

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 148/2000

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.**

BETWEEN	LLOYD SHECKLEFORD	DEFENDANT/ APPELLANT
AND	MOUNT ATLAS ESTATE LTD	PLAINTIFF/ RESPONDENT

**John Vassell, Q.C. instructed by Dunn, Cox, Orrett & Ashenheim
for Appellant**

**Dr. Lloyd Barnett & Carlton Williams instructed by Williams
McKoy & Palmer for Respondent**

25th, 26th September & 20th December, 2001

FORTE, P:

The plaintiff/respondent was at the material time and still remains the registered proprietor and in possession of property situate at Lot 106 Coopers Hill which is land registered at Volume 968 Folio 575 of the Register Book of Titles.

In or about July 1990, the respondent entered into a mortgage agreement with Ms. Gertrude Perkins (the "Mortgagee") and consequently a mortgage in her favour was endorsed upon the Title. The mortgage agreement contained a provision granting a power of sale to the mortgagee as follows:

"IT IS HEREBY AGREED AND DECLARED UPON as follows:

- (i) In case default be made in any of the payments of interest or if there be any breach or non-performance of any covenant or condition herein contained or by law implied it shall be lawful for the Mortgagee if such default breach non-observance or non-performance continue for the space of thirty days and without notice as required by Section 100 of the Registration of Titles Law to sell the mortgaged premises as provided by Section 101 of the said Law."

And 2 (x) so far as is relevant:

"(x) That the powers of sale and of distress and of appointing a Receiver and all ancillary powers conferred upon Mortgagee by the Registration of Titles Law shall be conferred upon and be exercisable by the Mortgagee without any notice to, demand on or consent by the Mortgagor NOT ONLY on the happening of the events mentioned in the said Law BUT ALSO whenever the whole or any part of the said principal sum or of any payment under paragraph 1 (g) above or any instalments of interest after the date on which the same should shall remain unpaid for thirty days or other sums of money payable hereunder have been paid under the covenant hereof ..."

On the 1st September, 1997 the mortgagee, purporting to exercise her power of sale under the mortgage on the alleged default in mortgage payments by the respondent, entered into an agreement for sale of the property to the defendant/appellant for the sum of seven million dollars (\$7,000,000). The full purchase price of the property having been paid by the defendant/appellant to the mortgagee, a transfer of the property to him was duly executed. However, at the time of the bringing of this action by the respondent, the transfer of the property had not yet been registered.

The respondent filed this action against the mortgagee (the 1st Defendant) and the appellant (the 2nd defendant) asking for the following relief.

"(a) A declaration that the purported exercise by the 1st Defendant of the powers of sale in respect of premises

registered at Volume 968 Folio 575 is invalid and of no effect.

(b) A declaration that the Agreement for Sale between the Defendants is invalid and unenforceable."

And against the 1st Defendant in the Alternative for -

- (e) Damages for breach of contract and/or negligence and or slander of title and/or fraud;
- (f) An account of the sums payable pursuant to the mortgage over the said property.

Those matters, however, are reserved for a trial of the issues joined between the parties.

This appeal arises out of the granting of an interlocutory injunction on the 14th December 2000 by Ellis J in the Supreme Court in a summons dated 19th March 1999 issued by the respondent. He ordered the following:

"(a) The First Defendant be restrained whether by her servants and/or agents or otherwise from exercising the powers of sale under Mortgage number 627693 endorsed on Certificate of Title registered at Volume 968 Folio 575 of the Register Book of Titles, and from transferring or dealing with the said Title until the trial of this action;

(b) The Second Defendant be restrained whether by his servants and/or agents or otherwise from effecting or acting upon the purported exercise by the First Defendant of the said powers of sale."

The 2nd defendant now appeals from this order, and makes the following complaints:

"1. The learned Judge failed to determine the issue on the construction of Section 106 of the Registration of Titles Act raised before him or alternatively determined the issue erroneously.

2. The learned Judge failed to appreciate that the material put by the Plaintiff before him failed to disclose any irregularity or impropriety in the sale and that accordingly no triable issue arose to support the grant of an injunction."

