Privy Council Appeal No 52 of 2006

DIANE JOBSON *Appellant*

v.

CAPITAL AND CREDIT MERCHANT BANK LIMITED
RONALD TAYLOR
RONALD TAYLOR (appointed by Order of the Court to represent CARMEN TAYLOR)

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 14th February 2007

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Carswell

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*[Delivered by **Lord Hoffmann**]*

1. In 1980 the appellant Diane Jobson, who was then an attorney at law, bought a small fruit farm at Above Rocks, St Catherine. In 1989 she borrowed $50,000 from the respondent, Capital & Credit Merchant Bank Ltd ("the bank", then known as Tower Merchant Bank and Trust Company) to repair hurricane damage. As security she executed on 8 September 1989

an Instrument of Mortgage of the property. The mortgage recited that it was made under the Registration of Titles Act and contained covenants to pay monthly sums by way of interest and in reduction of the outstanding capital. Clause 10 provided:

> "That the Powers of Sale and of distress and of appointing a Receiver and all ancillary powers conferred on Mortgagees by the Registration of Titles Act shall be conferred upon and be exercisable by the Mortgagee under this instrument without any Notice or demand to or consent by the Mortgagor NOT ONLY on the happening of the events mentioned in the said Laws BUT ALSO whenever the whole or any part of the Principal Sum or the whole or any part of any monthly instalment of interest shall remain unpaid for THIRTY DAYS after the dates hereinbefore covenanted for payment thereof respectively or whenever there shall be any breach or non-observance or non-performance of any covenant or condition herein contained or implied..."

2. In October 1989 Ms Jobson paid the first monthly instalment. But she paid nothing more. On 14 February 1990 the bank sent a standard form letter to Ms Jobson, notifying her that she was in arrears with her payments and saying that unless she paid within 10 days, the bank would exercise the power of sale. The letter was sent by hand but the trial judge found that Ms Jobson never received it. On 26 April 1990 the bank sold the property by auction to a Mr and Mrs Taylor for $260,000. This compares with the $350,000 valuation which the bank obtained for the purposes of the mortgage the previous September.

3. On 5 June 1990, pursuant to the contract made at the auction, the bank executed a transfer to the Taylors and their title was registered on 23 August 1990. But Ms Jobson refused to yield up possession. The Taylors commenced proceedings against her and she issued a third party notice against the bank, claiming that it had not been entitled to exercise the power of sale.

4. The trial judge (Harrison J) found that the Taylors had acted in good faith and that, whatever might be said about the bank's right to sell, their title was unassailable. A challenge to this finding was unsuccessful in the Court of Appeal and has been abandoned before the Board. The Taylors are therefore no longer parties to the proceedings, which is concerned solely

with the validity of the exercise of the power of sale. The judge rejected submissions that the bank's exercise of the power of sale had been negligent or otherwise than in good faith. These findings of fact are not challenged. The only remaining point is whether, despite the provisions of clause 10 of the mortgage, it was necessary for the bank to have given Ms Jobson notice that she was in default.

5. The Registration of Titles Act Cap 340 reflects the Torrens System of land registration, first adopted in South Australia in 1858 and afterwards in many British colonies. It was first enacted in Jamaica by the Registration of Titles Law 1888. Sections 105 and 106 of the present Act substantially reproduce sections 80 and 81 of the 1888 Act, except for that part of section 106 printed below in italics, which was added by Registration of Titles Amendment Law 1922:

> "105. A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum [or] interest...secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge, or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee...may give to the mortgagor...notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book.
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> 106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee...may sell the land mortgaged or charged...and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no

> purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; *and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.*"

6. The bank did not comply with the notice provisions in these two sections. But the terms of clause 10 of the mortgage were clearly intended to modify the provisions of sections 105 and 106 by dispensing with the need for notice and by providing that simple non-payment for 30 days or any breach of covenant was to be an event of default which made the power exercisable. The issue is whether it was open to the parties to modify the statutory requirements in this way.

7. Harrison J accepted the bank's submission that clause 10 prevailed. But the Court of Appeal disagreed. Cooke JA, with whom Forte P and Smith JA agreed, said that the statutory provisions were mandatory and that it was impermissible to contract out of them. That would seem to mean that the bank had acted unlawfully and that Ms Jobson, as a person claiming, in the words of section 106, to be "damnified by an unauthorised or improper or irregular exercise of the power" should have a "remedy...in damages against the person exercising the power." But the Court of Appeal dismissed Ms Jobson's appeal against the bank. Their Lordships cannot find in the judgments any explicit statement of the reason why Ms Jobson lost. She appeals to the Board, seeking an inquiry as to damages. The bank, on the other hand, submits that the Court of Appeal was wrong to hold that the statutory provisions could not be modified and that the appeal should for that reason have been dismissed.

