent.

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[2] Unreported, Suit No. C.L. S109/1990

[3] p. 7

8. The presumption has often been that the mortgagee must issue a notice. However based on the wording of s.105 I am of the opinion that this may not be necessary.

Ss. 105 and 106, particularly s. 106, have often been interpreted to mean that there must be service of a notice followed by default in payment for one month or for such other period as may be stipulated, with either period of time commencing after service of a notice.

S. 105 of the RTA indicates that a mortgagee "may" give notice. It is submitted that as a notice is not a mandatory requirement the reference in s.106 to default in payment for one month applies only where there has been a notice. Other than that the mortgagee needs only to rely on default for any period that is stipulated, in the instrument, not commencing or connected to service of a notice. To properly give rise to the interpretation that both time periods are connected to service of a notice, s. 106 would perhaps have read,

> *"If such default in payment shall continue for one month or for such other period as may in such mortgage be for that purpose fixed, after service of such notice ...."*

As a result, many mortgage instruments have provisions expressly excluding the need for service of a notice in accordance with the RTA.

9. However, despite this most if not all practitioners prefer to issue a notice with say a 14-day period for compliance. This is the approach which certainly I endorse as circumstances could arise in which a mortgagor is not truly in default (due to mistake or miscalculation on a mortgagee's part) and arguably it is preferable that the mortgagor should be offered the opportunity of receiving some notice of the mortgagee's intention towards his property.

FORM OF NOTICE OF DEMAND

10. As has already been stated, a notice must be in writing. A question which arises is whether a notice must state the amount being demanded for payment. Authorities suggest that this is not so.

11. A notice given to the mortgagor by a mortgagee as a condition precedent to the exercise of a power of sale is not rendered invalid because it demands payment of more than is due:

Campbell v Commercial Bank Co of Sydney[4]
Clyde Properties Ltd v Tasker[5]

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[4] (1879) 40 LT 137

[5] [1970] NZLR 754

12. There have been some particularly insightful cases involving companies and demands under debentures. It is submitted that the rationale underlying the decisions is sound and applicable to mortgages generally.

13. Reference may first be had to **Bank of Baroda v Panessar and Others**[6]. In this case, a notice demanding repayment of moneys secured by debenture read:

> *"We hereby demand all moneys due to us under the powers contained in the debenture mortgage dated 22nd September, 1981."*

No reference was made to the amount secured and being called on to be repaid.

14. Walton J reviewed the decision of the High Court of Australia in Bunbury Goods Pty Ltd v National Bank of Australasia Ltd[7] in which the notice did not specify the amount owing by the Company. Nonetheless, the Court held that the notice was valid. The underlying reasoning was that the absence of a specific statement of the debt may result in a lack of precise knowledge of what is payable so as to avoid enforcement or realization of the security. However, an onerous burden may be placed on the creditor to be specific, especially when some accounts are so complex and constantly changing. He stated at page 758,

> *"I cannot see any reason why the creditor should not do precisely what he is, by the terms of his security, entitled to do, that is to say to demand repayment of all monies secured by the debenture ... it is quite clear that knowledge of the precise amount of the sums outstanding is only required in the exceptional case (emphasis mine) because in most cases ... the debtor has no real means whatsoever of paying off the sum which is due ... If, on the contrary, the debtor is in a position to pay off the sum demanded and wishes to know the exact and precise sum, he can communicate with the creditor and ask the creditor what sum he is expecting to be paid."*

15. This was in contrast to the position of earlier English authorities where it was thought that the creditor ought to make a demand which was specific as to the amount being claimed.

The Court opted to follow what was described as the good, common sense approach of the Australian case, namely that a notice need not be specific as to amount.

A similar position was adopted by the English Chancery Division in NRG Vision Ltd and Others v Churchfield Leasing Ltd and Others[8].

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[6] [1986] 3 ALL ER 751

[7] (1984) 51 ALR 609

[8] [1988] BCLC 624

16. It is easy to argue that a notice needs to be specific. However, these more recent decisions suggest that correctness as to the amount due or even not stating it, is not essential to validity of notice. Further, it does appear onerous to place all of the burden on the mortgagee to establish the precise amount, especially when time may be of the essence to preserving the value of the security. If a mortgagor is in arrears with payments surely he must know or be presumed to be aware of the fact of his indebtedness. The notice of demand puts him "on notice" and facilitates enquiries on his part during the notice period so that he may comply with the demand. This is also supported by the judgment in Zachariah Sharief (supra) and the statement of Patterson J as to the general object of ss. 105 and 106 of the RTA, viz, to notify the mortgagor of the mortgagee's intention to sell and afford him time to forestall sale. The situation may arise in which a mortgagee is mistaken in demanding any payment from a mortgagor, but the fact of a notice will allow for enquiry on the latter's part.

17. Despite my acceptance of the reasoning I would submit, however, that where it is at all possible and *ex abundanti cautela* the sum claimed as due be stated. In this way one may avoid some of the controversy and, certainly from the mortgagee's perspective eliminate the possibility of a mortgagor seizing the issue of irregularity/invalidity of notice, in this regard.