Ground 1

The validity of this complaint depends on an interpretation of section 106 of the Registration of Titles Act (the "Act"). This is agreed on both sides. Also agreed is the fact that the 2nd Defendant/Appellant is a bona fide purchaser for value without notice of any irregularity in the sale or in the steps "antecedent thereto". Section 106 provides:

"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 or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, 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 unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."
(Emphasis mine)

The question to be decided therefore, in my view is as follows:

Is the Court precluded from granting an Injunction where a mortgagee in the exercise of his power of sale under the mortgage, has entered into an agreement for sale of the mortgaged property with a bona fide purchaser, but the transfer of the property has not yet been registered?

The appellant contends that the Court has no jurisdiction to do so, having regard to the provisions of section 106 and in particular the provision in the section which states that

"any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

The learned judge seemed not to have addressed the interpretation of section 106. While making reference to the Attorney's contention that section 106 of the Act precludes the grant of any injunctive remedy to inhibit the completion of the sale, he came to his conclusion based on the provisions of sections 70 and 71 of the Act. This is what he concluded on that aspect:

"It is not my understanding that Dr. Barnett is seeking to defeat any registered title in the face of SS. 70 and 71 of The Registration of Titles Act. What he says is that as far as the second defendant is concerned he is not within the protection of SS. 70 and 71. That is so because the transfer to him has not been registered. In that circumstance second defendant cannot be heard to say he has indefeasible title which denies injunctive remedy."

That passage discloses that the learned judge came to his conclusion, not on the basis of the issue before him, and which is now before us, but solely on the basis that since the transfer had not been registered the appellant would not hold an indefeasible title, and accordingly could not deny the respondent injunctive relief. In those circumstances, no assistance concerning this ground of appeal can be had, from the judgment of the Court below.

As an introduction to a determination of the question, it perhaps should be noted that the relevant section, (section 81), of the Registration of Titles Law of 1888, did not include any provision relating to the remedy of the "damnified person" being in damages only. It was not until 1922, that by virtue of the Registration of Titles Amendment Law 1922, such a provision was included. For convenience I set out hereunder, the particular amendment. It reads:

"Section eighty-one of the Principal Law is hereby amended by adding at the end thereof the following:-

"and the Registrar upon production of a transfer made in professed exercise of the Power of Sale conferred by this Law or by the Mortgage or Charge shall not be concerned or required to make any of the enquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

This amendment clearly does two things:

- (1) It relieves the Registrar of the burden of making enquiries into the propriety or regularity of the sale, before registering the transfer. Consequently, no liability can be attached to him for having registered a transfer which resulted from an improper exercise of the power of sale.
- (2) It provides that damages is the only remedy to the person damnified by an unauthorised, improper, or irregular exercise of the power of sale.

It would appear that before this amendment, an injunction could be granted before Registration to prohibit the completion of an agreement for sale made by virtue of the exercise of the power under the particular section. Mr. Vassell, Q.C. for the appellant, contends that the effect of the amended section, now section 106, is that an injunction will not lie, to restrain the completion of a sale of the mortgaged property to a bona fide purchaser for value, on the basis of a complaint by the mortgagor as to the regularity or propriety of the sale.

Dr. Barnett, on the other hand, contends that there is an important point at which the mortgagor will lose his right to protect his proprietary interest. In the Jamaican situation, he argues, the mortgagor has a legal title which attracts the general principle of indefeasibility by reason of its registration. That protection only accrues to a third party on registration of a transfer by virtue of which the purchaser will obtain the estate and interest of the mortgagor. He referred to section 108 of the Act which provides that the estate and interest of the mortgagor passes to the purchaser on registration. For that

reason, he maintains that when section 106 speaks of "effectuating any such sale" it is speaking of implementing section 108 and that until that time the estate and interest of the mortgagor is only threatened by the sale which has been agreed to between the mortgagee and the purchaser.

The respondent therefore relies on the fact that the transfer executed by the mortgagee had not yet been registered at the time of this action and also that the exercise of the power of sale is not a stated exception to indefeasibility of title under section 70. Therefore, it cannot deprive a registered owner of the benefits appurtenant thereto.

