[2022] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO 13/2018

BETWEEN MILLARD DUNBAR APPELLANT

AND ST CATHERINE CO-OPERATIVE CREDIT UNION RESPONDENT

Carlton Williams and Mark Williams instructed by Williams, McKoy and Palmer for the appellant

Mrs Tana'ania Small Davis and Ms Monique Hunter instructed by Livingston Alexander and Levy for the respondent

3 and 4 November 2020 and 2 December 2022

BROOKS JA

[1] The essence of the issues, in this case, is whether:

a. a mortgagee can properly claim to have served a notice of foreclosure if it is aware that the registered mail by which the notice of foreclosure was sent, was returned to it, unclaimed; and

b. in those circumstances, in subsequently applying for foreclosure of the mortgaged property, the mortgagee's assertion to the Registrar of Titles ('the registrar') that it had served the notice, constituted

fraud and allowed for the setting aside of the foreclosure.

[2] A judge of the Supreme Court ('the learned trial judge') ruled that:

a. the service of the foreclosure notice complied with the requirements of section 119 of the Registration of Titles Act ('the ROTA'), despite the foreclosure notice being returned; and

b. there was no positive duty placed on the mortgagee to have disclosed to the registrar that the postal article containing the foreclosure notice had been returned to it and, therefore, the mortgagee did nothing to warrant setting aside the foreclosure.

The learned trial judge also ordered costs in favour of the mortgagee. The full gamut of his orders will be discussed below.

[3] The mortgagor, Mr Millard Dunbar, has appealed that decision and asserted that the learned trial judge erred in his findings.

Background

[4] On 29 May 2009, Mr Dunbar mortgaged his registered land at Twickenham Park in the parish of Saint Catherine ('the land') to EduCom Co-operative Credit Union, which was formerly Saint Catherine Co-Operative Credit Union ('the CU'). He defaulted in making the agreed payments and the CU decided to exercise its power of sale contained in the mortgage.

[5] In doing so, the CU sent the statutorily required notice of sale, addressed to Mr Dunbar, to Keith Hall District, Bog Walk PO in the parish of Saint Catherine. That was

the address of his residence at the time and the address that appears for him on the certificate of title for the land and the mortgage instrument.

[6] Mr Dunbar's default continued but the CU was unable to have the land sold by either public auction or private treaty. It then pursued foreclosure. Through its attorneys-at-law, it sent the notice of its intention to foreclose to Mr Dunbar. It sent the notice by registered post addressed to him at the Keith Hall District address. In a letter, which was admitted into evidence at the trial, the postmistress at the Bog Walk Post Office stated that the registered mail was unclaimed and it was returned to the CU's attorneys-at-law. That evidence is uncontradicted.

[7] Despite the returned foreclosure notice, the secretary to the CU's board of directors later signed a declaration in support of the CU's application for foreclosure (which was prepared by the same attorneys-at-law that had sent the foreclosure notice). In that declaration, the secretary stated, in part:

> "That a Notice has been given to the Mortgagors [sic] of [the CU's] intention to apply for a Foreclosure Order by registered letter addressed to the Mortgagors [sic] and a copy of this Notice and the Post Office receipt for same are exhibited to the Statutory Declaration lodged herein."

No mention was made of the fact that the registered article containing the foreclosure notice had been returned to the CU's attorneys-at-law.

[8] The registrar approved the CU's application for foreclosure and the foreclosure was completed. Consequently, the registrar issued a new certificate of title for the land, with the CU as the registered proprietor.

[9] When Mr Dunbar discovered the fate of the land, he sued the CU to have the foreclosure rescinded. During the trial, he sought to adduce, as expert evidence, a report of an attorney-at-law, who is experienced in conveyancing matters. The report concerned the procedure to be used in applying for foreclosure. The learned trial judge

refused the application and, at the end of the trial, gave judgment in favour of the CU, giving rise to Mr Dunbar's appeal.

The appeal

[10] Mr Dunbar filed five grounds of appeal:

> "1. That the learned trial judge's ruling that the evidence of the duly appointed expert witness was inadmissible whether in part or whole, was erroneous and deprived [Mr Dunbar] of putting forward his best case, to his detriment.
>
> 2. That the learned trial judge erred in finding that [the CU's] assertion that 'notice in writing of the intention of [the CU (or [its] transferee) to make an application for foreclosure has been served on [Mr Dunbar]' was honest and accurate," [sic] there being uncontroverted evidence to the contrary, which [the CU] had knowledge of or ought to have had knowledge of.
>
> 3. The learned trial judge was, respectfully in error to have held that 'for the non-disclosure…to be evidence of dishonesty and/or fraud there would have had to have been a positive duty placed on [the CU]…' for the reason that dishonesty in any shape or form with intent to mislead and/or deceive is fraudulent and the absence of a provision to this effect in section 119 of the Registration of Title's [sic] Act, does not relieve applicants of the duty to be honest.
>
> 4. That the uncontroverted evidence relating to the issues of service, breach of oral representation, breach of fiduciary and statutory duty, unjust enrichment by [the CU] were all part of a scheme to defraud [Mr Dunbar] of his premises culminating in the non-disclosure to the Registrar of Titles and as such the learned trial [j]udge fell into error in treating with these issues individually instead of viewing them as threads in a composite whole, in support of the scheme to mislead or deceive the Registrar of Titles.
>
> 5. The failure of the learned trial judge to refer to or, as it appears, in any way whatsoever to consider the

> evidential fact that the outstanding sum on the mortgage had been paid into court by [Mr Dunbar], thereby indicating his ability, readiness, and willingness to liquidate the mortgage was fatal to [Mr Dunbar's] case."