TIME FOR PAYMENT TO FORESTALL EXERCISE OF POWER

18. Under the RTA, if a mortgagor defaults in payment for one month after service of a notice or defaults in payment for such period as is stipulated in the instrument then the mortgagee may proceed to sell. Therefore, initially the mortgagor has that period within which to pay and prevent exercise of the power. Naturally, if the money is paid prior to entry into a contract for sale, the mortgagee is forestalled.

19. It is not unusual for mortgages, especially those utilized by banks, to stipulate that moneys loaned are payable "on demand". The practice in such instances is often to give the defaulting party fourteen (14) days' within which to settle. Such was the case in Jamaica Citizens Bank v Leon Reid[9].

In that case, the mortgages provided that the power of sale was exercisable "upon any default after any demand for payment of the moneys ... without its being necessary ... to serve notice or demand ..."[10]. The Bank's Attorneys issued a letter informing the mortgagor of the default and requiring settlement within fourteen (14) days. There was no evidence of repayment and the mortgagor was found to be in default. It should be noted

[9] Unreported, Suit No. C.L. J822/1987 and J230/1988 (consolidated)

[10] p. 7

that neither the Court nor the mortgagor/defendant treated with this as an issue, but on the facts the procedure was not disputed.

20. An issue worthy of contemplation is what period of time is sufficient for compliance with a provision for payment "on demand". Again, reference may be had to **Bank of Baroda v Panessar and Others** (supra). The Court reviewed the development and refinement of views on the issue and also compared the English approach to that of Commonwealth authorities.

21. A strict approach was first adopted in England whereby it was felt that with a requirement to pay on demand the debtor must have the funds ready and was not entitled to further time to seek it: **Brighty v Norton**[11]

22. This approach in England developed into an interpretation that the person must be given reasonable time to get the funds from some convenient place, (example, the bank) as it would be improbable and physically impossible for the person to have the money in his possession to discharge the debt immediately. A reasonable opportunity was to be afforded of implementing reasonable mechanics of payment, not to extend any time to raise money: Toms v Wilson[12]
Cripps (Pharmaceutical) Ltd v Wickenden[13]

Walton J in **Bank of Baroda** (supra) pointed out that this is primarily academic as in *"99 cases out of 100, ... the debtor has not money available and the demand is only a step towards some other end ..."*[14]

England therefore adopts a "mechanics of payment" test.

23. Other Commonwealth authorities adopt a somewhat different approach, viz, a "reasonable time" test - a debtor should be allowed a reasonable time within which to pay. As usual, this is fraught with difficulties as the reasonableness test is imprecise:

- what time is reasonable?
- reasonable to do what? - source financing?

What is reasonable has always been said to turn on the particular facts of each case. So where does this test leave a mortgagee or other creditor?

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[11] 122 ER 116

[12] 122 ER 524

[13] [1973] 2 ALL ER 606

[14] p. 760

24. Walton J pointed out that there was perhaps little difference in the actual application of both tests. However, he further correctly indicated that:

- as a commercial matter a short but adequate period is preferred to a reasonable period that is dependent on the peculiar circumstances, as this latter formulation is imprecise;
- the creditor is not likely to be apprised of all the particular circumstances, and, there is greater risk of him underestimating a "reasonable" period of time.

25. None of the cases cited relate to mortgages, but do relate to commercial matters, example debentures in Bank of Baroda (supra). In my opinion the principle is the same as a mortgagee is a creditor, and the same commercial considerations should apply. It is also submitted that the better view is the adoption of the "mechanics of payment" test, for the following reasons:-

- a mortgagor must be presumed to be aware of his financial obligations and the provisions of the mortgage in relation to repayment on demand if in default;
- the "reasonable time" test is riddled with imprecision, not necessarily in tune with commercial reality and exposes a mortgagee/creditor to the risk of underestimating a reasonable time.

In light of this, it is suggested that where monies are made repayable on demand fourteen (14) days notice is not an unreasonable time within which to allow implementation of the mechanics for payment.

SERVICE OF NOTICE

26. S. 105 of the RTA provides that a notice of demand may be served in one (1) of the following ways:-

- by giving/delivering it to the mortgagor;
- leaving it in a conspicuous place on the mortgaged property;
- sending it by registered mail to the address appearing in the Register Book of Titles.

27. Zachariah Sharief (supra) is authority for the proposition that the manner of service is not of general importance. Patterson J stated:

> *"... it may be by any of the means set out in the Act or in the deed itself, and to my mind, it may be by some other means, provided that in such a case, it is clearly shown that the notice did come to the knowledge of the mortgagor".*[15] [emphasis mine]

[15] p. 7

On the facts of the case the Court found that the mortgagor had received the demand notices, although they had been sent to an address other than that stated in the schedule to the mortgage. The fact of service at another address did not vitiate the notice. You will recall that the primary function of the section is to ensure that the mortgagor is reminded of his obligation and to notify him of the intention to sell, so the means by which he receives the notice (once it can be established that it has been received) is secondary.

28. In practice, and again out of an abundance of cation, I have employed all three of the following methods of service, subject naturally to the provisions of the mortgage deed:

- by bearer, where situate in the parishes of Kingston and Saint Andrew; and
- by registered mail; and
- by ordinary mail

In this way, you are armed with a record of receipt either by signature in the delivery book or by the slip of posting.

