JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 35/83

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Jusitce White, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN MOSES DRECKETT PLAINTIFF/APPELLANT

AND RAPID VULCANIZING COMPANY LIMITED DEFENDANT/RESPONDENT

Miss D. Lightbourne for Appellant:

Mr. M. Hylton for Respondent

November 22, 1985; April 7, 8, 9
July 15, 16, 1986 October 28, 29,
30, 1987 and March 25, 1988

CARBERRY, J.A.:

I have had the opportunity of reading in draft the judgment of Campbell, J.A. and I have come to the same conclusion, but with some reluctance and regret, namely that the appeal should be dismissed and the judgment of Wolfe J. affirmed. I will set out below the reasons for both reluctance and regret, and also observe that in the long run it seems to me that while the primary facts are simple, the proper inferences to be drawn from them are not; and that the state of the law in this area, that is, the mode of sale to be adopted by the mortgagee in selling the mortgaged property and his possible liability arising therefrom is not free from difficulty. I also suspect, with respect, that the decisions rest upon an undisclosed major premise, namely the vast fluctuations that have taken place in land values over the past 15 years.

First, as to the facts: The plaintiff/appellant, Moses Dreckett, (hereafter called the mortgagor) was a Jamaican worker who migrated to England apparently prior to 1960. He is described as a mechanic, and in 1962 there was bought in the name of his mother and himself as joint tenants a piece of land in a subdivision: Lot 170, part of Waltham Farm, now known as 6 Tangerine Road. The land was transferred to them on 27th April and the transfer registered on 1st May, 1962. His mother is described on the title as a domestic. She died on the 6th March, 1978.

It is reasonable to assume that it was Moses Dreckett the mortgagor who put up the money for this purchase, some £900 (now J$1,800.00). They decided to build, and in 1964 entered into an arrangement with the Rapid Vulcanizing Company Limited by which the Company supplied materials and labour for the construction, and took on the 24th September, 1964 a mortgage in the sum of £3,200 (now J$6,400.00). That mortgage was registered on the 28th September, 1964. It is reasonable to assume that in the usual way the Company (hereafter called the Mortgagees) kept the registered Title, Volume 852 Folio 1, and that they would undoubtedly have been aware of the price paid for the land, and its value when they took their mortgage. It is not clear whether the mortgagees themselves built the house, or whether they only financed it, supplying materials and labour. Prima facie it would be reasonable to assume that the house and land were worth £4,100 (J$8,200.00) or more, if the mortgagees lent up to the customary 2/3 of its value, (J$9,600.00). The mortgage provided for interest at the rate of 8% (monthly instalments of £21.6.8) and for sinking fund or capital repayments of £16 per month, making a total of £37. 6. 8 per month. The house had three bedrooms, living and dining room, kitchen, two bathrooms, car-port and helper's room and bathroom. It was rented out at £30 per month to a single family, and was so rented up to the time of the sale. It will be observed that this moderate rent did not cover the monthly outgoings, and further that in the

evidence one Altamont Henry, who said that he took care of the premises for the mortgagor, collected the rents etc., said that he spent some $500.00 on it by way of maintenance.

Not surprisingly the mortgagor fell into arrears with payments of the principal and interest. On the 2nd July, 1970 the mortgagees gave the customary one months notice calling for payment of the principal debt and interest etc., then due and threatening sale in default. (The notice claimed that some ten months interest was then due). It appears that the mortgagor consulted local solicitors (Messrs Samuel & Samuel) who wrote offering to pay up the arrears of interest but this was unacceptable to the mortgagees who pressed for payment of the entire debt and required settlement by the end of October 1970, or threatened sale. They wrote again on 3rd November, 1970 advising that the proposed sale would take place on 2nd December, 1970 at the office of a real estate agent, Mr. C.A. Jacques.

The proposed sale was advertised in two copies of the Daily Gleaner, and though the advertisements were small, no issue was raised as to their adequacy. The "Particulars and Conditions of Sale " were put in evidence. Condition 1 declares that "The sale is subject to a reserve price fixed by the vendor." There is no evidence of what that reserved price was, or if any such reserved price was in fact fixed, and the mortgagees' attorney expressly stated that he did not rely on the particulars for this purpose. In fact he argued that no such reserve price was necessary in law.

The sale took place as scheduled on the 2nd December, 1970. The property was sold to a real estate dealer, one Mr. David Edgar Pennant for J$6,400.00. At that stage, according to an account rendered by the mortgagees on 20th January, 1971, the mortgage debt was some $5,522.00 and when the costs of the sale and other charges

were deducted, the sale realized some $117.00 for the mortgagor.

On the 29th October, 1971, some eleven months later, the purchaser at the sale, Mr. Pennant, resold the premises for J$14,400.00. In under a year then he realized a profit of 125% on his purchase.

There is no evidence as to the state of the premises when the sale took place on 2nd December, 1970, save that it was then rented or tenanted. Nor is there any evidence as to its condition when it was resold eleven months later. There is no evidence as to whether or not Mr. Pennant made any improvements before he re-sold.