[11] Except for grounds 3 and 4, which will be considered together, the other grounds will be considered separately, starting with ground 1.

Ground 1-The rejection of the expert evidence

[12] This issue arose from the learned trial judge's refusal to consider the report of the attorney-at-law on the point of whether the return of the notice to the CU's attorneys-at-law before the foreclosure application was made, invalidated the foreclosure exercise. The learned trial judge, when presiding at the pre-trial review hearing, had certified the attorney-at-law as an expert, but allowed for objection to be taken at the trial, to the admission of the report, or any part thereof, into evidence. The record of the trial discloses that he gave a reason at the time of ruling the report inadmissible:

> "**Court Rules**: that the Expert Report is not to be admitted having regard to the purpose stated in the report." (Emphasis as in original)

The learned trial judge did not mention his rejection of the report in his written reasons for judgment.

[13] In this court, learned counsel for Mr Dunbar, Mr Carlton Williams, submitted that although the refusal to admit the report into evidence was an exercise of the learned trial judge's discretion, it was subject to be overturned, because the learned trial judge erred in law in that regard. Learned counsel submitted that, had the learned trial judge availed himself of the report, he would have appreciated the distinction between the issue of service of the notice of foreclosure, and that of the failure to disclose to the registrar that the notice had not been served because it had been returned.

[14] Mrs Small Davis, for the CU, re-iterated the point that the learned trial judge's ruling on this issue was an exercise of his discretion. She argued that the exercise was beyond the jurisdiction of this court. Learned counsel submitted that the report was rightly rejected because it dealt with the same issue that the learned trial judge was supposed to have decided. She submitted further that the report was unhelpful since, dealing with matters of local law, it did not contain any information with which the court was unfamiliar. She relied on several cases including **Barings plc and another v Coopers & Lybrand and others; Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others** [2001] PNLR 22 ('**Barings plc and another**') and **Midland Bank Trust Company Ltd and Anor v Hett Stubbs & Kemp** [1979] Ch 384 ('**Midland Bank Trust**') in support of her submissions.

[15] It must be held that the learned trial judge's decision on this issue should not be disturbed. The report indeed sought to deal with the very points that the learned trial judge was required to resolve, namely, whether the foreclosure notice had been properly served and the status of the CU's representation to the registrar that it had served that notice. It is noted that the attorney-at-law, who provided the report, stated that one of the purposes of preparing it was to speak:

> "On the compliance by [the CU] with Section 119 of the [ROTA] in the circumstances leading to the foreclosure of the [CU] upon [the land][.]"

[16] It is plain that that is one of the matters that the learned trial judge was required to resolve. His decision to reject the report in those circumstances could not be considered an error in law and should not be disturbed (see paragraph [14] of **Caricom Home Builders Company Limited v Dinsdale Palmer** [2018] JMCA Civ 24, which approved the general application of the principles stated in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at paragraph [20], regarding the appellate court's approach to the exercise of discretion by first-instance judges, in interlocutory matters).

[17] Support for the learned trial judge's stance can be drawn from the judgment of Oliver J in **Midland Bank Trust**, in dealing with evidence concerning the scope of a solicitor's duty, when he is consulted about a particular aspect of a problem. Oliver J stated that the issue was one of law for the court and therefore the evidence in that regard was inadmissible. He said, in part, on page 402:

> "…I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. **The extent of the legal duty in any given situation must, I think, be a question of law for the court**. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. **But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide**." (Emphasis supplied)

[18] In **Barings plc and another**, Evans-Lombe J included that quote from Oliver J, in his judgement, and noted that the decision in **Midland Bank Trust** had been approved by the Court of Appeal of England and Wales (see pages 558-559).

[19] Based on the above reasoning, the learned trial judge's decision, refusing to admit the attorney-at-law's report cannot be disturbed.

Ground 2 - The learned trial judge's treatment of the issue of service

[20] The resolution of this ground turns on the validity, in law, of the statement that the notice of foreclosure was served.

[21] On this issue, as well as the issues raised by grounds 3 and 4 of the grounds of appeal, the learned trial judge seemed to have proceeded on the basis that the CU, or at least its attorneys-at-law, knew, when it presented the application for foreclosure to the registrar, that the notice of foreclosure had been returned unclaimed. He said, in part, in paragraph [5] of his judgment:

> "…[The CU] did not successfully refute the evidence of [Mr Dunbar] that he did not receive the Notice of Foreclosure. Most importantly, there was no challenge to the contents of the letter of the Postmistress of Bog Walk Post Office, addressed to Counsel for [Mr Dunbar], in which it was confirmed that the registered article for [Mr Dunbar] which was received by the Post Office on the 15th September 2014 was in fact returned from the Post Office to the offices of [the CU's attorneys-at-law] on the 22nd day of October 2014."