29. What of a situation where the mortgagor is deceased? Service at the address in the registered instrument has been held to be sufficient.[16] In practice, service on executors/administrators (if known) may be considered **but is not required unless their interest is registered on the title.**

EFFECTIVE DATE FOR EXERCISE OF POWER

30. A notice does not take effect until served. Further the time for determining default in payment by the mortgagor commences from service of notice - s.106 of the RTA. This is of vital importance as the power of sale actually becomes exercisable after there has been default. In this respect it is important to check the mortgage instrument as to the requirements of service and when a notice is deemed to be served eg. a notice may be deemed to be served 48 hours or 7 days after posting by registered mail.

31. Having records of service such as signed acknowledgment and slips of posting takes on great significance as they substantiate service, determine when the default period commences and following from that, when the power of sale becomes exercisable.

32. If no notice is served and a mortgagee relies on default continuing for the period fixed in the mortgage then the power becomes exercisable after the expiry of that time.

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[16] Gunn v. Land Mortgage Bank of Victoria Ltd. (1890) 12 A.L.J.49

THE MORTGAGEE'S DUTY TO THE MORTGAGOR

33. Having examined how the power of sale becomes exercisable, we should now cast our minds to the extent of the duty owed by a mortgagee. This is an area of competing formulations and two (2) main ones can be identified:

- English/Jamaican
- Australian

34. One of the most useful local decisions on this area and generally on the power of sale is Moses Dreckett v Rapid Vulcanizing Company Limited[17]. The judgment of the late Carberry J is a virtual treatise on the case law in the area and well worth perusing.

Briefly, the facts are that the plaintiff/mortgagor owned land jointly with his mother in Jamaica. The mortgagor granted a mortgage to the defendant who was to supply labour and materials to build on the land. The mortgagor fell into arrears and the property was sold at auction for $6,400.00 which realised $117.00 for the mortgagor after repayment of the debt and attendant costs. Eleven months later, the property was resold for $14,400.00 - a 125% profit. The issues focussed on the sale at auction, whether it was properly conducted and the duty owed by the mortgagee.

35. The issue is far from being free of difficulty. The law has had to deal with two (2) concerns:

- concern for the mortgagor and a wish/need to protect him from a mortgagee recklessly disposing of his property; and
- enabling a mortgagee to recover his money from a defaulting mortgagor by realising the security for the debt.

36. The first approach was demonstrated in decisions such as Marriott v Anchor Reversionary Co Ltd[18] and Wolff v Vanderzee[19] which can be summarised by saying that a mortgagee was bound to act with the same regard and prudence of the owner with a view to having a sale of the mortgaged property to the greatest advantage.

37. The second approach is exemplified in the dicta of Chitty J in Farrar v Farrar[20] which is well known:

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[17] Unreported, SCCA 35/1983

[18] 66 ER 191

[19] 20 LT 350

[20] (1888) 40 Ch D 395

"A mortgagee exercising a power of sale is not a trustee of the power ... He is bound to sell fairly and to take reasonable steps to obtain a proper price ... He cannot be required to run any risk in postponing the sale, or to speculate for the mortgagor's benefit".[21]

ENGLISH/JAMAICAN FORMULATION

38. The English formulation is of greatest significance as our Court of Appeal granted the visa for its admission into Jamaican jurisprudence in **Moses Dreckett** (supra).

39. **Farrar** (supra) spoke to reasonableness of the mortgagee's actions - taking reasonable steps to obtain a proper price. However, in **Kennedy v De Trafford**[22], the House of Lords expressed the duty as one of "good faith". Lord Herschell could not give an exhaustive definition but said:

"... if he wilfully and recklessly deals with the property, in such a manner that the interests of the mortgagor are sacrificed ... he has not been exercising his power of sale in good faith".[23]

40. Carberry J in **Moses Dreckett** (supra) correctly pointed out that this does not afford much guidance as to what is "sacrifice" or "reckless" e.g. is it a sale at half the proper price?

Over time, certain clear points have come to the fore and Carberry J highlighted these:

- a mortgagee should not enter into a collusive sale;
- a mortgagee might be held responsible if he or his auctioneer misdescribed the property so that it fetched less when sold;
- a mortgagee would be liable if he took possession and misused the property thereby reducing its value.

41. The decision cited as the *locus classicus* in formulating the English approach is the Court of Appeal's decision in **Cuckmere Brick Co Ltd v Mutual Finance Ltd**.[24] In this case, the auctioneer misdescribed the property in ads and omitted the fact of planning approval to construct flats. It was alleged that this resulted in a failure to attract builders and the land being sold for less than true market value.

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[21] p. 398

[22] [1897] AC 180

[23] p. 185

[24] [1971] 2 ALL ER 633

The issue was whether a mortgagee's duty on sale included a duty to take reasonable care to obtain a proper price, or was it sufficient to act honestly and without a reckless disregard of the mortgagor's interests?

The Court concluded that:

> "... *a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it*".[25]

We should note that the duty is to take reasonable precautions to obtain the true market value not to obtain this value.