The mortgagee had, in the exercise of her power of sale entered into an agreement for sale, and thereafter completed the sale by executing the transfer, as also by accepting the purchase price from the purchaser. It is clear from the provisions of section 106, that it not only gives the mortgagee the power to sell, but is specific in protecting a bona fide purchaser for value from the consequences that may flow, if the exercise of the power by the mortgagee was the result of impropriety or irregularity. The real question then, is whether a bona fide purchaser, who had no obligation to enquire into whether there was any default, impropriety, or irregularity in the sale should be deprived of the benefits of his contract already executed, for the reason that he had not yet registered the transfer.

Dr. Barnett's contention that until the transfer is registered, the estate and interest of the mortgagor does not pass, though correct, does not meet the question whether in spite of that, – the provision of section 106, does give to the purchaser before registration, the security that at that stage, the registration can no longer be avoided. In order to answer that question, some meaning has to be given to the words of the section which provides for damages as the only remedy. It must be a necessary part of that determination, that the mortgagee where there is a default, is authorized to execute a

transfer of the land, which on registration vests the owner's interest in the purchaser, as though transferred to him by the owner free from any interests or encumbrances created subsequent to the mortgage. That power exists, although the mortgagor at the time is still the owner, ownership not having passed to the mortgagee. When the mortgagee enters into a contract of sale, and brings it to completion as in the instant case, he does so as if he were the registered proprietor. Where then the purchaser is a bona fide purchaser without any knowledge of an impropriety or irregularity in the sale, and where he has no obligation to make enquiries into such matters, the Statute bestows upon him the guarantee that the registration cannot thereafter be restrained.

Mr. Vassell argues, that that is the true meaning of section 106, which he contends is stated in clear and unambiguous terms.

An interpretation of section 106, in my judgment, should not be dependent upon whether or not the purchaser at the time, had the estate and interest in the property. The matter for determination, is really whether the section, in spite of the fact that the purchaser had not yet acquired the estate and interest in the property nevertheless because of his bona fides, protects him from any avoidance of his agreement for sale before registration.

The contention of counsel for the respondent, is that since the mortgagor still remained the registered owner, he has an indefeasible title which can only be removed on registration of the transfer or by the exceptions in section 70. In my view, that indefeasible title is subject to the statutory protection given to the bona fide purchaser, and is akin to the exceptions to indefeasibility of title stated in section 70 of the Registration of Titles Act.

If section 106 is interpreted in the manner called for by the appellant then the mortgagor's indefeasible title would be threatened by his default of his responsibilities under the mortgage, which would give the power of sale to the mortgagee. That power

when exercised, would if no injunctive remedy is then available, result in the transfer of the property to the purchaser and the registration thereof to him.

I am aware that the law in relation to the registration of titles in this jurisdiction is fashioned on the Torrens system, but some assistance can be had from the dicta of Crossman, J in the English case of *Waring (Lord) v. London and Manchester Assurance Co.* [1935] 1 Ch. 310. I bear in mind that Crossman J was dealing with an English Statute, the Real Property Act 1925 but the following provisions do have some similarity to the provisions of sections 106 and 108 of our own Registration of Titles Act. Section 101 of that Act gives the mortgagee a power of sale and section 104(1) gives the mortgagee a power to convey the property sold. Then subsection (2) provides that where a conveyance is made in exercise of the power, the title of the purchaser shall not be impeached for named grounds. Then it states:

"... and a purchaser is not, ... concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

It should be noted that the above Statute speaks to the remedy of damages in the subsection which deals with "where a conveyance is made in the exercise of the power of sale conferred by the Act". Recognizing that the following dicta of Crossman J was directed to the English Statute, I nevertheless adopt his words as applicable to the instant case. He stated:

"... and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extra-ordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or

on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor.

It seems to me impossible seriously to suggest that the mortgagor's equity of redemption remains in force pending completion of the sale by conveyance. The only effect of the conveyance is to put the legal estate entirely in the purchaser: that follows from s. 104, sub-s 1, of the Law of Property Act, 1925, which provides that a mortgagee shall have power to convey the legal estate; and the whole legal estate can be conveyed free from all estates, interest, and rights to which the mortgage has priority ... The result in the present case is, in my judgment, that the sale effected by the contract, ... binds the plaintiff, and that it is too late after the sale for him to tender the mortgage money and become entitled to have the property reconveyed to him."

In that case, although the mortgagee had entered into a contract of sale with the purchaser, no conveyance of the property had yet been effected. In the instant case no registration had been effected. The registration would do no more than pass the estate and interest to the purchaser.

