[2015] JMSC Civ 161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013HCV05656

BETWEEN	**DENNIS ATKINSON**	**CLAIMANT**
A N D	**DEVELOPMENT BANK OF JAMAICA**	**1ST DEFENDANT**
A N D	**BUSINESS RECOVERY SERVICES LIMITED**	**2ND DEFENDANT**
A N D	**KENNETH TOMLINSON**	**3RD DEFENDANT**
A N D	**DIGIORDER JAMAICA LIMITED**	**4TH DEFENDANT**

Mr. Joseph Jarrett instructed by Joseph Jarrett and Company for the Claimant.

Mrs. Sandra Minott-Phillips, Q.C. and Ms. R. McLarty instructed by Myers, Fletcher and Gordon for the 1st Defendant.

Heard: 9th and 31st July, 2015

Mortgage – Whether subsequent mortgagee is a mortgagee in possession – Whether the proposed exercise of a prior mortgagee's power of sale must take into account the interests of the second mortgagee – Whether the prior mortgagee is a trustee for the subsequent mortgagee.

Evan Brown, J

[1] The claimant, an hotelier and businessman of 14 James Avenue, Ocho Rios, St. Ann, by an amended Fixed Date Claim Form (AFDCF) filed on the 7th February, 2014, sought, inter alia, the following orders:

> "1. *A declaration that the Claimant is a mortgagee in possession of the property known as 14 James Avenue. Ocho Rios, in the parish of St. Ann. registered at Volume 1269 Folio 97 of The Registered Book of Titles, whose mortgage is registered as No. 1486323 on the 4"' day of September. 2007 for the sum of Six Hundred and Sixtv Eight Thousand One Hundred and Sixteen Dollars andTwenty Eight Cents United States Currency (US$668,116.28).*
>
> *2. A declaration that any sale of the property registered at Volume 1269 Folio 97must be at a price which takes into account the claimant's interest as a mortgagee and must be at the market value or not less than the forced sale value.*
>
> *3. A declaration that the proposed sale of the property registered at Volume 1269 Folio 97 by the 1st Defendant to the 4th Defendant for a consideration of $50,000.000.00 Jamaican Dollars was below the forced sale value and a breach of the 1st Defendant's obligations as a trustee for the Claimant and the mortgagor/s*."

The other orders being sought in the AFDCF were abandoned. Those orders were abandoned as they related to the 2nd 3rd and 4th defendants, against whom, the claim was discontinued.

Background

[2] By an Agreement entered 30th March, 1998, the Development Bank of Jamaica (DBJ) granted a loan to Ocean Sands Resorts Limited ("Ocean Sands"') up to a maximum of US$308,106.00 for the expansion and upgrading of the property (a 29-room hotel at 14 James Avenue, Ocho Rios, St. Ann, registered at Volume 1269 Folio 97 of the Register Book of Titles). At the time the loan was granted the claimant was the Managing Director of Ocean Sands Resorts Limited.

[3] The security for the loan included a guarantee of repayment by the claimant personally, supported by his guarantor's mortgage of the property given on May 22,

1998 and registered on the title on March 30, 1999. Ocean Sands Resorts Limited did not repay the debt in accordance with the terms of the loan and, in an effort to sell the property and pay off the debt, the claimant, with the consent of DBJ, agreed to transfer the property to Cash Plus Development Limited for US$1m, subject to DBJ's mortgage. The sale to Cash Plus Development Limited was by way of cash and a vendor's mortgage of US$668,116.28. The transfer of the property to Cash Plus Development Limited was effected by an instrument of transfer dated 9th July, 2007. That transfer was registered on the title for the property on September 4, 2007.

[4] DBJ was a party to the instrument of transfer dated July 9, 2007. Under that instrument of transfer, Cash Plus Development Limited assumed the liability for the payment of the total sum outstanding to DBJ. The sale required Cash Plus Development Limited to make a lump sum of US$250,000.00 to DBJ, which it did on August 13, 2007, followed by monthly instalments. However, Cash Plus Development Limited failed to make any further payments on the debt owed to DBJ. DBJ therefore tried to realize the mortgage security. To that end, DBJ contracted Kenneth Tomlinson on September 30, 2010, to, among other things explore the most beneficial method of realization of the security for its loan to Ocean Sands.