As we will see when we look at the law, the crucial question in the case was what was the market value of this land when sold by the mortgagees at the auction? Was it sold at an under value? And if so by how much? If the mortgagor was to gain any redress in this action in respect of his complaint that the premises had been sold recklessly or negligently at an under value, he had the onus of producing evidence to establish what was the market value of 6 Tangerine Road on or about the 2nd December, 1970. What was that evidence?

Though the sale by the mortgagees had taken place in December, 1970, the present action was not commenced till the 29th November, 1976 when the writ and statement of claim were filed. This was a couple of days before the six years period of limitation would have expired. The case itself was not tried until the 15th and 16th March, 1982. (The respondents claim that this occurred only after they had taken out proceedings to dismiss the action for want of prosecution). In view of the delay that had occurred the problem of securing acceptable evidence of the market value in December 1970 was obviously a formidable one. The trial judge did not accept it, and so far as the evidence that was given goes he saw and heard the witnesses and I do not think he can be faulted on that score.

The first witness was a "realtor" (i.e. a dealer in real estate). He claimed that he had inspected the property in 1971 and valued it then for $14,000.00. He did not go into the building. In cross-examination it transpired that his valuation and inspection was made in 1974 (not 1971), though he insisted that the valuation related back to its 1971 value. The supporting witnesses were not very helpful. One was a lady who owned a house in the same area, and suggested that it was similar to the mortgagor's house. She said that in 1970 she would have asked $30,000.00 for her premises. Another witness was a contractor and builder who had seen the building from the outside, described it as being in good condition, and suggested that its 1970 value would have been $22,000.00 and that it should have fetched $15,000.00 at auction. Another witness was an adjoining owner on Tangerine Road who owned a duplex (i.e. two houses joined together) for which he had paid £7,500 ($15,000.00) in 1969. The duplex had on one side four bedrooms, bathroom, kitchen and living and dining room, and on the other two bedrooms, kitchen, bathroom, living and dining room. All of this evidence did nothing to answer the main question what was the market value of 6 Tangerine Road in December, 1970.

In the final analysis there was only one bit of real evidence on the point, and that was the undisputed fact that Mr. Pennant had resold the premises ten months later at a profit of 125%.

What of the auction itself? No evidence was offered that challenged the conduct of the auction. The bidding sheet was put in by consent. It showed that there had been four persons bidding (all real estate dealers); that the opening bid had been $1,000.00 but soon rose to $5,000 and after some bids in that region concluded with Mr. Pennant's bid of $6,400.00. That he should have re-sold ten months later at $14,400.00 may speak volumes; unfortunately by itself it is ambiguous. It does not answer that he may have been an excellent salesman or that his purchaser may have bought for more than he should, or that there had been some alteration in the premises. I do not agree that the re-sale price ten

months later was "no true indication as to the true value of the mortgaged property at the time of the auction." In normal times it would have been a factor of great significance, but it would have needed supporting evidence to establish that significance and I do not think that we can blind our eyes to what I describe as the undisclosed premise, the vast fluctuations that took place (and continue) in the value of real estate in Jamaica in that period, coupled with the effect of devaluation and inflation. It should be noted that the mortgagees called no evidence and elected to stand on their submission that there was no case to answer.

I turn now to the law, and it is fair to say that it is not in a very satisfactory state. The authorities that have been cited, and there were many, show that the courts have alternated between showing concern for the mortgagor and a wish to protect him against a mortgagee who recklessly sells off the mortgaged premises, concerned only to recover his mortgage debt; while on the other hand the courts have stated that the whole object of taking security for a loan is to enable the lender or mortgagee to recover his money on the borrower's default, and that the object of the mortgage was to enable this to be done speedily and at the mortgagee's convenience.

As indicative of the first approach see Marriott v. Anchor Reversionary Co., Ltd., (1860) 2 Giff 457; 66 E.R. 191 where Sir John Stuart V. Ch. observed:

> "Where a mortgagee enters into possession of the mortaged estate, with a view to sale, he is bound to act with the same care and the same prudence, and to use, every act which a prudent proprietor would use, to have the sale conducted to the greatest advantage."

This had been a case of mortgage of a ship, and between taking possession and sale the mortgagee had used the vessel so badly that its value depreciated. The mortgagees were held liable for the loss in value thereby caused. The decision was affirmed on appeal: (1861) 3 DeG. F. & J. 177; 45 E.R. 846.

Sir John Suart followed his own decision and repeated his views in Wolff v. Vanderzee (1869) 17 W.R. 547; 20 L.T. 350, where he said:

> "... mortgagees sell not only their own property, but that of another person, not only the property mortgaged but also the equity of redemption. Where a mortgagee in selling the mortgaged property fails to use proper precautions in order to obtain the best price that can be obtained, such conduct is equivalent to wilful neglect and default."

In Wolff v. Vanderzee the mortgaged property had been misadvertised by the auctioneer in the particulars of the sale, and but for this might have sold at a higher price.

On the other hand the courts have frequently taken the view that a mortgagee in exercising his power of sale of the mortgaged premises should be liable only for fraud, not for negligence.