42. It has been suggested that with the growth of the tort of negligence, it was inevitable that the Court would be disposed to the conclusion that a duty of care existed. The proximity could scarcely be closer, so surely some duty must exist.

43. The decision has been reiterated and applied in a number of cases, notably: Standard Chartered Bank Ltd v Walker[26]; Tse Kwong Lam v Wong Chit Sen [27]; Predeth v Castle Phillips Finance Co Ltd[28]; Lazard Brothers & Co (Jersey) Ltd v Worrall[29]; Parker-Tweedale v Dunbar Bank plc & Others (No 1)[30]; National Westminster Bank plc v Fairall & Another[31]; Downsview Nominees Ltd v First City Corp Ltd[32]; Joan Adams v Workers Trust & Merchant Bank Ltd[33]; Zachariah Sharief (supra); Rosehall Ltd v Chase Merchant Bankers (Ja) Ltd[34].

44. The New Zealand Courts also seem open to this formulation: Clark v UDC Finance Ltd.[35]

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[25] p. 646

[26] [1982] 3 ALL ER 938, CA

[27] [1983] 3 ALL ER 54, PC

[28] [1986] EGLR 144, CA

[29] Unreported English Court of Appeal, hearing date 22/11/88

[30] [1990] 2 ALL ER 577, CA

[31] Unreported English Court of Appeal, hearing date 15/11/93

[32] [1993] 3 ALL ER 626, PC

[33] Unreported, Suit No. C.L. A130/1989

[34] Unreported, Suit No. C.L. E211/1976

[35] (1985) 2 NZLR 636

AUSTRALIAN FORMULATION

45. We often look to Australian precedents and legislation in dealing with our RTA, however, in this area we are at variance. "Downunder" this has been described as a lesser duty of "good faith". In **Robert Rafec Oayda and A&S Oayda Investments Pty Ltd v Merchantile Mutual Life Insurance Co Ltd**[36], a 1994 decision of the Federal Court of Australia, Lindgren J stated that:

> *"the issue has usually been conceived of as involving a distinction between a duty of good faith or a duty not to act wilfully or recklessly thereby 'sacrificing' the mortgagor's interest ... The lesser duty of 'good faith' had been accepted as the one applicable in Australia by judges of this Court".*

DUTY TO SUBSEQUENT MORTGAGEES

46. A duty is owed not only to the mortgagor but also to any subsequent mortgagees or incumbrancers. In this regard one should refer to the Privy Council decision in **Downsview Nominees Ltd and Anor v First City Corp Ltd and Anor** (supra). The case relates to enforcement of debentures by a receiver, however, the Privy Council indicated that for the purposes of the case there is no material difference between a mortgage, charge or a debenture as each creates a security for the repayment of a debt.

Lord Templeman stated,

> *"The mortgagor can mortgage the property again and again. A second or subsequent mortgage is a complete security on the mortgagor's interests subject only to the rights of prior incumbrancers. If a first mortgagee commits a breach of his duties to the mortgagor the damage inflicted by that breach of duty will be suffered by the second mortgagee, subsequent incumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security (emphasis mine)."*[37]

47. Therefore, the duty owed to subsequent mortgagees by a mortgagee exercising the power of sale is the same as that enunciated in **Moses Dreckett** (supra).

EXTENSION OF MORTGAGEE'S DUTY

48. The English Courts have had occasion to examine the question of whether a mortgagee owes a duty to a mortgagor who sells property with the former's consent. The Court of

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[36] Fed. No. 898 of 1994
See also http://www.austlii.edu

[37] p.634

Appeal in 1988 was presented with the following facts in Lazard Brothers and Co. (Jersey) Limited v Worrall (supra):

A mortgagor in default put the security up for sale. The sale realized less than the alleged market value and could not settle the indebtedness to the mortgagee. The mortgagee instituted proceedings to recover the balance due. The mortgagor contended that the sale could not have occurred without the mortgagee's consent, and that although the sale was conducted by the mortgagor, the mortgagee owed a duty to ensure that the full value was realised.

The mortgagor argued that the basis of the duty lay not so much in the capacity of the parties as mortgagor and mortgagee but in the "neighbour" principle. Their proximity as neighbours brought them within the ambit of Cuckmere.

The Court rejected the argument as the preparation and conduct of the sale was entirely in the hands of the mortgagor and his professional advisers and he chose the moment of sale.

49. Of note, however, is the fact that the Court of Appeal left open the possibility of a mortgagee owing a duty of care to a mortgagor in consenting to a proposed sale of the security by the mortgagor. Templeman LJ gave the example of a mortgagor making it plain that he relied on the mortgagee to advise him as to the proper price and felt that it would be possible that such a duty might have arisen.

50. An argument such as was attempted in Lazard (supra) could, it is submitted, only be rationalized by application of the "neighbour" principle i.e. actionable as negligence due to the proximity of the parties and the reliance placed by the mortgagor on the mortgagee. The categories of application of the neighbour principle are not closed where not covered by previous authority, however, as Templeman LJ pointed out it is material for the court to take into consideration whether it is just and reasonable so to do. The formulation of the duty owed by a mortgagee exercising the power of sale as originated in Cuckmere (supra) brought into play the fact of proximity between the parties and the consequence of a legal obligation to take reasonable care to obtain the true market value. However, with the final formulation of the duty it is submitted that the example of Templeman LJ would/could not fall within its ambit, not being a sale by a mortgagee.