[22] The learned trial judge relied on several decided cases from Australia to find that, for section 119 of the ROTA, notices properly sent by registered post were to be deemed served. He said, in part, in paragraph [41] of his judgment:

> "…It is therefore this Court's opinion that the inclusion of the method of service of leaving it on the mortgaged land demonstrates that it was not the legislature's intent that the notice of foreclosure in every instance, including a notice '*sent through the post office by a registered letter*', must actually be received by or come to the attention of the mortgagor for there to be effective service of it." (Italics as in original)

[23] He concluded in paragraph [43] that "there was no defect in the service of the Notice of Foreclosure, in that it complied with section 119 of the [ROTA], notwithstanding the fact that it was not actually received by [Mr Dunbar]".

[24] Mr Williams accepted that the Australian cases asserted the principle that the learned trial judge followed. Learned counsel submitted, however, that the learned trial judge erred in relying on those cases, because they, or at least the later ones, acknowledged that that interpretation of the legislation created hardship, but felt bound

to follow the principle, because it was established by the earlier decided cases. Learned counsel submitted that the learned trial judge was not so bound and that he should have proceeded on the principle of fairness as demonstrated in cases such as **R v Appeal Committee of County of London Quarter Sessions, *Ex parte* Rossi** [1956] 1 All ER 670 ('**Ex parte Rossi**'). Mr Williams urged this court to adopt the fairness approach as set out in **Ex parte Rossi**. Learned counsel also relied on the reasoning of Phillips JA in **George Anthony Hylton v Georgia Pinnock (as Executrix of the Estate of Dorothy McIntosh, deceased) and others** [2011] JMCA Civ 8 ('**Hylton v Pinnock**'). In **Hylton v Pinnock**, this court considered the interpretation of the portions of sections 139 and 140 of the ROTA, which deal with the service of a warning on a caveator. The reasoning, Mr Williams submitted, is nonetheless applicable to this case.

[25] Mrs Small Davis countered by submitting that the Australian cases were based on the Torrens system of land titling that is also used in this country and therefore the learned trial judge was correct in relying on those authorities. She cited the cases of **Yap Cheng See v Challenge Bank Ltd** (unreported), Supreme Court, Western Australia, WASC Library No 970695, judgment delivered 12 December 1997, **Commonwealth Bank of Australia v Shaddick** [2011] WASC 205, **Kirkman v Frost** (1978) 20 SASR 192, **Bayford v St George Bank Ltd** [2003] SASC 210 and **Rickwood v Turnsek and another** [1971] 1 All ER 254. Learned counsel also argued that there were also previous decisions of this court that also supported the stance that the learned trial judge adopted.

[26] Learned counsel submitted that the cases supported the proposition that the intent of section 119 of the ROTA was that the methods of service were designed so that the foreclosure notice would most likely come to the attention of the mortgagor, but that there was no requirement that it should come to the attention of the mortgagor. Mrs Small Davis submitted that "[o]nce there is strict compliance with the [ROTA], service is effective". She also cited, in support of her submissions, the case of

Owen K Clunie v The General Legal Council [2014] JMCA Civ 31 ('**Clunie v GLC**') and the judgment of Phillips JA therein.

[27] The analysis of the issue raised by this ground largely turns on the interpretation of section 119 of the ROTA. The section states, in part:

> "Whenever default has been made in payment of the principal or interest money secured by a mortgage … the mortgagee or his transferee may make application in writing to the Registrar for an order for foreclosure; **and such application shall state** that such default has been made … and **that notice in writing of the intention of the mortgagee** or his transferee to make an application for foreclosure **has been served on the mortgagor** or his transferee, by being given to him or them, or by being left on the mortgaged land, **or by the same being sent through the post office by a registered letter directed to him or them at his or their address appearing in the Register Book**, and also that a like notice of such intention has been served on every person appearing by the Register Book to have any right, estate or interest, to or in the mortgaged land subsequently to such mortgage, by being given to him or sent through the post office by a registered letter directed to him at his address appearing in the Register Book. ..." (Emphasis supplied)

[28] Another legislative provision to be considered in this context is section 52(1) of the Interpretation Act. It states:

> "**Where any Act authorizes or requires any document to be served by post**, whether the expression 'serve', 'give' or 'send' or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, **unless the contrary is proved**, to have been effected at the time at which the letter would be delivered in the ordinary course of post." (Emphasis supplied)

[29] It does not appear that any previously reported case from this jurisdiction has interpreted section 119 of the ROTA in this context. Both Mr Williams and Mrs Small

Davis sought to assist the court by providing the interpretation given to similar provisions in other legislation. They understand that references to other legislation must be considered with caution.

[30] The decisions of this court, to which we have been referred, demonstrate that section 52(1) of the Interpretation Act cannot be prayed in aid in interpreting section 119 of the ROTA for these purposes. In both **Hylton v Pinnock** and **Clunie v GLC**, Phillips JA referred, with approval, to the relevant finding of Smith JA in **Mitchell v Mair and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 125/2007, judgment delivered 16 May 2008 ('**Mitchell v Mair**'). Smith JA held that section 52 of the Interpretation Act is excluded if there is a provision in any law to the contrary. He ruled that since the statutory provision under consideration speaks to "registered post", section 52 of the Interpretation Act, which speaks to "post" and "ordinary post", does not apply.