8. In support of its contentions, the bank relies principally upon section 128 of the Act, which appears to have escaped attention in the courts below:

> "Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument..."

Mr Knox QC, for the bank, submitted that the power of sale is a power implied in the mortgage by virtue of the Act and could therefore be modified by express declaration in the instrument. It was so modified by clause 10.

9. Lord Gifford QC, for Ms Jobson, said that clause 128 had no application. The power of sale was not, he said, implied in the instrument of mortgage. It was a statutory incident to the mortgage. The Act contains a number of sections which say expressly that covenants or powers shall be "implied" in various instruments: see, for examples, sections 92 (implied covenants by transferee of land) 95 (implied covenants by lessee) 96 (implied powers in lessor) 98 (implied covenants in transfer of lease or grant for years) 111 (covenants implied in mortgages). But the power of sale, like the power of entry in section 109, the power of distress in section 110 and the power to appoint a receiver in section 125, was a freestanding statutory power, taking effect by virtue of registration and not because it was deemed to have been included in the instrument.

10. Secondly, Lord Gifford said that sections 105 and 106 contained express provisions which allowed the period of notice to be varied. The initial period before a notice of default could be given under section 105 was one month or "such other period of time as may therein for that purpose be expressly fixed" and the period after the giving of the notice which section 106 requires to elapse before the power of sale can be exercised is also capable of variation by the terms of the instrument. But these limited powers of variation would be superfluous if there were a general power of modification in section 128.

11. Their Lordships accept that there is substance in both of these arguments but do not regard them as conclusive. If, as Cooke JA thought, these provisions of the Act were intended to protect mortgagors as a class, one would naturally approach their construction on the assumption that clear language was needed to allow them to contract out of the statutory protection. But an alternative legislative purpose is that the object was to provide a simplified system of conveyancing which was cheaper and more secure than the old. One way in which these objects could be secured was by providing for standard statutory covenants and powers, thereby avoiding the need for them to be spelled out in each instrument, but subject to any modification agreed by the parties which did not prejudice the functioning of the system. The standard covenants and powers are likely to have been taken from those customarily used by conveyancers under the old system and will therefore have reflected what most parties thought gave fair

protection to both sides. Such forms were by definition likely in most cases to be acceptable to the parties without modification and would therefore achieve the objective of simplifying the system. But that would not be inconsistent with allowing the parties freedom to vary the form if they wished to do so.

12. In support of his construction, Lord Gifford relied upon the observations of Patterson J in *Sharief v National Commercial Bank Jamaica Ltd* (1994) 31 JLR 304, 309:

> "The general object and paramount importance of the provisions of ss 105 and 106 of the Act must be, in my mind, to ensure that the mortgagee is notified of the mortgagee's intention to exercise his power of sale, and to allow the mortgagor time to forestall the sale."

13. That is of course true, and gives effect to what the legislature no doubt thought most parties to a mortgage would regard as striking a fair balance between their respective interests. But it does not follow that the parties are not entitled to take a different view about their particular case. Unless the legislation appears to embody a policy of, so to speak, consumer protection, it is a strong thing to construe it as depriving the parties of their freedom of contract.

14. In order to discover the general policy of the Act, it is perhaps helpful to look at the recital to the original 1888 legislation:

> "Whereas it is expedient to give certainty to the Title to Estates in Land, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive".

15. This strongly suggests that we are concerned with an efficient system of conveyancing rather than social legislation to give mortgagors a degree of protection against mortgagees which they did not have at common law or equity. It is to be noted that registration under the 1888 Act was voluntary and required the consent of the mortgagee (see the provision to section 19). It would hardly have been calculated to encourage the giving of such consent if the effect of registration was to deprive mortgagees of the rights they enjoyed under the unregistered system.

16. There is no Jamaican authority on whether the parties can modify the terms of the power of sale but the New Zealand case of *Public Trustee v*

Morrison (1894) 12 NZLR 423 is valuable because it is more or less contemporary with the 1888 Act and the relevant provisions of the New Zealand Land Transfer Act 1870 were exactly the same as those afterwards enacted in Jamaica. In that case too, the mortgage provided that "upon default the mortgagee may sell at once without any notice or waiting any further period whatever". The mortgagee had sold after a default without giving any notice and the sale was challenged by the personal representative of the mortgagor, whose counsel argued (at p. 424) that notice was required by section 59 of the Act (corresponding to section 105 of the Jamaican Act) and that the parties "cannot contract themselves out of the section". Denniston J said briefly (at p. 426) that he could "see nothing in the Act warranting this contention and the practice has certainly been to the contrary."