[5] On May 2, 2009 the Registrar of Titles noted the grant of an injunction prohibiting registration of any dealings in the land entered at Volume 1269 Folio 97 of the Register Book of Titles until further order of the court. The injunction was obtained on the application of the Trustee in Bankruptcy for Cash Plus Development Limited and was discharged on DBJ's application made at the request of Joseph Jarrett & Co, attorneys for Dennis Atkinson, who indicated that they had identified a prospective purchaser. The purchaser, however never came forward.

[6] By instrument dated January 4**,** 2010, the claimant, holding himself out as the registered proprietor of the property, 'leased' a minimum of 15 rooms as well as the area above the gift shop of the property, for $300,000 per month to Lornalee Nation, trading as "College of Hospitality &Vocational Skills" to operate as a college. However, Miss Nation was unable to make the payments and the "lease" was terminated.

[7] By letter dated March 31, 2010, the claimant's present Attorney-at-Law wrote to DBJ stating his commitment to pay $150,000 per month towards the loan extended to Ocean Sands by DBJ and representing that the first payment had been dispatched by post two weeks prior. DBJ never receive the payment.

[8] The property was advertised several times by Kenneth Tomlinson, who was appointed a receiver under the mortgage to DBJ, in the local daily newspapers and on Mr. Tomlinson's website, on DBJ's behalf. The highest offer received at the time of the filing of the claim, was that made by Digiorder (Ja) Limited on September 6, 2013. Digiorder (Ja) Limited wished to purchase the property for J$50,000,000.00. In accordance with its obligations under the Registration of Titles Act, DBJ issued a statutory notice dated October 10, 2013 to the registered proprietor, Cash Plus Development Limited, of its intention to sell the property.

Is the claimant a mortgagee in possession?

[9] The first question for my determination is, is the claimant a mortgagee in possession? Having given a vendor's mortgage to Cash Plus Development Limited, the claimant is de jure a mortgagee, shall I say, simpliciter. Whether or not the claimant was a mortgagee in possession is a question of both fact and law. I will outline the facts upon which the claimant relied to support his assumed status vis-a-vis Cash Plus Development limited.

[10] In his affidavit filed on the 15th October, 2013, the claimant said when Cash Plus Development Limited defaulted on his vendor's mortgage he served it a statutory notice and "took back possession of my property." He has been in possession ever since with the full knowledge of DBJ. He discovered the property to be in a state of disrepair and set about the task of rehabilitation. He embarked on numerous but unsuccessful schemes to attract investors. The claimant was therefore in physical possession of the property and, if doubt there be, his affidavit proclaims the address of the property as his place of residence.

[11] The submission of learned counsel for the claimant appears to be premised on the correctness of the steps taken by the claimant. That is, the service of a statutory notice and physically entering the mortgaged property. All counsel said on the point was, at all material times the claimant was a mortgagee in possession of the property known as 14 James Avenue (also known as Ocean Sands Hotel), Ocho Rios in the parish of St. Ann. Respectfully, that is merely to repeat the assertion contained in the claimant's affidavit.

[12] For her part, learned Queen's Counsel for the 1st defendant submitted that the right of a mortgagee to enter the mortgaged premises must be preceded by foreclosure proceedings before the Registrar of Titles. If a mortgagee wishes to have possession of the mortgaged property, the mortgagee has to apply for foreclosure. That is so because in Jamaica, which operates under the Torrens system, a mortgagee gets only the right to sell upon the execution of the mortgage. The submission continued, the mortgagee must first try to exercise the power of sale under the mortgage. It is only after the failure to redeem the mortgage through the exercise of the power of sale that the application for foreclosure can be made.

[13] Upon the application for foreclosure being made, if the Registrar grants the foreclosure application, an order for foreclosure is then entered into the Register Book of Titles. The effect of the foreclosure order is to vest in the mortgagee, or his transferee, the mortgaged land, free from all rights and the equity of redemption of the mortgagor, or any person claiming through or under him subsequent to the mortgage. Upon the entry of the foreclosure on the Certificate of Title, the mortgagee, or his transferee, shall be deemed to be the transferee and become the proprietor of the property.