[31] In his reasoning, Smith JA considered section 6 of the Election Petitions Act ('EPA'), which provided for the service of a petition within 10 days of presentation. The relevant portion of the section states:

> "Service of the petition may be effected either by personal service or by registered post to the address of the respondent stated in the respondent's nomination paper."

[32] On page 21 of the judgment, he specifically posed the question of "whether service is effected on the mere posting of the registered letter containing the documents[?]". On page 22, he went on to demonstrate that there was a distinction between the provisions of section 6 of the EPA and section 52 of the Interpretation Act. He pointed out that "section 6 of the EPA refers to registered post. Section 52 of the Interpretation Act speaks to post and ordinary post" (underlining as in original). He answered the question that he had posed for himself by stating, on page 23, "I am inclined to agree…that the language of section 6 of the EPA shows a 'contrary intention' and section 52 of the Interpretation Act does not apply". He continued on pages 23-24:

> "…In my view section 6 provides a statutory method of serving … so that when the documents have been 'served' as directed, **it is not necessary to show that the addressee has received them**. Once the service is effected within the time prescribed and in the manner stated such service is valid. **Since the validity of service does not depend on receipt**, the date of receipt is irrelevant…." (Emphasis supplied)

[33] In both **Hylton v Pinnock** and **Clunie v GLC**, Phillips JA found that section 52 of the Interpretation Act was excluded from the interpretation of the provisions under consideration by the court. Based on those cases, it must be found that the stipulation in section 119 of the ROTA, about the use of registered post, excludes the operation of section 52(1) of the Interpretation Act, which allows for evidence contradicting service.

[34] On that reasoning, it must be said that the CU complied with section 119 of the ROTA in serving Mr Dunbar. It did so by sending the notice of foreclosure to him "through the post office by a registered letter directed to him at his address…appearing in the Register Book".

[35] It is noted that Phillips JA, in **Hylton v Pinnock**, did refer with approval to the cases of **Ex parte Rossi** (on which Mr Williams relied) and **Beer v Davies** [1958] 2 All ER 255. However, as both **Ex parte Rossi** and **Beer v Davies** turned on the application of the equivalent of section 52 of the Interpretation Act, neither case assists Mr Dunbar. The details of those cases need not be outlined here.

[36] The other cases that Mr Williams cited, in support of his submissions, also fail to assist Mr Dunbar. In both cases, the court strictly applied the relevant procedural rules. In **Goodwin v Swindon Borough Council** [2001] EWCA 1478; [2002] 1 WLR 997, a claim form, which had been sent by registered post, was delivered on the last day of its validity. However, the relevant rule of the Civil Procedure Rules of England and Wales, deemed that service had been effected on the following day when the claim form had expired. The Court of Appeal of England and Wales ruled that the court could not consider the actual date of delivery. It, accordingly, struck out the claim. In **Watson v**

Sewell and others [2013] JMCA Civ 10, Phillips JA found that the default judgment had been regularly entered because of compliance with the relevant rules concerning service (see paragraphs [41] and [44]). The judgment was set aside, however, under the court's discretion, given by the rules, to set aside a regular judgment (see paragraphs [47] and [48]).

[37] The Australian cases may now be examined. Both **Commonwealth Bank of Australia v Shaddick** and **Yap Cheng See v Challenge Bank Ltd** considered the provisions of section 106(2) of the Transfer of Land Act 1893 (Western Australia). That subsection deals with the service of a notice of default upon a mortgagor. It stated:

> "Notwithstanding section 240 [of the same Act], service of the notice referred to in subsection (1) is not properly effected unless -
>
> (a) the notice is delivered personally to the mortgagor or the grantor or his transferees, as the case requires; or
>
> (b) **the notice is sent by registered post to -**
>
> > **(i) the address entered in the Register as the address of the mortgagor or the grantor or his transferees, as the case requires; or**
> >
> > **(ii) the address known to the mortgagee or the annuitant or his transferees as the current address of the mortgagor or the grantor or his transferees, as the case requires**; or
>
> (c) the notice is left in a conspicuous place on the mortgaged or charged land; or
>
> (d) the notice is sent to the number of the facsimile machine of the mortgagor or the grantor or his transferees, as the case requires (but only where the mortgagor or the grantor or the transferee has specified in writing to the mortgagee or the annuitant or his transferees, as the case requires, that notices under this section may be served on him by facsimile transmission)." (Emphasis supplied)

[38] In **Commonwealth Bank of Australia v Shaddick**, Master Sanderson said, in paragraph 3 of the judgment, that "[i]t was common ground between the parties [that] the default notice was posted by registered letter to the [mortgagor]. The letter was addressed to the [mortgagor] at her residential address which was the address of the mortgaged property. The letter - that is to say, the default notice - was returned unopened". Despite the return, the learned master held that service had been effected. In analysing section 106(2), Master Sanderson reasoned, in paragraph 6:

> "As counsel for the [mortgagee] submitted, this subsection is not in the nature of a consumer protection provision. It sets out a method by which default notices can be served. It is clear the subsection does not anticipate a default notice will, in every instance, actually come to the attention of the party to be served. Clearly, s 106(2)(a) anticipates this will occur. But subss (2)(b), (c) and (d) provide a method of service which is by no means certain to ensure the default notice will come to the attention of the registered proprietor. It may be a notice left in a conspicuous place on the mortgaged land will come to the attention of a registered proprietor who attends on the property. But if, as is the case here, the registered proprietor is overseas and does not attend on the property, then the notice will not come to his or her attention. But service is still effected."