The reasoning of Crossman J., given the specific statutory provision in our jurisdiction to limit the remedy to damages, even before registration of the transfer, is in my judgment most appropriate. A bona fide purchaser for value in the Jamaican jurisdiction, if the respondent's contentions are correct, would always be in danger of reversal of his contractual agreement with the mortgagee, and would never be certain as to whether there would be a completion of the sale. Nor could a mortgagee give any guarantee to the purchaser, as the mortgagor could at any time attempt to redeem the property.

However, I hasten to state that the Jamaican legislation apparently had its genesis in Australian legislation which was apparently adopted in this jurisdiction. In search for its origin I was led to the Transfer of Land Act 1915 from Victoria. Section 148 of that Act bears a striking resemblance to the provision of section 106 of the Registration of Titles Act. It reads:

"If such default in payment or in performance or observation of covenants continues for one month after the service of such notice or for such other period as in such mortgage or charge is for that purpose fixed, the mortgagee or annuitant or his transferees may sell **[or concur with any other person in selling the mortgaged or charged land, or any part thereof, either subject to prior mortgages or charges or not, and either together or in lots,]** by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or annuitant thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to vary or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, **[with power to make such roads, streets and passages, and grant such easements of right of way or drainage over the same, as the circumstances of the case require and the mortgage or annuitant thinks fit;]** and may make and sign such transfers, and do such acts and things as are necessary for effectuating any such sale; and no purchaser shall be bound to see or inquire whether such default as aforesaid has been made or has happened, or has continued, or whether such notice as aforesaid has been served, or otherwise into the propriety or regularity of any such sale. **[Where a transfer is made in professed exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause had arisen to authorize the sale, or that due notice was not given,]** or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. An instrument of transfer by a mortgagee or annuitant in exercise of the power of sale conferred by this Act, made in the form prescribed in the seventh schedule of this Act, may be accepted by the registrar as sufficient evidence that the power has been duly exercised and he shall not be bound or required to call for proof thereof."

[Brackets & emphasis mine]

Section 150 of this Act is equivalent to section 108 of the Registration of Titles Act. The bracketed portions of section 148 (supra) do not appear in our section 106, but in general terms, the other provisions appear therein. The emphasized portion of course indicates a striking similarity with the relevant part of section 106, in so far as it also

limits the remedy to damages. Other relevant similarities, relate to the purchaser and registrar not having to make enquiries.

By 1958 however, the law in Victoria was amended and the current Act is now the Victoria Transfer of Land Act 1958. The most important change, is the restriction of the remedy which was removed from the equivalent of section 148 of the older Act, now section 77(1) and placed in section 77(4) the equivalent to section 150 of the older Act which is in the same terms as our Section 108. Section 77(4) reads:

"(4) Upon the registration of any transfer under this section all the estate and interest of the mortgagor or grantor of the annuity as registered proprietor of the land mortgaged or charged shall vest in the purchaser as proprietor by transfer, freed and discharged from all liability on account of such mortgage or charge and (except where such a mortgagor or grantor is the purchaser) of any mortgage charge or encumbrance recorded in the Register subsequent thereto except:

- (a) a lease, easement, or restrictive covenant to which the mortgagee or annuitant has consented in writing or to which he is a party; or
- (b) a mortgage, charge, easement or other right that is for any reason binding upon the mortgagee or annuitant;

and the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised but any person thereby damnified shall have his remedy in damages against the person exercising the power, and for the purposes of Part 111 the purchaser shall be deemed to have dealt with the registered proprietor of the land."
(Emphasis mine)

The restriction on the granting of injunctive remedy, it would seem from the provision of section 77(4) would only become operative when the transfer has been registered. This is so because section 77(4) clearly states what happens "upon the Registration." This is certainly the view of Dr. S. Robinson author of "Transfer of Land in Victoria" 1979 when he states:

"Certainly the opening words of the subsection limit the protection to those who obtain registration of a transfer and those words are not sufficiently wide enough to include a buyer under a contract for the sale of land."