[14] So, if it is that a mortgagee wants possession of the mortgaged property, the mortgagee has to apply for foreclosure, the submission continued. The fact that the claimant was collecting rent pursuant to a lease he never had the power to grant, did not make him a mortgagee in possession. Unless, and until, a foreclosure order is made against Cash Plus Development Limited, foreclosing their rights of ownership, that entity

remains the owner of the property. Therefore, whoever is in possession is merely the occupant, or they may be legally entitled to occupy it if Cash Plus Development Limited has entered into some kind of arrangement with them. If rent is being collected, it should be paid either to the first mortgagee or the receiver.

[15] The main thrust of the declaration being sought, the submission continued, is for you to certify or declare that the claimant is a mortgagee in possession. He is not entitled to that possession unless and until the Registrar of Titles endorses on the title a foreclosure order, foreclosing the interests of Cash Plus Limited in favour of the claimant, the second mortgagee. Learned Queen's Counsel opined, the Registrar of Titles is unlikely to make that order in circumstances where there is a first mortgagee on the title whose interests have not been accounted for. For the preceding submission reliance was placed on sections 109, 119 and 120 of the ***Registration of Titles Act*** (***ROTA***).

Reasoning

[16] The cases are legion in which it has been confirmed that Jamaica operates under the Torrens system of registration of titles. A ready example of this is ***Sunshine Dorothy Thomas et al v Beverley Davis*** JMCA Civ. 22. In that case, in dealing with the question of setting aside a transaction for undue influence, the learned President made reference to the Torrens system of registration before going on to consider the provisions of the ***ROTA***. With that in mind, I will consider the relevant provisions of the ***ROTA***.

[17] The power of entry and foreclosure are dealt with sequentially in section 109 of the ***ROTA***. It is instructive to set out the relevant portions of the section below:

> "*The mortgagee ... or his transferees, upon default in payment of the principal sum or interest ... or any part therefore respectively, at the time mentioned in the mortgage or charge, may enter into possession of the mortgaged or charged land by receiving the rents and profits thereof, ... and any mortgagee or his transferee shall be entitled to foreclose the right of the mortgagor or his transferees to redeem the mortgaged land in the manner hereinafter provided*."

Although the power, or right, of entry and foreclosure appear sequentially in the section, are they to operate disjunctively or conjunctively?

[18] Both the right to enter into possession of the mortgaged property and the right to foreclose the mortgage are two of a bundle of five rights belonging to the mortgagee, according to Gilbert Kodilinye in ***Commonwealth Caribbean Property Law*** 2nd ed. at page 237,(see also ***Cheshire and Burn's Modern Law of Real Property*** 17th ed. at page 762 *et seq*.; ***Fisher & Lightwood's Law of Mortgage*** Second Australian Edition para. 16.4). The other three rights are the right to sue on the mortgagor's personal covenant, to appoint a receiver and to sell the mortgaged property. According to the learned author, these rights are "both concurrent and cumulative." The "exception to that is foreclosure, which, once made absolute, extinguishes the other remedies." In his treatment of the right to foreclose, the learned author does not make the exercise of the right to enter the mortgage property a prerequisite to foreclosure proceedings.

[19] If, as the learned author of ***Commonwealth Caribbean Property Law***, *op. cit*. says, the exercise of the right to foreclose extinguishes the other rights of the mortgagee, learned Queen's Counsel's submission that foreclosure is the precursor to an entry into possession by the mortgagee cannot be correct. The procedure for foreclosure is set out in sections 119 and 120 of the ***ROTA***, which I will attempt to summarise below, hopefully, without doing any violence to the sections.

[20] The mortgagee is entitled to make an application for foreclosure to the Registrar of Titles whenever the mortgagor is in default of payment of either the principal or interest of the mortgage debt for a period of six months. The application must be in writing and attest to five things. First, the fact of the mortgagor's default for the requisite six month period must be set out. Secondly, the mortgaged land had been offered for sale at a public auction conducted by a licensed auctioneer after service of the statutory notice.

