**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO 2004/HCV 2305**

**BETWEEN JAMAICA YOUTH DEVELOPMENT FOUNDATION CLAIMANT**

**AND PORTFOLIO INTERNATIONAL JAMAICA LTD DEFENDANT**

**IN CHAMBERS**

**Mrs. Denise Kitson instructed by Grant, Stewart, Phillips and Company for the claimant**

**Mr. Christopher Samuda instructed by Earl Melhado of Earl Melhado and Associates for the defendant**

**November 22, 26, December 1 and 10, 2004**

**Sykes J (Ag)**

## TENANT OF A MORTGAGOR, THE RENT RESTRICTION ACT AND THE REGISTRATION OF TITLES ACT

**1.** This hearing raises this question: does a tenant who leases property from a mortgagor, who let the property in breach of an express covenant not to let the property without the written consent of the mortgagee, becomes a tenant of the purchaser from the mortgagee who exercised his power of sale? Is such a tenant a tenant under the Rent Restriction Act (RRA)?

**2.** This issue has arisen because I had granted an ex parte interim injunction on October 8, 2004 restoring the claimant to possession of

premises from which it alleged it was being ejected. The injunction also restrained the defendant and/or its servants and/or its agents from doing anything that breached the claimant's right to quiet enjoyment. The matter was set for further consideration on October 25, 2004. It was not heard then because the parties needed to file further affidavits. This is now an inter partes hearing where Mr. Samuda has taken the fundamental point that there is no serious issue to be tried because the affidavit evidence of the claimant does not disclose that it has a tenancy binding on the mortgagee. Consequently, there is no lease binding on the purchaser from the mortgagee. Therefore, applying the principles of ***American Cyanamid Co v Ethicon Ltd*** [1975] 1 All ER 504 the injunction should be discharged. Mr. Samuda made other submissions regarding the balance of convenience but having regard to my conclusion I need not consider the other submissions.

**3.** He submitted that the tenant of a mortgagor, who leased premises in breach of his mortgage agreement not to lease the premises without the written consent of the mortgagee does not become, without more, a tenant of the mortgagee. As between the mortgagee and the tenant, there is, in law, no tenancy. If there is no tenancy between the mortgagee and the tenant, then there is no protection under the RRA, which leads to the ultimate conclusion that as between the purchaser from the mortgagee and the tenant, there is no tenancy. The tenant is a trespasser as far as the mortgagee is concerned. The RRA applies only to tenants and landlords. This, admittedly, seems an offensive conclusion in modern times but it seems to me that the law supports Mr. Samuda in his analysis and conclusion.

**4.** Mrs. Kitson says this is simply not so. Section 108 of the Registration of Titles Act (RTA) says that the creation of a mortgage does not have the effect of transferring the legal estate to the mortgagee. This means that the mortgagor still has the legal estate out of which he can create lesser interests and estates. According to Mrs. Kitson, this means that once the mortgagor created a lease, that lease binds the mortgagee and so is transferred to the purchaser from the mortgagee who exercised his power of sale. Thus, the tenant is a tenant of not only the mortgagee but also the purchaser from the mortgagee.

**5.** I must set out more of the history of the matter.

**The lease and the sale**

**6.** The defendant, Portfolio International Jamaica Ltd, (PIJ) purchased the property from the mortgagee of Summer Isle Vacation and Car Rental Limited (SIV) after SIV defaulted on its loan. SIV granted a lease to Jamaica Youth Development Foundation (the Foundation) on July 6, 2003. This was after the property was mortgaged. SIV, at the time of the lease, had mortgaged the property to Trafalgar Commercial Bank. It is not clear whether the mortgagee changed its name to First Global Bank Limited (FGBL) or FGBL acquired the mortgage, but either way, FGBL is the mortgagee for the purposes of this case. Both lessor and lessee are companies registered under the Companies Act of Jamaica.

**7.** There is a body of evidence that suggests that the defendant might not have known of the claimant's existence until after it bought the property. The correspondence suggests that PIJ thought that SIV was still occupying

the premises. That may explain why PIJ commenced recovery proceedings against SIV in the corporate area Resident Magistrate's Court.

**8.** It is not hard to see how this error might have come about. Mrs. Wright- Evans and her husband are the shareholders of SIV. Mrs. Wright-Evans is the executive director of the Foundation and a director of SIV.