[39] The learned master also relied on authority to support that reasoning. Among the cases cited was, in paragraph 9, **Yap Cheng See v Challenge Bank Ltd**:

> "Parker J applied the same reasoning in ***Yap Cheng See v Challenge Bank Ltd*** (Unreported, WASC, Library No 970695, 12 December 1997). His Honour said (at 29):
>
> > [']The methods of service provided for in s 106 suggest that it is not the intention of the provision that the notice to which it refers must reach the mortgagor. That is readily apparent from the method of service identified whereby the notice can be left on a conspicuous place on the mortgaged land, which method by no means ensures that the notice will be brought to the attention of the mortgagor. It seems to me, therefore, that there is no

> reason to understand the third method of service 'sending through the post office a registered letter' as requiring that the notice actually be received by the mortgagor.[']" (Italics and bold text as in original)

[40] Although not dealing with a foreclosure notice, or having identical terms, the requirements of section 106(2) of the Australian legislation are sufficiently similar to those of section 119 of the ROTA for this court to accept, as pertinent, the reasoning of the learned master. A similar interpretation should be applied to section 119 of the ROTA since the statutory treatment of the method of service is indistinguishable. Mr Williams' submissions to the contrary cannot be supported.

[41] The conclusion to this analysis is:

a. since section 119 of the ROTA provides a method of service, section 52(1) of the Interpretation Act does not assist in considering the issue of service of the foreclosure notice;

b. the CU, having sent the notice by registered post, complied with section 119 and effectively served it on Mr Dunbar, even though he did not receive it;

c. Mr Williams' submissions in respect of this ground of appeal cannot, therefore, succeed.

Grounds 3 and 4 - The learned trial judge's treatment of the issue of the honesty of the assertion that the foreclosure notice had been served

[42] These grounds turn on the question of whether the CU's representation to the registrar, that it had served Mr Dunbar with the notice of foreclosure, was dishonest since it knew when it made that statement, that the notice had previously been returned to its attorneys-at-law.

[43] The learned trial judge ruled that since service had been regularly effected according to the ROTA, the CU was under no obligation to disclose to the registrar that the notice had been returned unclaimed and undelivered. He found that the CU had not made any false statement and had not failed "to disclose a material fact which could amount to dishonesty, misrepresentation, fraud or deception" (see paragraph [55] of the judgment).

[44] Mr Williams submitted that the learned trial judge had erred in taking that approach. Learned counsel argued that the CU was deliberate in its actions and the circumstances demonstrate that it was dishonest when it failed to disclose that the registered article had been returned unclaimed. He pointed to the following factors:

a. the advertisement for the auction referred to an address which was not the address of the land;

b. the CU stated that the land was valued at $15,000,000.00, whilst Mr Dunbar had a valuation of $42,000,000.00;

c. the CU had encouraged Mr Dunbar to make payments toward liquidating the debt, whilst at the same time pursuing the foreclosure of the land; and

d. as soon as it had acquired the registered title to the land, the CU agreed to sell the land for many times the amount of the debt that Mr Dunbar owed.

[45] The dishonesty in this context, learned counsel submitted, amounts to fraud. Mr Williams cited a portion of the judgment of Batts J in **Iris Anderson v Thomas Anderson and Another** [2014] JMSC Civ 62, in support of the principle that failure to disclose known facts, with intent to obtain a title, constitutes fraud.

[46] Mrs Small Davis submitted that fraud requires proof of a higher standard than that attained by Mr Dunbar's assertions. Learned counsel supported the learned trial judge's approach and argued that for the CU's declaration to amount to fraud, there would have had to have been a duty placed on it to disclose the return of the notice. There was no such duty, Mrs Small Davis submitted, and therefore the omission "cannot amount to dishonesty, fraud or deception, particularly when the [CU] acted in honest belief that it has fully complied with the requirements of the [ROTA]" (paragraph 31 of her written submissions).

[47] Learned counsel submitted that the standard for establishing dishonesty has been well settled by the case of **Assets Company Limited v Mere Roihi and Others** [1905] AC 176 ('**Assets Company v Mere Roihi**'), which has been recognised and accepted in this jurisdiction in cases such as **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and others; RBTT Bank Jamaica Limited v Estate Rudolph Daley and others** [2010] JMCA Civ 46 ('**Harley Corporation v Estate Daley**'). Those cases, Mrs Small Davis submitted, established that fraud, for the ROTA "meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud", as Lord Lindley said on page 210 of **Assets Company v Mere Roihi**. There was nothing in the CU's actions, she argued, that rose to the level of dishonesty.