For example see Kay J., in Warner v. Jacob (1882) 20 Ch. D. 220 at 224:

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

See also Farrar v. Farrar Ltd (1888) 40 Ch. D. 395. At page 398 Chitty J., said:

> "A mortgagee exercising a power of sale is not a trustee of the power. The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt
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> .....
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> The mortgagor has no right after the power has arisen to insist that the mortgagee shall wait for better times before selling .....
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> The mortgagee has a right to obtain payment of his debt through the exercise of his power when it has arisen, without regard to the then existing condition of the market. He cannot be required to run any risk in postponing the sale, or to speculate for the mortgagor's benefit.

On appeal, at page 410, Lindley L.J., said:

> "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. .....
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> But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed."

It will be noted that though stressing the mortgagee's right to realize his security at will, once there had been a default, both Chitty J., and Lindley L.J., had spoken of the need to see that the mortgagee took reasonable steps to obtain a proper price. Reasonable steps however did not include postponing the sale.

In Kennedy v. De Trafford (1896) 1 Ch. 762, at 772 Lindley L.J., reviewed the phrase he had used in Farrar's case about the mortgagee "taking reasonable precautions to obtain a proper price." He said:

> "The reason why these words were added was this: A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully or recklessly, to sacrifice the property of the mortgagor: that is all."

It will be seen then that the forecasting of an obligation to take reasonable precautions to obtain a proper price had shrunk to one not to act recklessly.

When the case went to the House of Lords, (1897) A.C. 180, Lord Herschell at 185 saw the mortgagee's duty as being one that required him to act in good faith. Referring to Lindley L.J., in the passage cited above, he said:

> "Well I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words 'good faith', but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith."

With respect, not a great deal of guidance had been made available. One does not know quite what is meant by "sacrifice"? Is a sale at half the proper price a sacrifice? or must the disproportion be greater? The same question must be asked of the use of "recklessly"? Is selling at half the market price "reckless?"

Over the years and prior to the Cuckmere case the only clear points that had emerged seemed to have been these:

(a) A mortgagee could not enter into a collusive sale, that is one in which he sold to some relative or related business associate or any sale in which the parties were not at arms length: See Martinson v. Clowes (1882) 21 Ch. D. 857 National Bank of Australia v. United Hand in Hand (1879) 4 App. Cases 391 (P/C) Hodson v. Dean (1903) 2 Ch. 647.

(b) If the mortgagee or his auctioneer misdescribed the mortgaged property so that it consequently sold for less than it might, the mortgagee might be held responsible: Wolff v. Vanderzee (supra); Tomlin v. Luce (1888) 41 Ch. D. 573; (1889) 43 Ch. D. 191 (C.A.)

(c) If the mortgagee entered into possession and misused the property, so reducing its value he would be held liable: See Marriott v. Anchor Reversionary Co., (supra); and McHugh v. Union Bank of Canada (1913) A.C. 299.

McHugh v. Union Bank of Canada (1913) A.C. 299 (P.C.) apart from establishing the liability of a mortgagee who entered into possession and misused the mortgaged property, contained in the opinion delivered by Lord Moulton for the Judicial Committee, an observation at page 311 which echoed the earlier dicta in these cases. He said:

> "It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold."

In an earlier case, Colson v. Williams (1889) 61 L.T. 71; 58 L. Jo. 539 Kekewich J., had tried to reconcile the two streams of authority by pointing out that though the mortgagee was not a trustee of the power of sale, and could sell when he pleased, he was bound to also remember the position of the mortgagor, or second mortgagees. He said:

> "A mortgagee being owed a certain sum on security of land, cannot offer it 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 be reasonably obtained, he must remember that there is the mortgagor, or possibly a second mortgagee, claiming through him or possibly other persons having charges who are entitled to be considered.
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> But "so long as he exercises the power fairly, with that in view, so long as there is no fraud in a legal aspect of the case, so long as he does that which he can to realise a fair price, he is in my judgment entirely free ....."

In The Reliance Permanent Building Society v. Harwood-Stamper (1944) 2 All E.R. 75, Vaisey J., held that the ordinary mortgagee's duty on sale was to take reasonable precautions to obtain a proper price, not the best price. However, he went on to find that a Building Society, selling under its power of sale in a mortgage, had a higher duty, that of a fiduciary seller, under section 10 of the Building Society's Act, 1939, and as such it was their duty to take steps to obtain the best price.

In Cuckmere Brick Co., Ltd., v. Mutual Finance Ltd., (1971) Ch. 949; (1971) 2 All E.R. 633 (C.A.) The Court of Appeal in England reviewed the two lines of authority. It was basically a case which fell within type (b) above, a case in which the auctioneer had misdescribed the property in the particulars of sale or rather the advertisements of the sale, omitting therefrom the fact that planning permission had been given for the erection of flats on the mortgaged land. The result of the omission was alleged to be that the sale failed to attract builders who would have been interested in building flats, and that the land was consequently sold for less than its true value. The mortgagees in defending

the action brought against them by the mortgagors, alleged that their only duty was to show good faith in exercising their power of sale under the mortgage. They had engaged the services of competent auctioneers and were not liable for any negligence that the auctioneers committed. They relied on Kennedy v. De Trafford, (supra) and denied that they had acted fraudulently, wilfully or recklessly.