51. The application of the Cuckmere /Moses Dreckett principle in circumstances of sale by a mortgagor may become more tenable if the fact of agency between the mortgagor and mortgagee can be established, ie that in the sale of the property the mortgagor was acting as the mortgagee's agent, therefore the acts of the agent/mortgagor were the acts of the principal/mortgagee and the duty should of necessity have been observed. Regrettably, I have found no cases to support this, but it is an argument which may be explored.

SALE TO MORTGAGEE

52. Suffice it to say that it is trite law that a mortgagee cannot sell the mortgaged property to himself.

> *"For a sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take property subject to it at a price fixed by himself, even though such price be the full value".*[38]

53. The rule also applies to the following the following persons[39]:-

- any officer of the mortgagee
- any attorney or other agent acting for the mortgagee in the sale

54. This is in keeping with the basic tenet that the power of sale is given to the mortgagee to enable him to better realise his debt. The aim of a mortgage is not to vest the fee simple in the mortgagee and s.105 of the RTA specifically, states that it does not operate as a transfer. As such, a mortgagee cannot become vested with the legal estate except pursuant to an order for foreclosure.

AUCTION VS PRIVATE TREATY

Time to Exercise Power

55. Is a mortgagee bound to wait until a particular time before exercising the power of sale either by auction or private treaty? The authorities all make it clear that this is not so. A mortgagee is free to exercise the power at any time of his own choice, subject of course to the duty imposed on him to take reasonable steps to obtain the proper price. There is no obligation to sell at a particular time and thereby possibly reduce any loss which may be sustained by the mortgagor.

56. A number of authorities support this:-

Moses Dreckett (supra)

Joan Adams v Workers Trust & Merchant Bank Ltd (supra)

National Westminister Bank plc (supra)

China and South Sea Bank Ltd v Tan[40]

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[38] Farrar v. Farrars, Ltd. (1888) 40 Ch. D 395 at 409.

[39] Hodson v Deans [1903] 2 Ch. 647; Parnell v Tyler (1833) 2.L.J. Ch. 195

[40] [1990] 1 A.C. 536, P.C.

Need for Auction

57. It is usual that a mortgagee first put mortgaged property up for sale at public auction and if not successful in disposing of it there, to then proceed to sell by private treaty. However, it is not a legal requirement that this course of events be adopted.

58. S.106 of the RTA authorises the mortgagee to sell by public auction or by private contract. The procedure referred to in the foregoing paragraph is, it is submitted, usually adopted out of an abundance of caution - to demonstrate that there has been exposure to a wide market in a effort to obtain the best price.

59. The result of obtaining the best price can be secured by proceeding directly to sale by private treaty and the onus will fall on any mortgagor who contends that the duty has not been met to prove this. The ways to achieve this are discussed later.

60. Briefly reference may be had to Robert Rafec Oayda (supra). The case involved sale of property by private treaty under power of sale. The essence of the mortgagor's submission was that the only way for the mortgagee to discharge its duty was to advertise and promote the property and submit it to public auction so that the market could be tested. The Federal Court of Australia was of the opinion that to say that a mortgagee must sell by public auction is inconsistent with a power to sell by private treaty and that advertising, promotional and public auction procedure are not the only means of achieving a sale at the best price that's reasonably obtainable.

61. Whilst I appreciate the rationale behind proceeding first to public auction, I wish to emphasize that it is not essential and that circumstances may arise in which the property can best and readily be disposed of by private treaty. Provided that the necessary guidelines are adhered to, a mortgagee should not feel precluded from pursuing such a sale. If a mortgagor is intent on preventing the disposition of the mortgaged property, regardless of whether there is cause or not, he will seek to take legal action to do so and adherence to every procedural guideline and offering the property at auction first will not prevent him.

DISCHARGING THE DUTY - SEEKING THE TRUE MARKET VALUE

"True Market Value"

62. Moses Dreckett (supra) has echoed Cuckmere in establishing that "true market value" is synonymous with "proper price" and "best price". In this regard specifically see the first instance decision and judgment of Wolfe J (as he then was).[41] This decision was affirmed by the Court of Appeal.

[41] Unreported, Suit No. C.L. D134/1976 at p.7

63. Cases do not prescribe a formula for establishing "true market value" eg. not less than 10% of current market valuation. Instead, guidelines have been set down to determine whether the price obtained at the end of the day can be regarded as the "best price". These now will be examined within the context of sales at public auction and private treaty.

Auctions

64. Sale at public auction represents the more usual method of disposing of mortgaged property. The guidelines in such sales are set out Moses Dreckett (supra) and reference should be had to the judgments at first instance and on appeal.

(a) Valuation Reports

At first instance Wolfe J. was of the opinion that failure to obtain a prior valuation could not affect the price obtained at auction as bidders do not make bids on the basis of prior valuations received by the mortgagee.