[48] In this case, she submitted, it cannot be ignored that the posting of the notice of foreclosure was only a part of the foreclosure process. There were other opportunities, she said, for Mr Dunbar to be alerted to the application for foreclosure. Learned counsel pointed to the fact that the registrar, upon receiving the application, ordered the publication of advertisements, on three separate days, a week between each publication, in a nationally circulated newspaper. The publications were done.

[49] To analyse the issues raised by these grounds, it is necessary to restate major and well-established principles that are integral to the ROTA. Firstly, in the absence of fraud, a registered title confers an absolute title on the registered proprietor of the

property that is comprised in the certificate of title. Sections 68, 70 and 71 of the ROTA are often properly cited as the bases for that principle. This was done in **Gardener and Another v Lewis** [1998] UKPC 26; [1998] 1 WLR 1535 (an appeal from a decision of this court), where their Lordships of the Privy Council, after citing the three sections, said, in paragraph 7 of their judgment:

> "From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. **The appellants' legal title can only be challenged on the grounds of fraud** or prior <u>registered title</u> or, in certain circumstances, on the grounds that land has been included in the title because of a 'wrong description of parcels or boundaries': section 70." (Bold type supplied, underlining as in original)

[50] Another well-established principle is that stated in **Assets Company v Mere Roihi** that fraud, in the context of the ROTA, means actual, not constructive or equitable fraud. The Privy Council made this reference in the context of the Torrens system of land registration, in an appeal from New Zealand. This court reiterated that principle in paragraph [52] of **Harley Corporation v Estate Daley**. In the latter case, Harris JA re-iterated the need for actual dishonesty in paragraph [60], where she said, in part:

> "…Fraud for the purposes of sections 70 and 71 of the Act must be born out of acts which are 'designed to cheat a person of a known existing right' - see **Waimiha Sawmilling Company v Waione Timber Co; Bannister v Bannister** [1948] 2 All E.R 133 and **Binnons v Evans** [1972] Ch 359. It is clear that, as shown in **Asset**[**s**] **Company Limited v Mere Roihi** (1905) AC 176, 210, acts founded on contrived ignorance or wilful blindness would be such acts arising out of constructive or equitable fraud."

[51] It is also noted that on page 300C of **Doris Willocks v George Wilson and Another** (1993) 30 JLR 297, Carey P (Ag) stated that fraud in the ROTA, "means actual fraud, i.e. dishonesty". The requirement to provide all relevant information to the

registrar was highlighted in **Thomas Anderson v Monica Wan (as personal representative in the estate of Iris Anderson)** [2020] JMCA Civ 41 ('**Anderson v Wan**'). Although the following statement was made in the context of an application for first registration, it is no less pertinent to an application for foreclosure. Morrison P said, in part, in paragraph [41]:

> "I accept that, as [counsel for the appellant] was anxious to demonstrate, neither sections 28-31 of the [ROTA] nor the NLA guidance on how to apply for a registered title incorporates an explicit requirement for the applicant to disclose competing or adverse interests. **But, in my view, the clear intention of the stated requirements is that the applicant should disclose all such matters as may be necessary to put the Referee in a position to make an informed assessment of whether a case for bringing the land in question under the operation of the [ROTA] has been made out**. In particular, the information supplied must be, as [counsel for the respondent] submitted, sufficient to enable the Referee to determine that the applicant is in possession of the land in question and that he 'would be entitled to maintain and defend such possession against any other person claiming the same or any part thereof'." (Emphasis supplied)

[52] Each case, however, rests on its facts. This court accepted that principle in **Anderson v Wan**. In paragraph [39] of the lead judgment in that case Morrison P stated:

> "Fraud in [the context of sections 68 and 70 of the ROTA] therefore connotes dishonesty of some kind. Lord Buckmaster made the same point in **Waimiha Sawmilling Company Ltd (In Liquidation) v Waione Timber Co Ltd**, another decision of the Privy Council on appeal from New Zealand:
>
> > 'If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ... **each case must depend upon its own**

> **circumstances. The act must be dishonest** …'"
> (Emphasis supplied)

[53] Another principle in law, which should be considered, is the consequence of foreclosure. When a foreclosure occurs according to sections 119 and 120 of the ROTA, the mortgagee becomes the registered proprietor of the property comprised in the certificate of title. Section 120 states that consequence:

> "…and every such order for foreclosure under the hand of the Registrar when entered in the Register Book, shall have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, free from all right and equity of redemption on the part of the mortgagor or of any person claiming through or under him subsequently to the mortgage; and such mortgagee or his transferee shall, upon such entry being made, be deemed a transferee of the mortgaged land, and become the proprietor thereof, and be entitled to receive a certificate of title to the same, in his own name, and the Registrar shall cancel the previous certificate of title, and duplicate thereof and register a new certificate."