[21] Thirdly, at the auction the highest bid fell short of the outstanding mortgage debt and the expenses associated with the sale. Fourthly, the application must state that a written notice of the intention to make the application for foreclosure was served on the

mortgagor or his transferee. Finally, the fact of service of a similar written notice upon every person appearing to have any subsequent right, estate or interest in the mortgaged property, must be asserted in the application. Not only must the application for foreclosure speak to the insufficiency of the public auction, the application must be accompanied by the auctioneer's certificate.

[22] Upon receipt of the application, the Registrar of Titles may cause a notice offering the mortgaged land for sale, to be published in at least one newspaper published in Kingston. The frequency of the publication is once in each of three successive weeks. Further, the Registrar is required to fix a time to issue to the applicant an order for foreclosure. The time so fixed by the Registrar of Titles cannot be less than one month after the date of the first advertisement. The order for foreclosure is issued (naturally) only if ad interim, there is no sale of the land with the sufficiency adverted to above.

[23] After the order for foreclosure is issued, the Registrar of Titles enters the order in the Register Book. The effect of that entry is the destruction of the mortgagor's equity of redemption. The entry vests in the mortgagee or his transferee the mortgaged land. That vesting is free from all right and equity of redemption of the mortgagor, or any person claiming through or under him, subsequent to the grant of the mortgage. The mortgagee or his transferee is thereby deemed a transferee of the mortgaged property and becomes the proprietor. Accordingly, the Registrar of Titles then cancels the previously issued certificate of title and the duplicate, and registers a new certificate, which the mortgagee is entitled to take in his own name.

[24] It is to be observed that the legislation does not make any reference to the remedy of entry into possession in setting out the procedure for foreclosure. Moreso, in spelling out these two rights in section 109, the ***ROTA*** treats with them disjunctively. That the exercise of these two remedies is made to be independent of each other is apparent from the very nature of the remedies themselves.

[25] Taking first the right to enter into possession of the mortgaged property, in general, it arises immediately upon the execution of the mortgage, at common law. However, under the Torrens system, as under section 109 of the ***ROTA***, the right to enter into possession is upon the default of the mortgagor. The mortgagee enters into possession of the mortgaged property by receiving the rents and profits from the property.

[26] Having entered into possession, the mortgagee may become liable to the mortgagor. The liability may arise in two ways. First, if the mortgagee's possession prevents the mortgagor from operating his business, the mortgagee may be liable in damages for the loss of profits: ***Commonwealth Caribbean Property Law*** at page 240. Secondly, because equity exercises a strict supervision of a mortgagee in possession, he has to account not only for what he has received but also what he might have received. So, for example, where mortgagees in possession, themselves brewers, married the grant of a lease to the purchase of their beer, they were held to be liable for the additional rent they could have obtained if the premises had been rented without that stipulation: ***White v City of London Brewery Co***. (188) 42 Ch. D. 237.

[27] In contradistinction to the exposure of liability when in possession of the mortgaged property, once foreclosure is complete, the mortgagee has no similar exposure to the mortgagor. Whereas an entry into possession is an initial act to enforce the security, an application for foreclosure is a last resort. Foreclosure, it is said, was the mortgagee's primary remedy, but in modern times it is rarely sought or granted: ***Fisher & Lightwood's Law of Mortgage*** *op. cit*. para. 21.1. That foreclosure is a remedy of last resort is evident from the circumscriptions attendant upon its exercise, for example, the requirement to show a failed attempt to realise the mortgaged debt through sale by public auction (see section 119 of the ***ROTA***).

[28] If it is accepted that the right to enter the mortgaged land and the right to foreclose, although concurrent, are each exercisable separately and independently the one of the other, then I cannot accept that the claimant had to apply for foreclosure before properly entering into possession. Neither section 109 of the ***ROTA,*** nor the

learned authors of the works cited above, make the application for foreclosure an indispensable precondition for the entry into possession.

[29] That, however, is not dispositive of the issue. Under the Torrens system, the mortgagor is entitled to possession of the mortgaged property until his default (section 109 of the ***ROTA***). Although the mortgagee might enter into possession by collecting the rents and profits of the mortgaged property, the fact of entry into possession, he may not be in physical possession of the property. Indeed, a mortgagee in possession does not obtain physical possession merely by collecting the rent and profits of the mortgaged property.