The mortgagors relied on Lord Moulton's dictum in Mc Hugh v. Union Bank of Canada (supra) and Tomlin v. Luce (supra)

Salmon L.J., reviewed the two lines of authority at pages 965 (All E.R. 643) et seq. At page 966 he said:

> "It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare for example Kennedy v. De Trafford (supra) with Tomlin v. Luce (supra)
>
> The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. ...."

And at page 968 (646):

> "I accordingly conclude, both on principle and authority, 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. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

It was perhaps inevitable that with the growth of the tort of negligence the courts would come to the conclusion that a duty of care existed in this field. Clearly, the mortgagee and the mortgagor were "neighbours", and a duty of care owed by the one to the other. What is however still at large is the standard of that duty. We have still to work out the limits of the duty, granted that to a considerable extent the mortgagee is not a trustee of his power of sale, and may for example choose the time of sale to suit his own convenience.

Cross, L.J., expressed similar views at page 969 (646) et seq. He too preferred the views expressed in Wolff v. Vanderzee (supra) and Tomlin v. Luce (supra) to those in Kennedy v. De Trafford.

Cairns, L.J. puts the matter thus at page 977 (All E.R. 652):

> "The issues in this appeal are: (1) Does the duty of the mortgagee to a mortgagor on the sale of the mortgaged property include a duty to take reasonable care to obtain a proper price or is it sufficient for the mortgagee to act honestly and without a reckless disregard of the interests of the mortgagor? .....
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> (1) I find it impossible satisfactorily to reconcile the authorities, but I think the balance of authority is in favour of a duty of care .....
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> ..... I would hold that the present defendants had a duty to take reasonable care to obtain a proper price for the land in the interest of the mortgagors."
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> (emphasis supplied)

It will give some indication of the difficulty still posed by the necessity of finding the proper standard of the duty of care to note that in this case, though all the judges in the Court of Appeal agreed that there was such a duty, only two of the three found that it had in fact been broken in the case, and that in the result they referred the matter back for an inquiry as to damages, i.e., what loss had the breach of duty caused to the mortgagor.

The Cuckmere case has been followed by the English Court of Appeal in Standard Chartered Bank Ltd., v. Walker (1982) 3 All E.R. 938, and by the Privy Council in Tse Kwong Lam v. Wong Chit Sen (1983) 1 W.L.R. 1349; (1983) 3 All E.R. 54. The latter case involved the question of whether the sale had been collusive or not, in that it had been made to a related company. Giving the opinion of the Privy Council, Lord Templeman observed after reviewing the cases, at page 1355: (All E.R. 59):

> "In the view of this Board on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss." (emphasis supplied)

Their Lordships held on the facts that the mortgagee had not discharged the onus of proving an independent bona fide sale, an onus placed on him by reason of the relationship between himself and the purchasers.

Counsel in this case, particularly counsel for the mortgagor, spared no effort in putting before this court authorities drawn not only from England, but also from Canada, Australia and New Zealand. We mention them briefly.

The earliest case from the Australia - and New Zealand jurisdictions was Pendlebury v. Colonial Mutual Life Assurance Society Ltd., (1912) 13 C.L.R. 676. The case raised the issues in types (a) and (b) above. The sale was collusive, the advertisements for it were completely inadequate, the land was originally valued for £1280 and a mortgage of £600 made on that valuation. When sold at auction the reserved price fixed exactly equalled the amount of the debt and interest etc., and it was sold for that reserved price £720, and the purchaser at the auction resold the

land one month later for £1,800 - £1,900. The High Court found on these facts, even if the narrower views expressed in Kennedy v. De Trafford (supra) were followed, that there had been a reckless disregard of the mortgagor's interest and that the sale was not bona fide and independent. They held the mortgagee liable for the loss occasioned by the sale. The omission to take obvious precautions to ensure a fair price, getting a proper valuation, failing to adequately advertise the sale, etc., were held to amount to showing that the mortgagee was absolutely careless whether a fair price was obtained or not, his conduct was reckless and that he did not act in good faith.

The next case cited was Forsyth v. Blundell (1973) 129 C.L.R. 477. In this case the High Court left open the question as to whether they should follow the Cuckmere case or not. It was unnecessary to decide it in view of the fact that even on the old basis established in the Pendlebury case they found the mortgagees here had not exercised the power of sale in good faith. The case makes an interesting comparison of the position of the purchasers and that of the mortgagees: the former are usually protected unless aware of the irregularity affecting the mortgagees conduct of the sale.

The Australia and New Zealand Banking Group Ltd v. Bangadilly Pastoral Co., Pty Ltd., (1978) 139 C.L.R. 195 still saw the High Court leaving open the question as to whether to follow the Cuckmere Case or not. The sale in question here was clearly collusive, and the mortgagee had also been guilty of failing to get as much as might have been got from the purchasers, a related company. It was set aside. It was not a truly independent bargain. Interestingly enough, the sale was by auction, but the court held that this made no difference: See page 227.

In Alexandre v. New Zealand Breweries (1974) 1 N.Z.L.R. 497. The New Zealand Court of Appeal appears to have been willing to follow the Cuckmere case and held, as the head note put it:

> "Assuming that a mortgagee when exercising a power of sale has a duty to the mortgagor to take reasonable care to obtain a proper price, the question of whether there has been a breach of that duty in a particular case must be judged in a realistic way, having ample regard to the fact that the power of sale is given to the mortgagee to enable him to recover his advance."