**9.** PIJ's legal advisers trawled the seven seas of the law of mortgages, plumbed its depths, and found this legal principle: the tenant of a mortgagor who leased the premises in breach of the mortgage deed, which expressly prohibits any letting of premises without the express written consent of the mortgagee, is not, without more, a tenant of the mortgagee.

**10.**This legal revelation precipitated a change of course for PIJ. It promptly abandoned its action before the Resident Magistrate because the person from whom it sought recovery possession was no occupying the premises. PIJ resorted to the ancient remedy of self-help. i.e. they proceeded to eject the claimant from the property. The advantages are clear – no court, no judge, no lawyers, no extension of time. It is cheap, fast and effective and if the tenant is made of fluff, risk free. PIJ regarded the claimant as a trespasser.

**11.** The Foundation responded by claiming in the action filed,

- **(a)** damages for breach of contract/lease agreement;
- **(b)** damages for breach of the covenant of quiet enjoyment;
- **(c)** damages for trespass;
- **(d)** damages for nuisance;
- **(e)** special damages;
- **(f)** interest

**12.** Mrs. Wright-Evans filed an affidavit dated November 22, 2004 on behalf of the claimant. Her affidavit had these fatal words in paragraph 4: *That none of the names of any of the prospective Lessees for the offices were (sic) ever submitted for approval of the Bank and no specific written approval for any lease was ever sought.* This was not only a breach of the mortgage agreement but also a failure to follow the requirements of the RTA. Strengthened by this admission, Mr. Samuda laid his legal axe at the root of the claimant's action.

**The legal position of tenants of mortgagors vis a vis mortgagees**

**13.** It is somewhat surprising that there are no reported cases in the West Indian Reports and the Jamaica Law Reports, which have examined this narrow corner of the law, particularly, as it relates to registered land. Neither counsel nor I have been able to find a single case dealing with this specific issue. In the absence of reported authority in Jamaica and the West Indies, I have to go back to first principles. The journey goes back to the nineteenth century.

**14.** I begin with a definition of a mortgage. A mortgage is a transfer of ownership of the asset (or of any lesser interest held by the transferor [mortgagor]) by way of security upon the express or implied condition that ownership will be retransferred to the debtor on discharge of his obligation (see *Goode, Roy,* ***Legal Problems of Credit and Security*** 35 (London, Sweet and Maxwell 3rd ed 2003). This is a good definition that captures the essence of a mortgage. In relation to land, at common law, there was a transfer of the legal estate from the mortgagor to the mortgagee who would be obliged to retransfer the legal estate to the mortgagor once the

debt was paid. The mortgage of land was an actual conveyance from the mortgagor to the mortgagee. The condition of the reconveyance was the payment of the debt by the date specified in the instrument of mortgage. The common law knew no mercy. If the mortgagor did not discharge his debt by the date agreed, the mortgagee's estate in the land became absolute and he was no longer bound by the condition to reconvey (see ***Williams on Real Property*** 599 (23rd ed)).

**15.** Equity mitigated the rigours and treated the mortgagor as having an equity of redemption that existed beyond the date of repayment. In equity, this meant that failure to repay by the stated date did not mean that the title of the mortgagee became absolute. The mortgagee was not discharged from his obligation to reconvey and neither was the mortgagor relieved of his obligation to repay the loan. It was a short step from this initial development to the enunciation of the principle that the equity of redemption could not be excluded by agreement. This was the foundation for the rule that there could not be a clog on the equity of redemption. These were the straws from which equity established the principle that the mortgagee of land was the holder of a security interest in the land but not the owner of the estate or interest. In the eyes of equity, the mortgagee had a charge on the property. What the mortgagee had, in equity, was a right to repayment and not a right to the mortgaged property. This right to repayment became, in equity, a personal right, and not a proprietary right. This led to the ultimate view of equity that the mortgagor held the legal estate subject only to the mortgagee's charge. The mortgagor's equity of redemption became an equitable interest in the mortgaged land (see ***Williams on Real Property*** 601 – 602 (23rd ed) and *Holdsworth, William,*

***An Historical Introduction to the Land Law*** 256 – 257, (Oxford University Press (1927)).

**16.** At law, the mortgagee was the legal owner with the right to take possession. The mortgagee could oust the mortgagor at any time. In fact, the mortgagor was a tenant by sufferance. If the mortgagee chose to take possession, the mortgagor could not resist. Equity redressed this by holding the mortgagee strictly accountable if he took possession. Because of this, most mortgagees did not enter into possession. They allowed the mortgagor to remain in possession.