[30] According to ***Fisher & Lightwood's Law of Mortgage*** *op. cit*. para. 19.1, a mortgagee under the Torrens system has only statutory rights which exclude the right to possession. If the mortgagee wishes to have physical possession of the property, he must exercise his right to sue for recovery of possession. Indeed, the mortgagee may file a claim for recovery of possession either before or after the entry into possession (section 109 of ***ROTA***).

[31] So that, in the instant case, until the time of its default, Cash Plus Development Limited, the mortgagor, was entitled to possession of 14 James Avenue, Ocho Rios, St. Ann. When Cash Plus Development Limited defaulted, the right to enter into possession of the property accrued to both DBJ and the claimant. However, since the claimant is a second or subsequent mortgagee, his entitlement to enter into possession subsisted against all except DBJ, the prior mortgagee: ***Fisher & Lightwood's Law of Mortgage*** *op. cit*. at para. 19.13.

[32] Therefore, when the claimant said upon the failure of Cash Plus Development Limited to pay the instalments on his vendor's mortgage, he "served a Statutory Notice and took back possession of my property," he was clearly acting without authority. As a second mortgagee the claimant could not properly enter into possession of 14 James Avenue, Ocho Rios, St. Ann without the permission of DBJ, since his right to do so was postponed to DBJ exercising the like right.

[33] The claimant asserted, without more, that his being in possession of the mortgaged property was with "the full knowledge of the Development Bank Jamaica Limited." That allegation was not traversed by DBJ. So, the question of acquiescence may arise. However, I do not find it necessary for me to decide the point. Suffice it to say, it is rather doubtful that acquiescence could arise in the face of statutory requirements which remain unfulfilled. Since it is the claimant as second mortgagee who is claiming to be a mortgagee in possession, he must show that he did so with the consent of the prior mortgagee. It is palpable that he had no such permission. Even more so, the claimant cannot set up that status as against DBJ, the prior mortgagee, since his right to enter into possession is postponed to DBJ's.

[34] Fundamentally, the claimant appears to have been acting under a misconception concerning the requisite acts to enter into possession of the mortgaged property. Upon the default of Cash Plus Development Limited, the claimant simply served the statutory notice and waltzed back into physical possession of the property, which possession was perpetuated up to the time of the hearing, evidenced by his address. Thereafter, the claimant proceeded to exercise rights of ownership (leasing the property, for example), without reference either to DBJ or Cash Plus Development Limited.

[35] To enter into possession, the claimant needed to perform the acts of collecting the rents and profits of the mortgaged property. That is something the claimant has not asserted that he even tried to do. Further, as was said above, under the Torrens system, a mortgagee cannot just simply "take back possession" of the mortgaged property from the mortgagor. Therefore, if the claimant wished to have physical possession of the mortgaged property, he was obliged to file a claim for recovery of possession against Cash Plus Development Limited. The claimant could have filed the claim for recovery of possession either before or after entering into possession.

[36] I am therefore driven to the conclusion that, since the claimant failed to perform any of the statutory acts to enter into possession of 14 James Avenue, Ocho Rios, St. Ann, he did not enter into possession of the mortgaged property as contemplated by the ROTA. I also conclude that the claimant did not seek to eject or recover possession of

the mortgaged property from the mortgagor, Cash Plus Development Limited, by obtaining an order for possession from the court. So, although there is the coincidence of the claimant being a mortgagee, albeit a subsequent one, and physically occupying 14 James Avenue, Ocho Rios, St. Ann, he is not a mortgagee in possession, as understood in the law of mortgage.

At what price should the property be sold?

[37] I will now turn my attention to the second declaration being sought. This declaration raises two principal questions. The first question is, what are the obligations of a prior mortgagee, if any, to a second or subsequent mortgagee, when the prior mortgagee seeks to realise the security? Secondly, what is the appropriate price at which the mortgaged property must be sold? As a corollary, should the market value and the forced sale value, to the exclusion of any other consideration, be the determining factors of what is the appropriate price?