In Volume 1 of "The Law and Practice Relating to Torrens Title in Australasia 1972", the author E. Francis, after quoting section 77(4) of the Transfer of Land Act 1958, had this to say at page 419:

"This protection of a purchaser arises only upon the registration of the transfer to him, and in this regard differs materially from that afforded to a purchaser from a mortgagee by N.S.W. s. 58 (2), which enures to his benefit from the time of exchange of contracts."

Then at page 145 of "The Law Relating to the Sale of Land in Victoria" 3rd Edition 1978 the authors Vaumard and Wikrama, recognized the relevant changes in section 77(4) of the Transfer of Land Act 1958, from sections 148 & 150 of the Transfer of Land Act 1928 (the successor to the Transfer of Land Act 1915):

"This subsection (section 77(4)) is in a form materially different from the corresponding previous sections (*Transfer of Land Act* 1928, sections 148 and 150) and it omits the express provision (section 148) that 'no purchaser shall be bound to see or inquire whether such default as aforesaid has been made or has happened or has continued, or whether such notice as aforesaid has been served or otherwise into the propriety or regularity of any such sale'. Has it effected any change in the law as to the position of a purchaser at a mortgagee's sale between the date of the contract of purchase and the date of the registration of the transfer from the mortgage? Prior to the enactment of the legislation in its present form (*Transfer of Land Act* 1954) the position appears to have been that the purchaser from a mortgagee obtained full protection as from the date of the contract if he had no actual notice of any irregularity in connection with the sale." (*McDonald v. Rowe* (1872) 3 A.J.R. 90 – cited)

All the learned authors, seem to have accepted that the Act of 1915 – the relevant provisions of which, (sections 148 and 150), remained the same in the 1928 Act – gave the purchaser greater protection than the 1954 Act: as in section 148 it provided that the only remedy would be in damages at a stage where there was a contract of sale,

and at a time when the transfer had not yet been registered. The 1954 Act offered the protection only "upon registration".

As section 106 of the Act, is almost similar in terms to section 148 of the Victoria Transfer of Land Act 1915 (1928), I am of the view, accepting the learned authors' opinion as a correct interpretation of the relevant sections, that in our jurisdiction by virtue of section 106 of the Act, the purchaser is protected when he enters into contract with the mortgagee and consequently the only remedy available to the mortgagor is in damages.

In any event in my judgment, on a simple reading of section 106, it is clear and unambiguous that the legislature intended to give the purchaser the protection as soon as the mortgagee, in the exercise of his power of sale, enters into a contract with a bona fide purchaser for the sale of the mortgaged property. A view consistent with mine is to be found in the Digest of Cases Volume 35 (1) 2nd Re-issue 2000 at page 500 paragraph 3306 which in reference to Canadian Legislation states:

"After sale proceedings regularly taken by a mortgagee of land under Real Property Act 190 ss 108-112 whereby the property is sold to a *bona fide* purchaser who makes the first payment called for by the terms of the sale and binds himself to complete the purchase, it is too late for the mortgagor to apply for redemption even if the purchaser has made default in strict compliance with his agreement."

Saltman v. McColl (1910) 19 Man. L.R. 456 (Can.)

Also in the Law and Practice Relating to Torrens Title in Australasia Volume 1 by E.A.

Francis, the author speaking of legislation in New South Wales states:

"A purchaser from a mortgagee exercising this power is protected by N.S.W. s. 58(2), which provides that such a purchaser shall not be answerable for the loss, misapplication, or non-application, or be obliged to see the application of the purchase money by him paid, nor shall he be concerned to inquire as to the fact of any default or notice having been made or given as required by N.S.W. s. 57 and s. 58 (1). The benefit of this protection is not limited to a purchaser who has acquired the legal estate by the registration of the transfer to him, but enures for the

benefit of the purchaser from the time of the signing of the contract and the payment of the deposit."