[54] Upon foreclosure, the mortgagee not only supplants the mortgagor, but unlike an exercise of a power of sale contained in a mortgage, after foreclosure, the mortgagee has no obligation whatsoever to account to the mortgagor. Although the procedure for foreclosure is different under the Torrens system than under the common law, the consequence is the same. The learned authors of Land Law 6th Edition, Kevin Grey and Suzan Francis Grey, speaking to the common law and English procedure, describe foreclosure, in paragraph 6112, as:

> "…the most draconian remedy open to the mortgagee in the event of default by the mortgagor. Foreclosure abrogates the mortgagor's equity of redemption and leaves the entire value of the mortgaged land in the hands of the mortgagee irrespective of the amount of the mortgage debt…"

[55] The learned authors of Australian Land Law in Context, Ken Mackie, Elise Bennett Histed and John Page, in paragraph 12.4.3, describe foreclosure under the

Torrens system as being "[s]uch a drastic remedy [that it] is naturally subject to stringent conditions and safeguards".

[56] In determining, against the background of those principles, whether the CU was being dishonest in omitting to disclose to the registrar that the notice of foreclosure had been returned unclaimed and undelivered some other factors may be considered. Apart from the fact of the non-delivery of the registered article, these factors are undisputable:

a. the fact of the non-delivery was material; and

b. the CU cannot claim that it did not know that the registered article had been returned, for, as mentioned above, the attorneys-at-law, who prepared its application for the foreclosure, were the ones to whom the registered article was returned.

[57] Mr Dunbar is not unreasonable in pointing out the CU's omission to inform the registrar that the foreclosure notice had been returned through the post, but it is difficult to find that there was dishonesty in this case.

[58] Although the return of the notice is material, the circumstances are different from a without-notice application to a court for an injunction, where the applicant failed or omitted to inform the presiding judge of the return of a notice to the other side of some aspect of the matter. The difference is that other steps must be taken before the result of the application takes effect. The registrar's intention to register the foreclosure would have had to be advertised publicly before foreclosure could be ordered.

[59] Whereas it is true to say that the CU was aware that Mr Dunbar did not know what was afoot, it cannot be said that the CU knew a certain fact and decided not to declare it, with a view to depriving him of his property. The CU, or at least its legal

advisers, would have known that other steps would have had to be taken before foreclosure could have been ordered.

[60] Some of the cases that Mrs Small Davis cited on behalf of the CU in this context, do not assist.

[61] **Wylie and Others v West and Others** [2013] JMCA App 37 ('**Wylie v West**'), which Mrs Small Davis cited, is distinguishable on the facts and the law. In that case, an omission to inform the registrar of a statement of fact was not found to have been fraudulent. This court found that the devisees under a will were entitled to have the property transferred to them and had no obligation to inform the registrar that a third party had claimed to have an option to purchase the property. The court also found, in paragraph [38], that the judge below determined that there was no valid option to purchase and "[e]ven if the option was valid the legal personal representative of [the deceased's] estate would not have been under any obligation to honour it". Unlike this case, where Mr Dunbar had a clear registered legal interest that was being prejudiced, the third party had no registrable interest in the property. There was no obligation on the respondents in that case, who were the transferees of the property in issue. They had no obligation to the third party.

[62] A similar situation, in law, occurred in **Harley Corporation v Estate Daley**, where the property was sold by a mortgagee. This court found that, in exercising its power of sale under a mortgage, the mortgagee was not obliged to take into account any transaction which the mortgagor had entered into to sell the property to a third party. As in **Wylie v West**, the third party had no legal interest in the property that the party conducting the transaction on the Register Book of Titles was obliged to consider. Mr Dunbar was not in a situation akin to those third parties.

[63] This is not a case of "contrived ignorance or wilful blindness" as cited in **Harley Corporation v Estate Daley**. This is also not a case of the CU taking a blinkered approach, or burying its head in the sand, as mentioned in paragraph 22 of

Twinsectra Limited v Yardley and others [2002] UKHL 12; [2002] 2 AC 164 (also relied on by Mrs Small Davis). This may be categorised as a case of "want of candour", to apply the term Batts J used in **Iris Anderson v Thomas Anderson and Another**, which was approved in paragraph [44] of **Anderson v Wan**, but the circumstances, in this case, differ from **Anderson v Wan**. The CU although aware of the relevant fact of non-delivery was entitled to rely on the legal position that it had complied with section 119 of the ROTA and that Mr Dunbar would be entitled to take measures to avert the foreclosure upon the advertisement of the registrar's intention coming to his attention.

[64] In the circumstances, it cannot be said that the learned trial judge erred in his approach. Accordingly, these grounds of appeal fail.

Ground 5 – The consequence of the payment into court of the amount due on the mortgage

[65] Mr Williams stated the background to this ground of appeal. It was that, upon Mr Dunbar's application, the Supreme Court ordered him to pay the sum of $4,735,173.03 into court. That sum represented, he said, the amount due and owing to the CU, as set out in the notice of sale. The fact that Mr Dunbar made the payment, Mr Williams submitted, meant that Mr Dunbar "had the capacity to act in redemption of the mortgage" (paragraph 60 of learned counsel's written submissions). This, he said, allowed for the re-opening of the foreclosure.

[66] Mrs Small Davis did not dispute the fact that the court has the authority to re-open the foreclosure. She submitted that it, however, did not arise in this case.

[67] It is fair to say that the ROTA does not allow for the re-opening of a foreclosure except in the case of fraud. In the 2nd edition of Baalman The Torrens System in New South Wales, the learned authors, in commenting on section 61 of the Real Property Act NSW, which has similarities to section 119 of the ROTA, opined that while re-opening a foreclosure was possible under the general or common law, an order for foreclosure registered under the relevant Act cannot be re-opened except on the ground of fraud.