[38] The evidence is that DBJ intends to sell the mortgaged property for J$50m. To get to this point, DBJ contracted Mr. Kenneth Tomlinson on the 30th September, 2010, to, as Ms. Sheron Henry said in her affidavit, explore "the most beneficial method of realization of the security." To that end, Mr. Tomlinson advertised the property for sale some thirteen times, from the 14th November, 2010 through to the 11th August, 2013.

[39] In December 2010 Mr. Tomlinson received an expression of interest in the property, through an attorney-at-law, from an unnamed client of the attorney-at-law. The letter said the client proposed to make an offer of US$1,300,000.00 for the purchase of the property. The attorney-at-law refused to reveal the identity of this phantom and, no doubt for money laundering concerns, Mr. Tomlinson refused to conduct any sale with a ghost.

[40] The next proposal came in July, 2013 from Mr. Joseph Issa for J$3m. Two proposals came from Digiorder (Ja) Limited, the intended purchaser. The first for J$40m by letter dated 13th August, 2013 and the second for J$50m by letter dated 6th

September, 2013. Between the receipt of those two offers, another offer was received from Rohan D. Miller by letter dated 15th August, 2013 for J$15m.

[41] Against the background of those offers and the proposed sale, Mr. Tomlinson exhibited a valuation report prepared by C.D. Alexander Company Realty Limited, dated 30th March, 2012. That report lists the market value as J$149m and the estimated restricted realization price or, forced sale value, as J$105m. The claimant complains that this valuation was dated and that the property would have appreciated in value by October, 2013. It was also the claimant's complaint that the proposed sale was less than half the forced sale value and, "amounts to giving the property away." There was also a charge that DBJ relied too much on private treaty instead of public auction, at which a reserve price could be set.

[42] The claimant's further complaint was that, with the debt to DBJ standing at US$351,268.12 or J$39,693,297.56 as at 30th April, 2014, using an exchange rate of J$113 to US$1, there would be very little left for him, once attendant expenses are taken into consideration. His vendor's mortgage exceeded US$1m or J$100m. Consequently, the claimant argues, the proposed sale "has given hardly any or no consideration to my interest as a fellow mortgagee." Mr. Tomlinson, the claimant said, had a duty to ensure that the best price was achieved based on an up to date valuation of 14 James Avenue.

[43] The claimant's further contention was that an updated valuation should have been ordered since the valuation report noted that the property was being refurbished. Lastly, he said he was getting offers exceeding US$1m from as far back as 2002. The sale to Cash Plus Development Limited in 2007 proved that the property could be sold for in excess of US$1.3m. That much is evident from the offer from Garfield Whyte, the claimant concluded. Indeed, the claimant had obtained a valuation report from Theo M. Dixon which said the property was inspected on the 11th October, 2013. Mr. Dixon's report valued the property at J$207,088,000.00 with a forced sale value of J$150m.

[44] Against the background of that evidence, learned counsel for the claimant submitted that DBJ, in exercising its right to sell the property, is under a duty to ensure that the best possible price on the open market is obtained, subject to an updated valuation report. He argued that both the claimant and DBJ, as mortgagees, are entitled to be satisfied out of the proceeds of sale in full in the order of priority of the respective mortgages. He went on, the first defendant cannot purport to sell 14 James Avenue for a price which satisfies its mortgage but which leaves the claimant's mortgage unsatisfied. For that submission counsel cited ***Fisher & Lightwood's Law of Mortgage*** 11th ed. chapter 24.1 at page 671. Learned counsel also advanced that since the proposed purchaser was the claimant's tenant, the purchaser was well aware that the value exceeds J$50m.

[45] Responding, learned Queen's Counsel submitted that the only declaration the court can make is that the mortgagee must exercise his rights bona fide. Relying on ***Cuckmere Brick Co Ltd and Another v Mutual Finance Ltd*** [1971] 2 All E.R. 633 (***Cuckmere Brick Co Ltd***), learned Queen's Counsel submitted that the exercise of the power of sale must be in good faith, honestly, without reckless disregard for the mortgagor's interest and take reasonable care to obtain whatever is the true market value.