The author relied for this proposition on the case of *Brigers v. Orr & Anor.* (1932) 32 S.R. (NSW) 634 on which the appellant in this appeal also relies. This case however was decided upon the construction of a particular clause in the mortgage agreement, which is in terms, similar to section 106 of the Registration of Titles Act. The clause stated:

"And it is hereby agreed and declared that every receipt in writing of the mortgagee for the purchase money of the said property and effects or of any part thereof shall effectually discharge the person or persons paying the same from all responsibility in respect of the application of the moneys therein expressed to have been received ... and that such person or persons shall not be obliged or concerned to enquire whether such default as aforesaid has been made or into any matter connected with the propriety or regularity of any sale or sales as aforesaid and shall not be affected by express notice that the same is or are irregular and improper." (Emphasis mine)

In coming to his conclusion on the effects of this clause Long Innes J said, in so far as is relevant the following:

"... but, on principle, and having regard to the difference between the language of the protection clause in question and that employed in s 21 of the Conveyancing and Law of Property Act, 1881, which confers statutory protection only where the conveyance to the purchaser had been executed – *Life Interest and Reversionary Securities Corporation v. Hand-Hand Fire and Life Insurance Society* (1898) 2 Ch. 230 – I, am of opinion that I would not be justified in reading this clause as affording protection only to a purchaser who had acquired the legal estate by conveyance or whose contract had arrived at the stage of what is technically known as completion. I consequently, am compelled to hold that the defendant Corrie takes a good title, and that the plaintiff's title must be postponed to his in the absence of anything in the nature of fraud or collusion."

Both the author Mr. Francis and Long Innes, J in the *Briger's* case, even in the absence of express provisions in the Statute and the Clause in the agreement

respectively, restricting the remedy to damages, concluded that the protection offered to the purchaser, had effect as soon as the contract for sale had been entered into.

In this appeal, the express restriction in section 106, puts it beyond doubt that the protection to the purchaser was created as soon as the mortgagee had entered into the agreement to sell the property to the purchaser. In the instant appeal further steps had been taken, - the full purchase price had been paid and the transfer had been executed.

In England, in the case of *Dicker v. Angerstein* (1876) 3 Ch. D. 600 words similar to those in the provisions of section 106, were interpreted in the same manner now proposed. The words of course appeared in particular clauses in the mortgage. After relieving a bona fide purchaser from making enquiries into any impropriety, irregularity etc in respect of the exercise of the power of sale, the term of the mortgage continues as follows:

"... and the remedy of the said W.I.N. Angerstein - that is, the mortgagor - his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only."

Jessel, M.R. in delivering the judgment of the Court, interpreted that clause thus:

"It appears to me that this is put in about as plain language as you can put it, that the right to sell shall be absolutely vested in *Tidy* as to give a good title to the purchaser, that is a bona fide purchaser, which this gentleman is, notwithstanding that the power of sale is not really exercisable, if it purports to be in exercise of the power, which this sale was, it is to be deemed The power, which means that the remedy of Angerstein is against *Tidy* in damages, which is supposed to be sufficient protection to the mortgagor."

He thereafter concludes:

If the mortgagor loses his estate through the misconduct of the mortgagee in selling when he has no right to sell, his only remedy would be against him personally for damages."

These cases must be distinguished from cases where the particular term giving protection to the purchaser and restricting remedies to damages, appear "after or upon registration or conveyance" as the case may be, or where there is no such provision. Section 106, clearly and as plainly as Jessel, M.R. found the particular clause in the Angerstein's case (*supra*) to be, gives in my judgment, the protection to the purchaser after the sale agreement and before the registration of the transfer of title to him. For the above reasons, I agree with the contention of counsel for the appellant, and conclude that the learned judge had no jurisdiction to grant injunctive relief in the circumstances of this case.

Ground 2

Having regard to my conclusion on the first ground, no conclusion need to be stated on this ground. The purchaser i.e. the 2nd defendant/appellant is the only appellant in this appeal. The effect of lifting the order for an interlocutory injunction will be that the appellant can now register the transfer, and obtain an indefeasible title which for the reasons stated heretofore, would be his right. Whether the sale was irregular, or the subject of impropriety, would now be an issue between the mortgagor and the mortgagee in which the purchaser has no place. The trial should therefore be discontinued against the purchaser. There being no appeal by the mortgagee, the issues between the respondent and the mortgagee should be resolved at the trial.

I would allow the appeal, and set aside the order of the Court below. The respondent is ordered to pay the costs of this appeal, to be taxed if not agreed.

HARRISON, J.A:

I agree that the appeal should be allowed. However, I wish to make some comments.

The power of sale granted to a mortgagee of land under the Registration of Titles Act is an instance of an individual being able to transfer the legal estate in land, to a prospective purchaser, although such legal estate is not vested in him, the mortgagee.