> *"Prima facie the object of sale by auction is to give the world at large an opportunity of making an offer at the sale with the hope that in so doing the "best price" or the "proper price" or the true market value ... will be realised. In the absence of any allegation of fraud or negligence in supplying information as to the mortgaged property or impropriety in the conduct of sale from which it can be inferred that but for such misconduct a better price might have been realised the highest bid at an auction must of necessity be deemed to be the best price (emphasis mine)".*[42]

65. On appeal, Campbell JA reinforced this by indicating that a mortgagee is not obliged to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price. Reliance can be placed on the independent, competitive bids even if there is poor attendance or exceptionally low bids. Failure to ascertain current market value by valuation does not amount to a breach of duty in an auction sale in which the mortgagee has not participated and which is not tainted by impropriety.

66. Of note is also the decision in Zachariah Sharief (supra). Here, the mortgaged property was sold at auction. The mortgagee obtained a valuation report which was found to be more reliable than that of the mortgagor. The Court commented that the mortgagee acted with prudence in obtaining the report. However, the property sold at a price slightly below the estimated market value but having regard to the bidding which took place it was held that the price was not unreasonable nor at an undervalue.

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[42] p.8

(b) Collusion and Impropriety

67. The principle to be extracted from Moses Dreckett (supra) and others is that if the sale is tainted by collusion or impropriety or has not been properly advertised then the mortgagee will be held to not have fulfilled his obligation.

68. In Tse Kwong Lam (supra) a company bought property at auction. The mortgagee was a director of the company with a large beneficial interest and entirely responsible for financing the company. His wife and children were the other shareholders. His wife was appointed to attend the bid at the auction. The mortgagee provided the reserve price. His wife made the only bid at the reserve price and obtained the property for the company. The money was advanced to the company by the mortgagee. Here, the company knew everything about the property from the mortgagee. The Privy Council felt that there had been no competitive bidding and that the company purchased at a price fixed by the mortgagee. This was obviously an instance of collusion.

69. The case is also authority for the proposition that poor attendance and low bidding at an auction, without more, do not prevent a mortgagee from accepting the best bid there.

(c) Reserve Price

70. Moses Dreckett (supra) is authority for the proposition that in a sale by auction there is no obligation on the mortgagee to fix or have fixed a reserve price because he is entitled to accept the highest bid even if it is below the market value as indicated by a valuator.

(d) Guidelines

71. In sales by public auction the following are therefore the pertinent guidelines:-

- a mortgagee need not obtain a valuation of the property being sold, although this may be prudent;
- a mortgagee need not set a reserve price;
- in the absence of collusion or impropriety the mortgagee is entitled to accept the highest bid as reflective of the true market value, despite low bidding and poor attendance.

72. One may question whether bidding at auction can represent the true market value. Traditionally, people bid low at these sales so is this an accurate reflection of what the property can fetch on the market? Are the 10 or 12 persons present at the auction representative of the market place? Short of having a specific formula to apply the answer seems to be this: *The property having been exposed through the published notices has come to the attention of the persons who are willing to bid for it. They therefore represent the*

market place within which the property may be disposed of and the bidding reflects the best price which can be obtained via this medium at this time.

Private Treaty

73. Whilst the duty is the same it seems to be harder to discharge when selling by this means. The extent of this is seen in the decision in Joan Adams (supra). In this case the Bank sold the mortgagor's property by private treaty. It accepted an offer of $395,000 and declined to accept a higher offer from a purchaser identified by the mortgagor. A valuation report was obtained by the mortgagee in **December 1988** who subsequently made an Agreement for Sale by private treaty in **June 1989.** It did not advertise the property. The court determined that the mortgagee had not discharged its duty. The Court spoke to the need to expose the property to "prospective purchasers in the open market".[43]

(a) Valuation Reports

74. In Joan Adams (supra) the mortgagee obtained a valuation report of the open market valuation in December 1988 and sold six (6) months later without further valuation or advertisement. However, this was not sufficient to discharge the duty.

75. Another decision worth examining is that of the 1986 English Court of Appeal in Predeth v Castle Phillips Finance Co. Ltd. and Anor (supra). In this case a mortgagee disposed of property by private treaty. The valuator was instructed to carry out a "crash sale" valuation, which connotes a more rapid sale than "forced sale". This would have given the mortgagee the lowest valuation. The court affirmed that the mortgagee had failed to obtain a valuation on the basis which the exercise of reasonable care would require and in compliance with its duty to the mortgagor ie. current market value.

76. So regard must be had not only to the fact of obtaining a valuation report but also to the basis of the report. The cases appear to consider whether the report is for:-

- current market value vs another value, such as crash sale;
- the property in its existing state or in a future state e.g. in instances in which construction is underway is the value reflective of the incomplete or the anticipated completed state. This was considered in Zachariah Sharief (supra);
- the purpose of sale or otherwise eg. loan financing.

(b) Advertising

77. The Courts also examine what steps are taken to advertise the property and bring it to the attention of prospective purchasers. As stated before, in Joan Adams (supra) the

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[43] p. 6

mortgagee did not advertise before selling by private treaty. This, coupled with a misdirection on its part as to whether or not there was a binding contract in place at the time the mortgagor identified a purchaser offering a higher price, led the Court to conclude that the standard of the duty of care had not been met.