17. Their Lordships have observed that the freedom to modify the standard powers and covenants incorporated by the Act had to be limited by the need to ensure that the Act provided a "simple and less expensive" system of conveyancing. This was achieved by the provision in section 78 that a mortgage had to be in a form provided in the Eighth Schedule. In addition to a standard form of words, the Schedule includes a place for "any special covenant". In *National Bank of Australasia v The United Hand-in-Hand and Band of Hope Company Regd* (1879) 4 App Cas 391, in construing a similar schedule in the Victoria Transfer of Land Statute, the Board had no difficulty in holding that a clause modifying the notice provisions by allowing a notice of demand to be served immediately instead of one month after default was a special covenant which the form permitted. In any case, the mortgage in this case was accepted by the Registrar and registered, so that their Lordships consider that it is not open to objection on the ground that it departed from the statutory form.

18. Lord Gifford relied upon some cases in other jurisdictions in which the original statutory scheme has been altered or subsequently amended in a way which was plainly intended to be for the benefit of the mortgagor. So, for example, when the Torrens System was introduced into Manitoba by the Real Property Act 1885, section 79, the equivalent of section 105 of the Jamaica statute, provided that the period of default before a notice could be served was to be one month or "such *longer* period of time as may therein for that purpose be expressly limited". In 1900 section 80, which was the equivalent of section 106, was amended to add a proviso:

> "Provided that, in case the mortgage or incumbrance contains a provision that the sale may take place without any notice being served on any of the parties, the district registrar may order such sale to take place accordingly."

19. This proviso contemplates that the mortgage may dispense with a second notice but requires that in such case it is still necessary to obtain an order from the registrar. As Duff J observed in his elegant judgment for the Supreme Court of Canada in *Smith v National Trust Co* (1912) 1 DLR 698, 719, these provisions —

> "[afford] evidence of the care with which the legislature deemed it necessary to protect the mortgagor against oppression or unfairness or mere carelessness on the part of the mortgagee as well as improvidence on his own part in this matter of the sale of the mortgaged property."

20. In New South Wales, on the other hand, the legislative policy has varied over the years. The Real Property Act was amended in 1930 to add a new section 58A after sections 57 and 58 (the equivalents of sections 105 and 106):

> "(1) Any notice or lapse of time prescribed by sections fifty-seven or fifty-eight may, by agreement expressed in the mortgage or encumbrance, be dispensed with, and in such case section 58 shall operate as if no notice or lapse of time were thereby required."

21. The fact that subsection (2) of this new section provided that it was to apply to mortgages and encumbrances made before as well as after the passing of the amendment suggests that it was regarded as declaratory of what had been held in *Public Trustee v Morrison* (1894) 12 NZLR 423 to be the law under the equivalent provisions in New Zealand rather than innovatory. It is hard to believe that the legislature intended retrospectively to enlarge the powers conferred on New South Wales mortgagees by existing mortgages. In 1976, however, section 58A was amended to restrict the right to contract out: see Schedule 8, paragraph (5) of the Real Property (Amendment) Act 1976. The parties could now dispense with a notice under section 57 only if the default did not relate to non-payment of principal or interest. This enactment shows an altogether new legislative policy and it is significant that a similar provision was enacted for unregistered land: see

Schedule 13. In Jamaica, on the other hand, the power of sale conferred by mortgages of unregistered land may be "varied or extended by the Mortgage deed" without any restriction: see section 21(2) of the Conveyancing Law 1889.

22. In their Lordships' opinion, a narrow construction of the power of modification in section 128 of the Registration of Titles Act would not be consistent with the scheme and policy of the Act or other conveyancing legislation. If the legislature, as far back as 1888, intended for social reasons to give mortgagors a protection which they could not bargain away, it is difficult to see why mortgagors of registered land were favoured over mortgagors of unregistered land. If the legislature intended that a period of notice should be mandatory, it is difficult to see why that period could have been reduced by agreement to a mere *scintilla temporis*. In the circumstances their Lordships do not accept Lord Gifford's submission that section 128 requires one to distinguish between those powers which are expressly stated to be implied in the registered instrument and those which the statute attaches as a consequence of the registration of the instrument. Such a distinction would not reflect any discernible legislative purpose.

23. It is also true, as Lord Gifford says, that this construction makes the express power to vary the periods of time redundant, but that is by no means unusual in these statutes: compare sections 21(2) and (3) of the Conveyancing Law. Accordingly, their Lordships consider that the decision in *Public Trustee v Morrison* (1894) 12 NZLR 423 remains good law for Jamaica.

24. Lord Gifford submitted in the alternative that clause 10 of the mortgage did not comply with section 128 because there was no "express declaration" that the power in question was to be modified. It should have said in so many words that the statutory power required a month's notice and was to be modified by requiring no notice. Their Lordships do not accept that the statute requires such a degree of pedantry, which would serve no purpose. Read as a whole, clause 10 gave ample notice that it was a modification of the statutory power. The power of sale was therefore validly exercised.

25. For these reasons, which are not quite the same as those of the Court of Appeal, their Lordships will humbly advise Her Majesty that the appeal should be dismissed.