The Act details the circumstances in which such a power may be exercised. One such circumstance arises when a mortgagor defaults in his payments under the terms of the mortgage agreement.

The Registration of Titles Act in Jamaica, modeled on the Torrens System of land registration in Australia, regards the entry on the Register of Titles as the effective means of transferring title. Until such registration, no title passes to the purchaser (section 108). However, on the completion of the contract of agreement for sale between the mortgagee and the purchaser, in the exercise of the power of sale, the title of the mortgagor is effectively barred.

Section 106 of the Registration of Titles Act reads:

"106 If such default in payment or in performance or observance of covenants continues for one month after the service of such notice or for such other period as in such mortgage or charge is for that purpose fixed, the mortgagee or annuitant or his transferees may sell or concur with any other person in selling the mortgaged or charged land, or any part thereof, either subject to prior mortgages or charges or not, and either together or in lots, by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or annuitant thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to vary or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages, and grant such easements of right of way or drainage over the same, as the circumstances of the case require and the mortgagee or annuitant thinks fit; and may make and sign

such transfers, and do such acts and things as are necessary for effectuating any such sale; and no purchaser shall be bound to see or inquire whether such default as aforesaid has been made or has happened, or has continued, or whether such notice as aforesaid has been served, or otherwise into the propriety or regularity of any such sale. Where a transfer is made in professed exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause has arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an authorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

(Emphasis added)

The effect of the phrase in that section that:

"... (on) such default in payment ... the mortgagee ... may sell ... the mortgaged ... land ... without being answerable (to the mortgagor) ... for any loss occasioned thereby ..."

grants an initial statutory protection to the mortgagee on the exercise of the power of sale. Continuing, the section restricts any aggrieved person to a remedy in damages, thereby excluding injunctive relief, by the use of the phrase:

"... and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

Clearly, in section 106, the protection provided to both the purchaser from enquiry and the Registrar "... upon production of a transfer made in professed exercise of the power of sale ..." exists before any registration of transfer has been effected. The "immunity" therefore exists from the time when the contract is entered into.

A power of sale with such a far-reaching effect is not without onerous responsibilities on a mortgagee. A mortgagee may not, by ill-will or spite or sheer negligence misuse the power of sale and expect the protection of the statute. Although the mortgagee is less than a trustee of the power of sale, he is bound to exercise it with

due diligence, fairness and propriety. He is answerable to the mortgagor, albeit in damages, for any wrongdoing on his part by such exercise.

The Judicial Committee of the Privy Council in ***National Bank of Australasia v The United Hand-in-Hand and Band of Hope Company and Lakeland*** (1879) 4 App. Cas. 391, considered and re-stated the liabilities of a mortgagee bank, in the exercise of its power of sale under section 85 of the Transfer of Land Act of Victoria (in pari materia with section 106). The headnote reads:

"A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value."

The statute must be read as a whole. The words and tenor of section 106 provide protection to a bona fide purchaser for value innocent of any wrongdoing of a mortgagee in the exercise of the power initiating a sale of mortgaged property.

In the instant case, the 2nd defendant/appellant is immune from injunctive relief. The mortgagee however, like any mortgagee who exercises a power of sale under section 106 of the Registration of Titles Act is subject to the scrutiny of a court, to ensure that there is no "... unauthorized or improper or irregular exercise of the power." This sanction for any misbehaviour found, is for the protection of a wronged mortgagor, although the liability is in damages only. Mortgagees are given the statutory power of sale to bring a degree of finality to the realization of the debt on their loans. However, they retain an obligation not to do wrong to a mortgagor.

The appellant/purchaser herein is not subject to injunctive relief.

WALKER, J.A.:

It seems to me that Ellis J fell into error in granting the plaintiff/mortgagor the injunction sought to restrain the contracting parties from completing the sale of the mortgaged property herein. The provisions of section 106 of the Registration of Titles Act are clear and unambiguous. They effectively oust the jurisdiction of the Court to grant injunctive relief in a situation such as this.

For this reason I agree that this appeal should be allowed with costs.

FORTE, P:

Appeal allowed. Order of the Court below set aside. Judgment entered for the appellant. Costs both here and in the Court below to be paid to the appellant to be taxed if not agreed.