**17.** In relation to the granting of leases, the divergence between the common law and equity led to the position that any lessee who took a lease of mortgaged property was in a precarious position. The following statement of principle demonstrates the precariousness of the tenant's position: since the mortgagor had no legal estate, it followed that at law, he could not create any legal or interest in the land. Any interest or estate created by him, was necessarily equitable. Although the mortgagee held the legal estate, any lease granted by him was vulnerable, if the mortgagor redeemed his equity of redemption. The lessee was in danger of being removed by the mortgagor who redeemed his equity of redemption.

**18.** The lawyers resolved this issue by inserting into the mortgage express powers of leasing. This practice had become so well established that by 1881 the Conveyancing Act of (UK) implied powers of leasing into every mortgage. These powers could be excluded or regulated by express agreement. When Jamaica enacted the Conveyancing Act in 1889, similar powers of leasing were implied into every mortgage. In short, there was no longer any need to provide for the power of leasing in the mortgage deed –

if the draftsman omitted them the statute implied them. However this, it appears, only applied to unregistered land in Jamaica. The Jamaican Conveyancing Act is explicit on the point. It provides in section 2 that the provisions of the Conveyancing Act shall not apply to any land under the RTA.

**19.** The lawyers for the mortgagees devised a stratagem to mitigate the great efforts of equity to reduce the mortgagee to creditor. Their nuclear weapon was the power of sale. This was inserted into mortgage deeds.

**20.** Like the power to lease, this power of sale was so common that by the Conveyancing Act of 1881 (UK), the power of sale was implied into every mortgage. The second device inserted into mortgages was the power to appoint a receiver who could take possession. When the receiver took possession, he took possession as agent of the mortgagor only. This device was implied into mortgages by the provisions of the Conveyancing Act 1881. These two devices were implied into mortgages by the Jamaican Conveyancing Act of 1889.

**21.** Lest it be thought that equity had only a jaundiced view of the mortgagee I should point out that equity provided the mortgagee with the remedy of foreclosure. By this action the mortgagee asked the Court of Equity to fix a date for repayment of the loan. If the mortgagor failed to meet this condition the foreclosure nisi became absolute and the mortgagor's equity of redemption was extinguished.

**22.** This was the context when the RTA was enacted in 1888.

**The Registration of Titles Act**

**23.** When this Act was passed the legal position regarding mortgages that I have outlined existed. The Act does not define mortgage. The Act presupposes that it already exists. It is my view that the RTA did not intend to alter radically the law relating to mortgages. What it did was to regulate mortgages in the context of a system of registration of titles making such changes as was necessary.

**24.** Mrs. Kitson pinned her hopes on section 105, which states that a mortgage does not operate as a transfer of the mortgaged land. The registration of a mortgage operates as security. This for, Mrs. Kitson, meant that the mortgagor had the power to create a legal lease. The lease being a legal interest or estate binds the mortgagee. Mrs. Kitson built on this foundation by submitting that section 108 had the effect of transferring to the purchaser from a mortgagee exercising his power of sale the burden of any lease created by the mortgagor. The problem with this submission is that it does not give enough recognition to section 114 of the RTA. More will be said about this section later. The other problem with this submission is that it does not take account of the fact that the RTA does not prevent the parties to a mortgage from regulating how the power of leasing should be exercised.

**25.** Section 108 provides that the estate and interest of the mortgagor passes to whomever the land is transferred when the mortgagee exercises his power of sale. In my view, this provision had to be there since section 105 says that registration of the mortgage does not transfer the legal estate to the mortgagee. Therefore, without section 108 any purchaser from a mortgagee could not get any legal estate of the mortgagee since he

had none. For the purchaser from the mortgagee to get the legal estate the RTA had to have section 108.

**26.** Section 108 goes on to say that the estate and interest of the mortgagor passes to the purchaser free from and discharged from all liability on account of the mortgage that precipitated the sale as well as any mortgage registered subsequent ***excepting a lease to which the mortgagee... shall have consented in writing*** (my emphasis).

**27.** This ties in with section 94 of the RTA which says that freehold land may be leased but no lease of any land subject to mortgage ***shall be valid or binding against the mortgagee...unless he shall have consented in writing to such lease prior to the same being registered*** (my emphasis). The meaning is clear. The owner has the power to grant a lease of mortgaged land but any lease created by the mortgagor is not valid or binding on the mortgagee without the written consent of the mortgagee. There is nothing in the RTA that prevents the mortgagee from stipulating that the mortgagor cannot lease the property unless he has the written consent of the mortgagee. If the parties include this provision in the mortgage the parties are in the same position they would have been in at common law where the mortgage document was the source of the power to lease.