On the facts however the New Zealand Court of Appeal held that the duty of care had not been broken.

If the Australian and New Zealand Courts have been cautious in dealing with the Cuckmere case, and finding that a duty of care exists, it appears that the Canadian cases, or at least those from the Ontario High Court to which we were referred, have been eager to adopt the Cuckmere case and have had no difficulty in that respect.

In Sterne v. Victoria and Grey Trust (1984) 14 D.L.R. (4th) 193 there was no shortage of evidence as to the value of the mortgaged property, as no the mortgagor himself had been trying to sell it and had got an offer of $210,000.00 but the closing date was some months away and the mortgagee decided not to wait, he wanted to collect his debt at once. The mortgagee had valuations made of the property, but in response to his advertisements for sale the best offer he got was $185,000.00 (though his valuations had put the property at $190,000 - 210,000 - 240,000). The advertisements were defective in that they omitted to state that the farm was a "hobby farm", a factor which would have engaged the attention of a bigger and more expensive market. Rutherford J., took note of the two lines of authority with respect to the mortgagee's duty in conducting the sale and suggested that one applied where the action was brought against the purchaser and the other (the duty in negligence) when action was brought against the mortgagee. (The distinction, with respect, is untenable, see Cross L.J., in the Cuckmere case). But he applied the duty of care and found the mortgagee liable in failing to take reasonable steps to produce the best possible price, in that the advertisements had been misleading. This then was a

case that fell within type (b) above: the mortgagee's advertisement had misled the public and so reduced the price that might have been paid for the farm had it been properly advertised.

Siskind v. Bank of Nova Scotia (1984) 10 D.L.R. (4th) 101 was a similar case, again from Ontario. The mortagees obtained valuations, and duly advertised the premises, inviting tenders. The tenders fell far below the reserved price, and the appraised price, but the mortgagee decided to accept the higher of the two tenders. The evidence showed that the purchaser resold the premises, which he had bought for $70,000.00 for $100,000.00 which was the lower of the valuations that the mortgagee had got. Carruthers J., citing the Cuckmere case, held that the mortgagees had been negligent and had failed to take reasonable steps to obtain the true market value.

Bank of Nova Scotia v. Barnard (1984) 9 D.L.R. (4th) 575, again a case from Ontario, in which Craig J., applying the Cuckmere case held that the mortgagees were liable for not getting the full market value of the mortgaged premises in that they had not exposed the property for sale over a longer period.

If one may venture a comment on these cases from Ontario it would be to say that on the whole they demand a higher standard of duty from mortgagees ~~than that~~ actually set in the Cuckmere case. Mortgagees are not only required to have valuations made and used for guidance, they are held liable for failure to give sufficient time for the market forces to become aware of the proposed sale and to react accordingly. With respect, this seems difficult to reconcile with the principle that the ~~mortgagee, once default has occurred, is to be~~ at liberty to realize his debt at his convenience, and is liable for failure to get the proper or market price that existed at that time.

An interesting point that was canvassed before us by counsel for the mortgagee was whether it could be said that there had been a failure to get the proper or market price where the sale had been conducted by an auction to which the public had access. The answer is that a "sale by auction does not necessarily prove the validity of a transaction:" per Lord Templeman in Tse Kwong Lam v. Wong Chit Sen (1983) 1 W.L.R. at 1355 (1983) 3 All E.R. at 59 citing Hodson v. Dean (supra). See also Martinson v. Clowes (1882) 21 Ch. D. 857; Tomlin v. Luce (1888) 41 Ch. D. 573; 43 Ch. D. 194: McHugh v. Union Bank of Canada (193) A.C. 299 and of course the Cuckmere case itself. In these cases the fact that the property had been sold by public auction did not mean that the mortgagees had fulfilled all their obligations: It was still possible to find that one or other duty had been broken, for example that the sale had been collusive, or had not been properly advertised.

The instant case was conducted on the basis that the Cuckmere case should be adopted and followed by the Courts in Jamaica, and if there was any doubt on the matter I think it should be received and followed by the Courts of Jamaica. In fact the industry of counsel discovered a first instance case in which Rowe J., (as he then was) followed and applied the Cuckmere case: See Rose Hall Ltd., v. Chase Merchant Bankers (Jamaica) Ltd., Suit E 211/1976, judgment 22nd November, 1976.

Counsel on both sides conducted the case on the basis that the common law rules applied. This is correct, but it is necessary to remember that this was land under the Registration of Titles Act, and that that Act has specific provisions dealing with mortgages and charges: See sections 103 et seq.

The effect of registering a mortgage (and a mortgage will not be a legal mortgage unless and until it is registered) is provided for in section 105: It does not, unlike the common law mortgage, operate as a transfer of the title to the mortgaged land, and if the mortgagee wishes to realize the mortgage by sale, then he must comply with the provisions contained in sections 105 and 106. It should be noted that for the avoidance of doubt the Transfer of Land Act of Victoria in Australia (the Torrens System Act in that state) has inserted into their section 77 (1) which is the equivalent of Jamaica's section 106: "power of sale in cases of default", after the word "the mortgage or annuitant "may" and before the words "sell the land mortgaged or charged" the words "in good faith and having regard to the interests of the mortgagor grantor or other persons."