78. Similarly in **Predeth** (supra) the mortgagee failed to instruct any agents to expose the property and his own efforts were accepted by the Court of Appeal as wholly inadequate.

(d) Guidelines

79. What, therefore, is required before entering into a sale by private treaty? The following guidelines are suggested:-

- obtain a valuation report indicating current market value and reflective of the mortgaged property in its current state and condition
- expose the property to open market by adequate advertising viz:
  - listing with realtors
  - accurate advertising in newspaper akin to the method utilised by auctioneers, over a reasonable period of time (note that sales by auction usually have at least four [4] insertions).
- be cognizant and have regard to offers procured by the mortgagor or otherwise prior to the entry into a binding agreement for sale.

EFFECT OF TRANSFER BY MORTGAGEE

80. This is addressed by s. 108 of the RTA. Registration of a transfer by a mortgagee vests the mortgagor's estate and interest in the property in the purchaser free of all liability under the mortgage or any subsequent registered mortgage. The purchaser is deemed to be a transferee.

APPLICATION OF SALE PROCEEDS

81. The relevant section is 107 of the RTA. The priority for application is as follows:-

1. expenses of and incidental to the sale and arising due to the default by the mortgagor - stamp duty, transfer tax, auctioneers costs - cost of valuation report (if any) etc.
2. payment of monies due under the mortgage;
3. payment of subsequent mortgages and of any money due and owing in respect of any subsequent charge in order of priority;
4. surplus (if any) to the mortgagor.

The mortgagee is a trustee of the surplus sale proceeds for persons interested according to their priorities.

82. In relation to the application of proceeds mention may be made of the 1995 Court of Appeal decision in Halifax Building Society v Thomas & Anor.[44] Here, a mortgager, by fraudulent misrepresentations, obtained a 100% mortgage. He fell into arrears and the power of sale was exercised. The debt was satisfied and a surplus left. The mortgagee placed the money in a suspense account and sought a declaration that it was entitled to retain the surplus. The declaration was not granted as the Court was of the opinion that the mortgagor's wrong doing did not entitle the mortgagee to the surplus. There was an inconsistency between being a secured creditor and yet claiming more than that to which it was contractually entitled and had fully recovered. The mortgagee was required to hold the surplus in trust for the mortgagor.

83. The wording of the relevant section of the English Law of Property Act, 1925 is different from our and speaks specifically to the money being held "in trust" to be applied in much the way, that our legislation provides. Despite this the effect is the same viz, to render the mortgagee liable to pay over the surplus to the mortgagor or hold it to his account.

PROTECTION UNDER S. 106

84. S. 106 of the RTA allows the mortgagee to sell once there has been default and provides that there shall be no liability to the mortgagor for any loss sustained. It further provides that,

> *"... no purchaser shall be bound to see or inquire such default ... shall have been made ... or whether such notice ... shall have been served or otherwise into the propriety or regularity of any such sale ... and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages ..."*

Effect on Purchaser

85. The section speaks of not being bound to enquire into circumstances giving rise to the sale, but does this relieve a purchaser from the effects of the doctrine of notice?

86. The section is similar in wording to s. 104(2) of the Property Law Act, 1928 in Victoria. In effect, this provided that either before or on conveyance, a purchaser was not bound to enquire into whether the power of sale was properly exercised, i.e. that occasion arose to authorise the sale or notice given or otherwise, and that any person damnified had his remedy in damages.

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[44] [1995] 4 ALL ER. 673.

This wording was considered by Voumard in the text "The Law Relating to the Sale of Land in Victoria"[45] who said:

> *"The enactment ... does not entirely abolish the doctrine of notice ... It says, in effect, that a purchaser will not be affected with notice of an irregularity by reason only of his having failed to make enquiries as to the circumstances under which the sale is made. His title will still be impeachable if at the date of the contract he has actual knowledge of any irregularity or impropriety, or, it seems, if he has knowledge of factors which aroused his suspicion as to the regularity of the sale, but wilfully chooses to shut his eyes."*[46]

87. We can also look at s. 104(2) of the Law of Property Act, 1925 which also provides that the purchaser has no obligation to inquire into the exercise of the power. This was considered by Tyler in "Fisher and Lightwood's Law of Mortgage."[47] It is said:

> *"The section does not provide, as was usual in express powers of sale, that a purchaser shall not be affected by knowledge that the notice required by the power has not been given. Since he is not protected by a mere provision that he shall not be bound to ascertain or inquire into the existence of the notice, he is ... liable to have the sale set aside if he took with actual or constructive notice of an irregularity, such as failure to give proper notice."*[48]

88. We should also consider the case of Selwyn v Garfit[49], a Court of Appeal decision. This case did not involve a statutory provision but an express clause in the mortgage providing that upon any sale in pursuance of the power of sale a purchaser would not be bound to inquire into the default or propriety or regularity of the sale. Kay J in delivering judgment at first instance described the case as one in which a purchaser bought from a mortgagee with knowledge that proper notice had not been given. He is quoted at page 280,

> *"if ... a purchaser buys from the mortgagee, knowing at the time that the mortgagee ... has no right to exercise the power ... it would be a gross injustice to allow such a purchaser to maintain the purchase as against the mortgagor."*

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[45] 2nd Edition, 1965

[46] p. 163 et seq.