**28.** The obvious intention of the RTA was to prevent the mortgagor, who under the Act had the legal estate and by extension the power to create lesser legal interests or estates, from doing so without the express permission of the mortgagee. One possible reason for this is that the property was not to be encumbered with a lease unless the mortgagee

agreed so that in the event that the power of sale was exercised, the property could be sold free of all interests and estates.

**29.** It is also important to note what sections 94 and 108 do not say. They do not say that any lease created without the consent of the mortgagee is not binding between the mortgagor and his tenant. The sections only say that unless the mortgagee consents in writing it is not binding on him.

**30.** Now comes an important section. Section 114 says that in addition to the powers conferred on mortgagees or transferees of mortgagees under the Act, every mortgagee and transferee of a mortgagee shall have, until the discharge of the liability, or transfer of sale or an order for foreclosure, ***the same rights and remedies at law and equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had actually vested in him, with a right in the mortgagor of quite enjoyment of the mortgaged land until default..***(my emphasis). This supports my view that the RTA was not intending to make any radical alteration of the law relating to mortgages as it was understood prior to the passing of the Act.

**31.** It should also be noted that the Act does not state what is the legal relationship between the tenant of the mortgagor and the mortgagee, assuming that the statutory requirement of consent in writing has not been met. In my view, the answer is to be found in the common law.

## The common law position of tenants and mortgagees

**32.** In ***Corbett v Plowden*** 25 Ch. D 678 none other than the Lord Chancellor said at page 681

> *If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease*

*by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them.*

**33.** Farwell J in ***Iron Trades Employers Insurance Association Ltd v Union Land and Housing Investor Ltd*** [1937] Ch. D 314 stated the position with admirable clarity at pages 318 – 319.

*Under the law as it was before the Act of 1881 the position was this, that in the case of a legal mortgage the mortgagor, although in possession, had no power at all to grant a lease which was binding on the mortgagee. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment. So far as the mortgagor, who had granted the lease, was concerned, it was binding upon him as against the lessee, and he was estopped from disputing it and as against the mortgagor or against any one other than a person having a title paramount to the mortgagor, e.g., the mortgagee, such a lease was good and the lessee was entitled to the benefit conferred thereby, but so far as the mortgagee was concerned the lessee had no estate or interest as against him, except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property which had been leased to him by the mortgagor, but beyond that right to redeem he had no rights as against the mortgagee nor had he any estate or interest as against the mortgagee in the land at all; he had by virtue of equity a right to redeem if he was in danger of being evicted by the mortgagee who had, as I have said, a paramount title, but except to that extent a lease granted by the mortgagor prior to the Act of 1881 was ineffective as against the mortgagee. That position was altered by the Conveyancing Act, 1881, because by that Act express power was given to the mortgagor in possession to grant leases on certain terms and subject to certain conditions which were good as against the mortgagee. The effect of that statutory power was to enable the mortgagor for the first time to do something which hitherto it had not been possible for him to do - namely, to grant a lease during*

*the continuance of the charge which would be binding on the mortgagee. The fact that that power was given to the mortgagor did not, and as the law now stands does not, in my judgment, deprive the mortgagor of the power of doing that which he could have done apart from the Act - namely, grant a lease to a third party, which without the consent of the mortgagee is not binding on him, but is binding as between the lessor and the lessee. I cannot find that the power which the mortgagor had in that regard was taken away by the Act, which merely gave the mortgagor a wider power of granting leases on certain conditions which were binding on the mortgagee. The position, apart from the Act, in my judgment, remained the same. The mortgagee as soon as he ascertained that the mortgagor had granted a lease to a third party was entitled to take steps immediately to evict the tenant, to treat him as a trespasser, and, subject to the tenant's right to redeem, the mortgagee could evict him and recover possession of the property. On the other hand, he might, if he desired, confirm what had been done, but if, knowing the facts, he stayed his hand and did nothing, he might find himself in danger of being held to have acquiesced in and thereby confirmed the lease and, therefore, not entitled to oust the tenant.*

**34.** Farwell J grounded the lease granted by the mortgagor in breach of his agreement not to lease without the consent of the mortgagee in estoppel. He also made the point that the mortgagor could lease but the lessee's position was tenuous.