The effect of these words is to make it clear that the decision in Pendlebury's case (1912) 13 C.L.R. 676 (supra) applies to mortgages under the Act. In my view this would now include the Cuckmere case if and when the Australian Courts decide to adopt it. (See pages 85 - 87 of The Transfer of Land Act, 1954 by P.M. Fox).

It will also be remembered that in Reliance Permanent Building Society v. Harwood-Stamper (1944) 2 All E.R. 75, a decision made before that in the Cuckmere case, the Building Society was held to owe the duty of care to get the best possible price because of section 10 of the Building Societies Act., 1939, which reads:

> "Where any freehold or leasehold estate has been mortgaged to a society as security for an advance, it shall be the duty of any person entitled by virtue of the mortgage to exercise any power, whether statutory or express, to sell the estate, to take reasonable care in exercising that power to ensure that the price at which the estate is sold is the best price which can reasonably be obtained; and any agreement, if and is so far as it relieves, or may have the effect of relieving, a society or any other person from the obligation imposed by this section, shall be void."

The common law position reflected in the Cuckmere case does apply to mortgages of land under the Registration of Titles Act, but it would be useful if all doubts were set at rest and our section 106 was amended along the lines indicated in the Victoria Statute or the U.K. Building Societies Act, 1939.

The fact that the mortgages failed to offer any evidence in this case was disturbing, but it should be remembered that the delay in bringing this action may have greatly embarrassed the defence. One is left with the suspicion that the mortgagee in this case did just what Kekewich J., said was wrong in Colson v. Williams i.e., offered the premises for just enough to cover his principal, interest and costs, independently of the value of the property. Unfortunately, though the fact that the property was resold some 10 months later at 125% profit tends to confirm this, I have reluctantly come to the conclusion that the mortgagor has failed to discharge the burden of establishing that the property was sold at under the market value of the property at the time of the sale, or to show that for some identifiable reason the auction here failed to realize a proper price or the market value at the date of the auction. It may be that had these facts occurred say in Ontario, a court there might have been persuaded to intervene, having regard to the social and economic milieu there. Sadly, in Jamaica, we have seen such vast fluctuations in expressed land values, that I do not think that we can intervene in this case, and we must perforce affirm the judgment of the trial judge, and dismiss this appeal, with costs to the respondent to be taxed or agreed.

CAMPBELL, J.A.

The facts from which this appeal arises are simple, straight-forward and not in dispute. The appellant and his mother Naomi Dobney were the registered proprietors of Lot 170 Waltham Farm, now known as 6 Tangerine Road in the parish of Saint Andrew. The land was purchased in 1962 for the sum of £900.00 notionally $1,800.00. The respondent pursuant to an agreement with the registered proprietors constructed a house on the lot at a cost of £3,200.00, or $6,400.00, inclusive of materials and labour. This house was completed on 24th September, 1964 and the registered proprietors mortgaged this property to the respondent to secure payment to it of the $6,400.00 then owing.

The parties admitted, so there is no dispute, that the registered proprietors fell into arrears with the mortgage payments resulting in the respondent exercising its power of sale given in the Mortgage Deed.

The property was sold by Public Auction on December 2, 1970 to one David Pennant, a Real Estate Broker, for the sum of $6,400.00. The transfer to Pennant was effected on January 13, 1971 and on 29th October, 1971, Pennant sold the same property for $14,400.00 to one Carol McLaughlin. It was duly registered in this purchaser's name on 19th November, 1971.

On 29th November, 1976 the appellant on behalf of himself and the other registered proprietor, commenced action against the respondent claiming damages on the ground that the respondent acted negligently and/or improperly in selling the premises at a price which constituted a gross under value of which it was aware or ought to have been aware. The appellant claimed that the respondent was negligent in failing to ascertain what was then the current market value of the premises and in failing to fix a reserve price in respect of the auction sale.

In a full and closely reasoned judgment, Wolfe, J., found that on the facts before him the appellant had failed to discharge the onus of proof which rested on him of showing that the principle stated by Salmon, L.J., in Cuckmere Brick Co., Ltd., and Anor., vs. Mutual Finance Ltd (1971) 2 All E.R. 633 on which the appellant relied, had been breached by the respondent. He concluded that the respondent had neither acted negligently nor in bad faith in exercising the power of sale. The principle stated by Salmon L.J., at p., 646 in the abovementioned case is that:

> "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."

From this judgment the appellant appeals to us on the undermentioned grounds namely:

> "1. That the judgment appealed from is unreasonable, against the weight of the evidence, and cannot be supported by the evidence.
>
> 2. The learned trial judge misdirected himself on the facts and the law and came to conclusions that were erroneous and unreasonable.
>
> 3. The learned trial judge erred in not holding, in line with the authorities that the mortgagee selling under powers of sale is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had, and that such mortgagee has an obligation to take reasonable care to ensure that the sale approximates to the true market value of the property."

Before us Miss Lightbourne presented her submission on ground 3 in the form of propositions, which are distilled principles culled from decided cases, which not only define the duty of care of a mortgagee selling mortgaged property under a power of sale, but also the standard of care required of him.