[68] Based on the finding that fraud had not been proved, Mr Williams' submission cannot be supported. It is also to be noted that the fact that Mr Dunbar made a payment into court after the commencement of the claim against the CU and the payment was made sometime after the foreclosure, does not signify that he had the means to redeem the mortgage if he had received the foreclosure notice. The history of the matter certainly suggests otherwise. Mr Dunbar was attempting to make payments by instalments and failed to abide by an arrangement that he had with the CU to bring his payments up to date and clear the arrears.

[69] He would now be entitled to a refund of any monies that he paid into court in respect of this case.

[70] Some other issues must be briefly addressed.

Breach of oral representation

[71] Mr Williams pointed to evidence from Mr Dunbar that representatives of the CU had told him that if he made certain payments, the CU would not sell the land. Learned counsel complained that the foreclosure was a breach of that oral representation.

[72] Not only did the CU deny making that representation, but as Mrs Small Davis pointed out, the evidence is clear that Mr Dunbar did not adhere to the payment schedule that he said he was to have met. Learned counsel also pointed out that:

a. the representation that Mr Dunbar said was made to him was that if the requested payments were made, and a buyer was not found, the loan would be renegotiated, in which case that was not a contract, but, at best, a contract to negotiate; and

b. the CU, after having received Mr Dunbar's written settlement proposal, informed him in a letter dated 28 January 2015, that his file had already been sent to

> their attorneys-at-law, the CU was not prepared to cancel its instructions to the attorneys-at-law and that he should refer his correspondence to them.

The evidence supports the CU on these points. Mr Dunbar's complaint, in this regard, cannot be supported.

Breach of fiduciary duty

[73] Mr Dunbar's complaint that the CU breached a fiduciary duty that it owed to him, is also misplaced. A mortgagee has no fiduciary duty to a mortgagor in respect of the power of sale. Although stated in the context of the exercise of the power of sale, the court in **Cuckmere Brick Co Ltd and another v Mutual Finance Ltd; Mutual Finance Ltd v Cuckmere Brick Co Ltd and others** [1971] 2 All ER 633 noted that the mortgagee's interests may conflict with that of the mortgagor and in such a case could consider its interest over that of the mortgagor. In **Moses Dreckett v Rapid Vulcanizing Co Ltd** (1988) 25 JLR 130 this court also recognised that the interests of the mortgagee and the mortgagor may conflict. The mortgagee is, however, required to be careful considering that it would be liable for any loss that its or its agent's negligent action may cause a mortgagor.

Unjust enrichment

[74] Mr Williams also advanced the proposition that the CU had been unjustly enriched by the improper exercise of its right to foreclosure and ought to be ordered to account for the gains that it thereby made.

[75] Mrs Small Davis asserted that the very nature of the remedy of foreclosure is such that once an order for foreclosure is made, the mortgagor has no interest in the property to require the mortgagee to account for the proceeds of any subsequent transaction that it conducts concerning the property. It is always likely, learned counsel submitted, that a sale that is carried out after foreclosure, may reap a sum greater than the debt which the mortgagor owed.

[76] Mrs Small Davis is correct on this point as well. The law governing the principles of unjust enrichment is a developing area. The findings made above do, however, rule out the CU being liable to Mr Dunbar under this heading. The CU has followed the provisions of the ROTA and, in the absence of fraud, the benefits that it has gained therefrom should not be deemed to have been unjustly achieved.

Costs

[77] Unfortunately, Mr Dunbar fails on all the grounds of appeal. Although the general principle is that costs should follow the event there is a basis for departure from the principle in this case. Mr Dunbar, in the circumstances of the non-delivery of the foreclosure notice, may reasonably feel hard done by. It was therefore reasonable for him to have raised the issues in this appeal (see rule 64.6 (4)(d) of the Civil Procedure Rules). Additionally, the CU has made a huge windfall from the foreclosure as, based on the information provided to the court, it has sold the property at a price that is many times the sum which Mr Dunbar owed. His payment into court has also been a burden in the circumstances. Accordingly, it is proposed that he should not be burdened with the costs of the appeal.

[78] The orders that should, therefore, be made are proposed below:

a. The appeal is dismissed.

b. The judgment and orders of the Supreme Court made in this matter on 18 January 2018 are affirmed.

c. The sum of $4,735,173.03 that Mr Dunbar paid into court in respect of this matter should be refunded to him forthwith.

d. Each party shall bear its own costs of the appeal.

Apology

[79] This judgment would not be complete without an apology to the parties for the long delay in having it delivered. The court apologises for the delay and for the inconvenience it has undoubtedly caused.

STRAW JA

[80] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion.

FOSTER-PUSEY JA

[81] I too have read in draft the judgment of my learned brother, Brooks JA, and agree.

BROOKS JA

ORDER

a. The appeal is dismissed.

b. The judgment and orders of the Supreme Court made in this matter on 18 January 2018 are affirmed.

c. The sum of $4,735,173.03 that Mr Dunbar paid into court in respect of this matter should be refunded to him forthwith.

d. Each party shall bear its own costs of the appeal.