**35.** There is dictum in the passage cited from Farwell J that suggests that a mortgagee might be bound by a tenancy created by the mortgagor in breach of the agreement not to lease without the consent of the mortgagee if the mortgagee was inactive. However, an examination of the cases shows that the courts do not readily infer that the mortgagee acquiesced in the tenancy and is therefore bound by it. Neither do they lightly come to the conclusion the mortgagee has accepted the tenant as his. Cross J in ***Taylor v Ellis*** [1960] 1 All ER 549 held that nineteen years of inactivity by the

mortgagee and then by his successor did not create a tenancy between the mortgagee and the tenant who had been let premises in breach of a term of the mortgage that he could not lease the property without the written permission of the mortgagee. In ***Parker and others v Braithwaite*** [1952] 2 All ER 837 Dankwerts J held that although the agent of the mortgagee knew of the tenancy from April 1951 and only sought possession in January 1, 1952 that was not recognition of the tenancy. The Court of Appeal held in ***Tower v Jackson*** [1891] 2 Q.B. 484 that the fact that the mortgagee gave notice to the tenant telling him of the existence of the mortgage and requiring him to pay rent to the mortgagee was not evidence that the mortgagee accepted the tenant as his tenant. ***Tower*** reaffirmed the decision of ***Evans v Elliot*** 112 ER 1242 where it was held that a mortgagee could not make the tenants of the mortgagor his tenants by giving them notice of the mortgage and requiring them to pay the rent to him. It followed from this that the mortgagee could not exercise any of the powers given to a landlord for arrears of rent. In ***Carpenter v Parker*** 140 ER 718 the mortgage deed expressly prohibited any lease without the consent and approbation of the mortgagees. The defendant leased the property to the plaintiff in breach of the covenant. The plaintiff was told by the mortgagee of the mortgage and was required to pay rent to the mortgagee. The plaintiff gave up possession of the property and successfully sued the mortgagor for breach of the covenant of quiet enjoyment.

**36.** A mortgagee was permitted to bring an action for ejectment against defendant tenant without giving him a notice, such tenant being let into

possession by the mortgagor as a tenant in ***Thunder d Weaver v Belcher*** 112 ER 669. Lord Ellenborough CJ went as far to say at page 669

> *The defendant never had any possession under the mortgage from whence any tenancy could be inferred, and therefore was not entitled to any notice. He could not be said to have any possession under the mortgagee if the mortgagor had no authority to let*

**37.** It is significant to note that decisions such as ***Tower*** and ***Iron Trades*** were post the Conveyancing Act of 1881 (UK). Those decisions do not reflect any alteration in the common law position by the Act. This is explicable on the basis which I have stated earlier which is that the provisions in the Conveyancing Act (UK) were merely giving statutory recognition to well established conveyancing practice in the United Kingdom.

**38.** ***Dudley and District Benefit Building Society v Emerson*** [1949] 2 All ER 252 establishes the proposition that a tenant under a lease that does not bind the mortgagee and has not been accepted as a tenant by the mortgagee is not a tenant for the purposes of rent restriction legislation.

**39.** The cases have established that any mortgagee who accepts the tenant does not adopt the old tenancy but creates a new one from the moment both parties agree (see ***Stroud Building Society v Delamont and Others*** [1960] 1 All ER749).

**40.** This is the common law that is applicable when dealing with land under the RTA where it is silent.

The conclusion from all this is that under the RTA

**(a)** a mortgagor under the RTA may grant a lease to a tenant.

**(b)** a registered proprietor is not prohibited from agreeing in the mortgage document not to lease without the written agreement of

the mortgagee as an additional requirement to that of section 94 of the RTA;

**(c)** any lease granted in respect of property subject to mortgage is not valid or binding on the mortgagee unless the mortgagee agrees in writing before the lease is registered;

**(d)** any lease granted by the mortgagor in breach of the covenant not to lease without the consent of mortgagee is binding only on the mortgagor. One definite source of the validity of this lease is the doctrine of estoppel that would prevent the mortgagor from denying the existence of the lease as between himself and the tenant;

**(e)** any tenant under a lease that was granted in breach of any covenant not to lease without the consent of the mortgagee or without the consent of the mortgagee under section 94 is not a tenant of the mortgagee and is a trespasser vis a vis the mortgagee;