[47] 8th Edition, 1969

[48] p. 310

[49] 38 Ch D 273

The sale was set aside. The purchaser appealed. The Court of Appeal dismissed the appeal on the basis that the purchaser could not be allowed to say that the sale was regular in light of knowledge that things which ought to have been done were not.

89. To my mind it would appear that within this jurisdiction, s. 106 of the RTA ought not to be interpreted as providing a shield or absolute defense in the face of knowledge, actual or constructive, of some irregularity or impropriety in the exercise of the power which results in the sale . The section is therefore of limited protection to a purchaser.

90. The result of this is that it is open to argue that in the face of actual or constructive notice, to a purchaser, of some impropriety in the sale to him, a mortgagor ought to be entitled restrain the sale by obtaining an injunction. A mortgagor in these circumstances, it is submitted, is not compelled to only have damages as his remedy.

WHEN PROTECTION ACCRUES

91. Does the protection accrue on entering the contract or only on completion? S. 106 speaks to a mortgagee being able to sell and a purchaser not being bound to inquire into, inter alia, impropriety. Therefore, it would seem that upon a sale, there is no obligation to make inquires. In the case of Life Interest & Reversionary Securities Corporation v Hand-in-Hand Fire & Life Insurance Society[50], Stirling J referred to a decision in which an express provision in a mortgage provided that, inter alia, upon a sale there was no obligation to inquire. He said,

> *"Observe the language of the proviso. First of all, it applies to any sale (not conveyance) [emphasis mine]..."*[51]

Reference to "purchaser" was interpreted as a person who entered into a contract for purchase.

92. This language was contrasted with the wording in the Conveyancing Act, which said "Where a conveyance is made ..." This was interpreted as providing protection only after a conveyance. This has been supported by Voumard in his text at page 163. Voumard

constructive notice of an irregularity it is open to the mortgagor to intervene. It appears that there are instances in which mortgagors successfully obtain injunctions to stall sales in circumstances in which it has not been established that the purchaser has been affected by notice. In light of the foregoing interpretation of s.106, and as difficult as this may appear, to my mind this should not be so.

94. When a transfer has been effected and a purchaser vested with the legal estate, except where the knowledge by the purchaser of the impropriety is such as to amount to fraud, the mortgagor's relief at the end of the day may only lie in damages pursuant to s. 162 of the RTA.

95. Regrettably, I have not been able to unearth any local written authority on the operation and effect of s. 106 in particular in relation to application of the doctrine of notice.

PRECONDITION TO INJUNCTIVE RELIEF

96. The primary weapon of the mortgagor is his ability/right to obtain injunctive relief against the mortgagee to restrain him from exercising the power of sale. This has been seen in relation to s. 106 of the RTA and the effect of the doctrine of notice. An issue which has arisen and been determined by our Court of Appeal is whether a mortgagor must make payment into Court of the amount claimed before an injunction will issue.

97. The leading Jamaican decision is SSI (Cayman) Ltd et al v. International Marbella Club S.A.[52] This was an appeal from an order restraining exercise of the power of sale on condition that, inter alia, the mortgagor make monthly payments to the mortgagee for maintenance of the mortgaged property. The mortgagee had made demand for repayment of the debt owed amounting to US$6,338,566.00. The Court, comprised of Justices of Appeal Rowe, Carey and Downer, affirmed the order but varied the condition to provide that the amount claimed be paid into Court in order for the mortgagee to be restrained.

Carey J.A. stated at pages 14-15:-

> *"There is no question but that the Court has an undoubted power to restrain a mortgagee from exercising his powers of sale, but if it so orders, the term invariably imposed is that the amount claimed must be brought into Court .. The rule is therefore well settled and indeed ... nothing has been said, which in any way permits a Court of Equity to order restraint without providing an equivalent safeguard, which is, the payment into Court of the amount due or claimed in dispute."*

[52]Unreported, SCCA 57 of 1986

98. This decision has not been disturbed and therefore represents the law as it currently stands. However, it appears that there are instances in which injunctions are granted without payment into Court. Attorneys acting for mortgagors and mortgagees are therefore reminded of this obligation.

CONCLUSION

The subject area is expansive and there are many hypothetical situations and nuances which could perhaps still be explored. The focus of the paper has been to highlight the legal requirements of the exercise of the power and demonstrate some areas in which we may need to be more prudent and others in which we may at times be too cautious.

The mortgagee's power of sale is a far reaching one which has repercussions on the mortgagor, subsequent mortgagees, purchasers under the power and especially on the donee of the power if suit is filed or other legal action taken by a mortgagor. Due regard must at all times be given to the established duty of care but without being a slave to the mortgagor's wishes and interests, which will not necessarily coincide with the mortgagee's need to settle the debt.

As attorneys, although unfortunately at the expense of our clients (no pun intended), it can only be hoped that we will see more written judgments tackling some of the nuances of the area and further delineating the "dos" and "don'ts" of exercising this power. This will go a far way in eliminating much of the guesswork involved in determining the "safest" manner to proceed so that both mortgagees and mortgagors can be guided on the effective and correct method of exercising the power of sale

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