[46] In developing the point, Learned Queen's Counsel said that the whole point of being the first mortgagee is that you have first recourse to the proceeds of sale because, under the ***ROTA***, the proceeds of sale are distributed in accordance with the ranking of the various mortgages. So, if the property could only be sold for $500,000.00, then clearly the same could only satisfy the interest of the first mortgagee (for example where there are five mortgages noted on the title, each for $500,000.00). That fact that the sale can only satisfy the interest of the first mortgagee, counsel continued, does not mean that the sale was at an under value, and the first mortgagee must sell for $2.5m.

[47] The starting point is that the power of sale is given to the mortgagee for his own benefit. That is, the power is given to the mortgagee to enable him to realise his

security: ***Fisher & Lightwood's Law of Mortgage*** *op. cit*. para. 20.21. In ***Cuckmere Brick Co Ltd***, *supra*, at page 646, Cross LJ said this:

> *"A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given to him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly regard pay some regard to the interests of the mortgagor when he comes to exercise the power. Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at."*

[48] What Cross LJ said is fortified by Salmon LJ, at page 646, who concluded:

> *"both on principle and authority, ... a mortgagee in exercising his power of sale does owe 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 it."*

Cuckmere Brick Co Ltd was applied in ***Moses Dreckett v Rapid Vulcanizing Company Limited*** (1988), 25 JLR 130 (***Moses Dreckett***). The Jamaican Court of Appeal, in addition to adopting the dictum of Salmon LJ, held that there is a burden on the mortgagee to show that he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgagor's property.

[49] Accordingly, I accept the submission of learned Queen's Counsel concerning the obligation imposed on the mortgagee in exercising the power of sale, as a correct statement of the law. That is, the obligation placed on the mortgagee in the exercise of a power of sale is to act in good faith, honestly, without reckless disregard for the interests of the mortgagor and to take reasonable care to obtain what the true market value for the property. The duty owed to a subsequent mortgagee is no different from that owed to the mortgagor (see, for example, ***National Westminster Finance New Zealand Ltd v United Finance & Securities Ltd*** [1988] 1 NZLR 226).

[50] In ***Cuckmere Brick Co Ltd***, *supra*, at page 644, Salmon LJ was of the view that a second mortgagee can be treated as being in the same position as a mortgagor. In a much older case, ***Colson v Williams*** (1889) 58 LJ Ch 539, 541; [1886-90] All E.R. 1040 Kekewich J said this:

> "*A mortgagee to whom is owed a certain sum of money on security of land to a purchaser cannot offer the land to a purchaser merely for that which would cover his principal, interest and costs, independently of the value of the property. If there is a margin which can reasonably be obtained he must remember that there is a mortgagor, or possibly a second mortgagee claiming through him, or possibly other persons having charges who are entitled to be considered.*"

[51] Since a prior mortgagee has an obligation to exercise the power of sale with the same circumspection in relation to a subsequent mortgagee, as he would the mortgagor, DBJ is similarly bound to consider the interests of the claimant. Does that mean that the price at which DBJ sells the mortgaged property must be circumscribed in the manner sought in the declaration? The authorities appear to provide an answer in the negative.

[52] To turn the declaration upon its head, it amounts to this, unless the price at which the mortgaged property is sold is either at the market value or, the forced sale value, the interests of the claimant would not have been taken into account. If, as was accepted in ***Moses Dreckett***, *supra*, at page 144, a mortgagee does not have an obligation to fix, or have fixed, a reserve price at an auction, on what authority could the court limit DBJ's exercise of its power of sale? To so direct DBJ would be tantamount to saying no sale can take place below the forced sale value. However, a mortgagee has a right to accept the highest bid at an auction even if the bid is below the ascertained true market value: ***Moses Dreckett***. If the mortgagee is not chargeable with any want of care in the exercise of the power of sale, even though the sale was below the true market value is neither here nor there: ***Cuckmere Brick Co Ltd***, *supra*, at page 144. After all, the market value at any given moment in time is the best price the market has to offer at that time, it not always what a valuator may estimate it to be.