Thus she submitted that:

"1. A mortgagee entering into possession for sale must act with the same care and prudence, and must use every effort that a prudent owner would use to have the sale conducted to the best advantage.

2. He must take proper precaution to obtain, the best price that can be obtained failing which he will be guilty of wilful neglect or default;

3. He must not sell merely to recover his principal, interest and cost, independently of the value of the property if there is a margin which reasonably can be obtained, since he must remember that the mortgagor is entitled to be considered.

4. The mortgagee's duty extends beyond acting in good faith, he must take reasonable steps to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell."

For these propositions Miss Lightbourne relied inter alia on Colson v. Williams (1889) L.T. Vol. 58 p. 539 and Cuckmere Brick Co., Ltd., v. Mutual Finance Ltd., (1971) 2 All E.R. 633.

The above propositions correctly state in essence the modern principle enunciated in Cuckmere Brick Co., Ltd., (supra) which has been approved and adopted by the Privy Council in Tse Kwong Lam v. Wong Chit Sen and Others (1983) 3 All E.R. p. 54:

Miss Lightbourne has however advanced the view that cases decided since Cuckmere Brick Co., Ltd., (supra) have seemingly extended and enlarged the mortgagee's duty and/or raised the standard by which to judge whether he is in breach of his duty. Thus, Miss Lightbourne submits that at the very least, a mortgagee ought to have a valuation of the mortgaged property which is being sold. He must sell at a price approximating as nearly as possible to the market value. He must establish a reserve price which bears reasonable relationship to the true market

value. He must expose the property to a wide section of the market for a reasonable period before sale. He must not merely hand over the property to an auctioneer for sale, he must do more by ensuring that the sale is not at an undervalue. For these propositions she relies on Bank of Nova Scotia v. Barnard (1984) 9 D.L.R. (4th) p. 575 and Siskind v. Bank of Nova Scotia (1984) 10 D.L.R. (4th) 101.

In my view the above cases do not attempt in any way to enlarge the duties of a mortgagee and or to affect the standard of care established in Cuckmere Brick Co., Ltd., (supra). In fact they expressly adopt the principle of that case and proceeded to apply it to the particular circumstances of the case before the court.

Dealing with sales by mortgagees at auctions, it is undoubtedly true, and a matter of commonsense that the highest bid at an auction will not without more, per se necessarily provide satisfactory evidence that the principle in Cuckmere Brick Co., Ltd., (supra) is not breached. Thus, in Hodson v. Deans (1903) 2 Ch. 647 the sale was at an auction by a Friendly Society in exercise of their power of sale. But the secretary of the committee who fixed the reserve price, nominated the auctioneer, and instructed him, presented himself at the auction, and bought the property for himself with a view to profit. There was impropriety in the way the acution was conducted since the person who bid the highest was he who had fixed the reserve price, and bearing in mind his preconceived intention to purchase for resale at a profit he would not be expected to fix a reserve price which would stultify this preconceived intention.

In Tse Kwong Lam (supra) the mortgaged property was bought on behalf of a company in which the mortgagee was a director who hold a large beneficial interest therein and who was entirely responsible for financing the company. The other share-holders were the mortgagee's wife and children. The company by resolution of its directors comprising the mortgagee and his wife, nominated the mortgagee's wife to attend and bid at the auction as agent of the company. On the day of the auction the

mortgagee and his wife attended the auction. The mortgagee then gave the auctioneer the reserve price. The auctioneer introduced the property, announced the reserve price and invited bids. Though there were 30 to 40 persons present, there was no bid, until the mortgagee's wife made the only bid which was at the reserve price and the property was knocked down to her. The money to complete the sale by auction was advanced by the mortgagee to the company, which paid back this very sum to the mortgagee, in return for a transfer of the mortgaged property from the mortgagee to the company. It was in these circumstances that Lord Templeman at ~~page 59~~ said:

> "... the sale must be closely examined and a heavy onus lies on the mortgagee to show that in all respects he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgaged property. Sale by auction does not necessarily prove the validity of a transaction."

Lord Templeman went on to consider many options which in the particular circumstances were open to the mortgagee which would have gone a far way to establish some semblance of fairness. For example, he could have consulted an independent person such as an estate agent about the level of the reserve price since he was interested in the auction sale. Lord Templeman concluded that:

> "It was not of course in the interests of the company that enthusiasm for the sale should be stimulated or that the reserve should be settled by anyone other than the mortgagee. The reserve of $1.2 m was fixed by the mortgagee and was the price at which he advised and intended that the company should purchase. The mortgagee was a property investor and speculator. The company was his family company and he held shares in and financed the company. The mortgagee would not have advised the company to bid $1.2 m for the property unless he thought that was an advantageous price for the company to pay. The company unlike an independent bidder, knew all about the property through the mortgagee and knew

> "the amount of the reserve in advance ..... There was no competitive bidding and the company purchased the property at a price fixed by the mortgagee. There is no sufficient evidence that this particular auction produced the true market value." (emphasis mine)

It is clear that though Lord Templeman stated that an auction does not necessarily prove the validity of a transaction, he is not to be understood as saying that an auction at which there are independent competitive bids by persons who have no foreknowledge of information improperly given by the mortgagee which could reduce the level of the bids, will not be accepted as valid and will not provide cogent evidence that the mortgagee has taken reasonable steps to obtain the true market value of the property by, and through, the medium of the auction sale itself. In this regard the view of Salmon L.J., in Cuckmere Brick Co., (supra) at p. 643 is most apposite. He said:

> "Nor in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding is exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes."