**(f)** there is nothing in the RTA that says that the mortgagee cannot subsequently recognise the tenant as his tenant. Even if the mortgagee is prepared to accept the tenant as his tenant no tenancy can arise unless and until the tenant agrees to become the tenant of the mortgagee. If the mortgagee recognises the tenant as his tenant and the tenant agrees then this is a new tenancy that comes into existence at the point at which there is consensus ad idem between the tenant and the mortgagee. It is not an adoption of the existing tenancy between the mortgagor and the tenant;

**(g)** in circumstances where the tenant's lease does not bind the mortgagee and the mortgagee does not accept his as a tenant then such a person is not a tenant for the purposes of the RRA. One

cannot become a tenant without a landlord and if in respect of the mortgagee the tenant was put in, in each of the mortgage or in breach of the RTA and there is no creation of a tenancy between the mortgagee and the tenant then there cannot be any landlord and tenant relationship which attracts the RRA. That Act only applies to tenants and landlords and no other class of persons.

**Application to instant case**

**41.** In the case before me there was an express provision between the mortgagee and the mortgagor that the mortgagor would not lease the property without the written consent of the mortgagee. The evidence is that the necessary permission was not obtained. This means that the lease was not binding on the mortgagee. Equally, there is no evidence that the lease was registered under the RTA and that the mortgagee consented in writing to the lease before the lease was registered. This provides another basis for concluding that the lease did not bind the mortgagee. The consequence is that the lease was only binding between the Foundation and SVI. The Foundation was a trespasser in the eyes of the mortgagee.

**42.** Mrs. Kitson submitted that the mortgagee knew of the tenant and had created an account into which monies were paid from which the mortgagee drew its monthly payments. This she said, amounted to an adoption of the tenant as its own. From my review of the law, the cases show that much more than this is needed before the inference is drawn that a tenant is the tenant of the mortgagee. The case law says that there is no unilateral creation of a tenancy. It requires conduct from both parties before a tenancy can arise.

**43.** Mrs. Kitson submitted that by going to the Resident Magistrate's Court to eject SIV was proof that the mortgagee regarded the claimant as its tenant. This submission is not supported by the cases. The fact that the purchaser went to court to get rid of the defaulting mortgagor does not make the purchaser the landlord of the tenant.

**44.** Learned counsel for the claimant finally submitted that when the mortgagee sold the property to the defendant and did not assign any of the rights under the mortgage to it then the defendant could not rely on any breach of the mortgage agreement to say that the claimant is not on the property pursuant to a valid lease. She was relying on the idea of lack of privity of contract. Since there was no contract between the purchaser and the claimant and there was no assignment of the benefit of the contract to the defendant it cannot rely on any term there to say that the claimant is not a tenant. This submission does not adequately answer the point made by the defendant which I accept. The defendant says that there is a burden on the claimant to establish that the tenancy was lawfully created and binding on the mortgagee. Since the claimant is relying on a property right then it must be for the claimant to show that it has such a right. The defendant has adduced evidence that establishes that the mortgagee never gave permission to SVI to lease the premises. The claimant has admitted this. The ultimate conclusion is that there is no serious issue to be tried and the injunction granted on October 8, 2004 is discharged.

**45.** This does not necessarily mean that the claimant has absolutely no cause of action. During the hearing Mrs. Kitson mentioned that even if the claimant is a trespasser the conduct of the defendant was unlawful. The point was not fully developed. I make no pronouncements on it. It can be

canvassed on some other occasion. This decision is based solely on whether, on the evidence put forward at this time, the claimant is a tenant of the defendant with the consequence that there is a landlord and tenant relationship between them that is governed by the RRA and the procedures for recovery of possession from tenants under the RRA.

**Conclusion**

**46.** SIV granted the claimant a lease in breach of the express agreement between SIV and the mortgagee not to lease the property without the written consent of the mortgagee. This breach meant that the lease was only binding between the claimant and SIV. At common law, the mortgagee would not be bound and under the RTA the mortgagee would not be bound unless it gave its consent in writing before the lease was registered. Any tenant in this position is a trespasser in relation to the mortgagee unless he can show that the mortgagee has acknowledged him as a tenant and he has agreed to be the tenant of the mortgagee.

**47.** There cannot be a tenant unless there is a landlord. If the mortgagee is not a landlord then he cannot turn the purchaser from him into a landlord simply by exercising his power of sale. The claimant is not the tenant of the defendant. The RRA does not apply here. Out of nothing, nothing comes. My orders are

i. Injunction granted on October 8, 2004 is discharged. Execution stayed for ten days.

ii. Costs to the defendant to be agreed or taxed.

iii. Special costs certificate granted.