[53] If, when it is said that DBJ has a duty to obtain the best possible price on the open market, what is meant is that DBJ should use its best endeavours to obtain the best price reasonably obtainable, the submission cannot be faulted. It appears, however, that what is meant is that DBJ must obtain a price out of which both mortgages can be satisfied. If DBJ fails to do that, the argument seems to be, it would not have deployed its best efforts and equally, would have failed in its duty to the claimant.

[54] Respectfully, this submission rests on an incorrect premise. Counsel based his argument on learning which asserts that a prior, as well as a subsequent mortgagee, is entitled to have its mortgage satisfied in full out of the proceeds of sale, in the order of priority. The passage on which Mr. Jarrett relies from ***Fisher & Lightwood's Law of Mortgage*** appears in the chapter treating with priorities of mortgages. Likewise, ***Real Estate Board v Victor MacCauley Spence et al*** 2010 HCV 00380, delivered 14th April, 2010, in which that very passage was quoted, was concerned primarily with postponing the exercise of the power of sale at the instance of the claimant.

[55] I do not understand the learned author to be there saying the price at which mortgaged property is sold must be such that each mortgagee is fully satisfied from the proceeds of sale. And surely, I intended no such meaning in ***Real Estate Board v Victor MacCauley***, *supra*. What a subsequent mortgagee has is an entitlement to full satisfaction out of the proceeds of sale. Whether or not that entitlement can be fulfilled depends on what the mortgaged property can properly be sold for.

[56] What if the value of the property has fallen since the giving of the mortgages or, through some contrivance of the mortgagor the property was mortgaged several times for more than its value can sustain? In either of those scenarios (borrowed from **Fisher &Lightwood's Law of Mortgage**, op.cit.), it would be a forlorn hope to expect a sale that would realize sufficient proceeds to satisfy all the mortgages. Hence, there is the order of priority to satisfy the holders of the security. The point was well made by learned Queen's Counsel in the analogy of the five mortgagees. And, it must be

remembered, in spite of its limitations, the mortgagee's recourse to satisfaction of the mortgage debt extends to suit upon the mortgagor's personal covenant.

[57] It is therefore clear, that it is unsound to assert that a subsequent mortgagee's interest has not been taken into account because the proposed sale price will be unable to satisfy in full, both the prior and the subsequent mortgages. The entitlement the claimant has to satisfaction in full cannot be divorced from what the mortgaged property can actually be sold for. What the property is eventually sold for will depend on the state of the market.

Is DBJ a trustee for the claimant as second mortgagee?

[58] Coming now to the third declaration being sought, the fact of the proposed sale price being below the forced sale value is undeniable. However, the force of the declaration is that, by virtue of that fact, DBJ is in breach of its obligation as a trustee for the claimant and the mortgagor. As was pointed out by learned Queen's Counsel, Cash Plus Development Limited, the mortgagor is not a party to these proceedings. Therefore, any reference to the mortgagor is purely for the purpose of the analysis and not with a view to making any pronouncement in respect of a party who is not before the court.

[59] It has long been established that, in the exercise of the power of sale, the mortgagee is not a trustee for the mortgagor: ***Halsbury's Laws of England*** 4th ed. reissue vol.32 para. 316. Since the mortgagee is not a trustee for the mortgagor, neither can it be said that he is a trustee for a subsequent mortgagee. The mortgagee only becomes a trustee in respect of any surplus arising from the sale of the mortgaged property. In ***Weld-Blundell v Synott*** [1940] 2 KB 107,115, Asquith J said that the duty of the first mortgagee "is to hold the balance of the proceeds after satisfying his own debt in trust for those other encumbrancers." In those circumstances, it is clear, that it a constructive trust which arises as there was no antecedent fiduciary relationship.

[60] Since there was no trust relationship between the DBJ and the claimant, it is incongruous to say that DBJ is in breach of trust in proposing to sell the mortgaged

property for a consideration which is below the forced sale value. Unless, and until, there is a sale of the property which results in a surplus, no trustee relationship will arise between the claimant and DBJ. In short, to speak of DBJ being a trustee for the claimant in the proposed sale of 14 James Avenue, Ocho Rios, St. Ann, is simply to put the cart before the horse.

[61] In consequence of the foregoing, i am constrained to refuse the declarations sought. Costs are awarded to the 1st defendant, to be agreed or taxed.