Thus Salmon L.J., was saying that consistent with the principle which he later enunciated at p., 646 which has been stated earlier in this judgment, an auction which has not been manipulated by the mortgagee is evidence of reasonable precaution taken by the mortgagee to obtain the true market value of the mortgaged property on the date on which he decides to sell. The view expressed by Salmon L.J., (supra) negatives any obligation of the mortgagee to fix, or have fixed, any reserve price (in circumstances where he does not bid at the auction), because he has the right to accept the highest bid even if it was below what was the ascertained true market value. Equally, the 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 when the sale is by auction. He can properly rely

on the independent competitive biddings at the auction to obtain the true market value, and even if this is not obtained through poor attendance at the auction and or exceptionally low bids, he is not on that account per se liable to his mortgagor for breach of any duty to take reasonable precaution to obtain the true market value. To the contrary, the mortgagee could say that he had taken the reasonable precautionary steps to protect the mortgagor by having an auction which has been conducted without any impropriety.

In the present appeal no impropriety as to the conduct of the auction is alleged or proved. The bases on which the mortgagee is being held to have failed in its duty are that it failed to ascertain the then current market value by valuation prior to the auction, and failed to fix a reserve price. These failures I have already said, do not individually or collectively constitute breaches of duty particularly in an auction sale in which the mortgagee has not participated and where no impropriety, in relation to the auction itself has been alleged or appears on the evidence. The situation fits neatly into the case postulated by Salmon L.J., of poor attendance and exceptionally low bids.

The first and second grounds of appeal are premised on there being a duty on the part of the mortgagee to ascertain the market value of the property prior to the auction sale so to ensure that it is not sold much below this market value. These grounds are of academic interest in the light of the preceding opinion. Nonetheless, the complaint made is that the evidence as to what the true market value was at the date of sale, was so cogent that the learned trial judge ought not to have rejected such evidence. The learned trial judge in relation to this aspect of the case said:

> "The fulcrum of the Plaintiff's argument is that the sale price of Six Thousand Four Hundred Dollars ($6,400.00) was far less than the true market value or the best price, which is evidence of bad faith or negligence. In support of the proposition the Plaintiff relied upon the evidence of the several witnesses called and who testified as to what in their view would be the value of the mortgaged premises or comparable holdings on the date of the auction."
> With all deference to the fact that three of these witnesses were persons experienced in the business of Real Estate and construction I was far from impressed as to the basis upon which they arrived at their valuation. It was quite clear from their demeanour in the witness box that their valuations were more imagined than real."

The evidence disclosed that Kenneth Reid, a Realtor valued the premises based on an inspection in February 1974 some three years after the auction, and two years after the sale by Pennant. He had earlier testified that his inspection was in January, 1971 a mere three months after the auction sale. He admitted that he never went into the premises as he could not gain entrance. He relied on an estimate of the land space, and equally on an estimate of the approximate number of square feet occupied by the building. He certainly was in no position to give a credible valuation. Hylton Dawson, a contractor and builder, said he had never been inside the premises, but that he can properly estimate the value of a building without entering. The other witnesses called by the appellant had no knowledge whatsoever of the valuation of buildings. The two so-called experts in real estate valuations could not in the light of their evidence say what was the condition of the building, at least, internally. In this state of the evidence, it cannot fairly be said that the learned trial judge did not have a basis for concluding that "the evidence was more imagined than real." He considered, having regard to the demeanour of these witnesses and the tenuous nature of the basis of

their valuation, that their evidence was unreliable as to the market value of the premises at the date of sale.

Further, the sale price in October 1971 provided no true indication of the true value of the mortgaged premises at the time of the auction, since considerable improvements could have been made prior to this sale and there was no evidence to the contrary.

There is thus in my view no basis on which the learned trial judge's finding can be faulted and/or disturbed.

For the reasons given herein the appeal ought to be dismissed.

<u>WHITE, J.A.</u>:

I have read in draft the judgments of Carberry and Campbell JJA, and I agree that the appeal should be dismissed.

Cases referred to cont'd

16. Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 13 CLR 676

17. Forsyth v Blundell (1973) 129 CLR 477

18. The Australian and N.Z. Banking Group Ltd v Bangadilly ... Ltd (1978) 139 CLR 195

19. Alexandre v N.Z. Breweries (1974) 1 NZLR 479

20. Sterne v Victoria and Grey Trust (1984) 14 DLR (4th) 193

21. Skibinski v Bank of Nova Scotia (1984) 10 DLR (4th) 101

22. B.N.S. v Barnard (1984) 9 DLR (4th) 575

23. McHugh v Union Bank of Canada (1913) AC 299 (P.C.)

24. Rose Hall Ltd v Chase Merchant Bankers (Jamaica) Ltd Suit E 211/76 Judgment 22/11/76