[2016] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 102/2013

APPLICATION NO 174/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**COWELL ANTHONY FORBES (Representative of Estate of Wilfred Emmanuel Forbes, deceased)**	**1ST APPELLANT**
AND	**COWELL ANTHONY FORBES**	**2ND APPELLANT**
AND	**MILLER'S LIQUOR STORE (DIST) LIMITED**	**RESPONDENT**

Ransford Braham QC and Christopher Dunkley instructed by Phillipson Partners for the appellants

Mrs Marvalyn Taylor-Wright instructed by Taylor-Wright & Company for the respondent

18, 19 November 2015 and 11 January 2016

BROOKS JA

[1] The facts of the case with which this appeal is concerned have been set out in four previous written judgments in this jurisdiction. It will be sufficient at this stage to outline only the essential elements of those facts and expand on each below, as the context requires.

[2] The essence of the case is that Miller's Liquor Store (Dist) Limited (Miller's) entered into an agreement with Messrs Cowell and Wilfred Forbes to sell premises, situated in Mandeville in the parish of Manchester, to them. The parties agreed that the Forbeses would pay a deposit and the unpaid balance of the purchase money over time in instalments. They agreed that interest would accrue on the unpaid balance. Miller's took a vendor's mortgage from the Forbeses as security for the debt. An instrument of transfer and a vendor's mortgage were prepared and executed but Miller's did not have them registered on the certificate of title for the premises.

[3] Unfortunately, the Forbeses fell into arrears with the payments and Miller's demanded the full payment of the debt within 30 days, failing which it would sell the premises. The Forbeses did not meet the deadline and two months later Miller's entered into an agreement to sell the premises to Duncarl Limited (Duncarl). The day after the agreement with Duncarl was executed, the Forbeses tendered a cheque in the sum that Miller's had claimed in the demand notice. Miller's returned the cheque, insisting that it was too late.

[4] The Forbeses contended that the sale to Duncarl was wrong for a number of reasons. The main elements of their complaint that are relevant to this appeal, were, firstly, that the sum that Miller's claimed was owed on the mortgage was incorrect, secondly, that Miller's wrongly returned the money that the Forbeses tendered to repay the mortgage debt, and thirdly, that Miller's purported sale of the property to Duncarl was done in bad faith. The Forbeses filed a claim against Miller's in the Supreme Court.

They claimed that the sale to Duncarl should not be allowed to proceed, and that the title for the premises should, instead, be transferred to them.

The decision in the court below

[5] The claim was tried in 2005. Five years later, the learned trial judge gave judgment for Miller's. An appeal has been filed from that decision. Mr Cowell Forbes filed in his own right. He was also allowed by an order of this court to represent the estate of Mr Wilfred Forbes, who had died before the judgment had been handed down in the court below. Mr Cowell Forbes and the estate of Mr Wilfred Forbes will continue to be referred to herein as the Forbeses.

[6] The Forbeses asserted that the learned trial judge erred in her findings in respect of the issues that were before her. Her decision turned mainly on certain findings of fact in respect of each of the issues raised by the Forbeses. Those facts, and the findings in respect of each, will be set out during the analysis of each issue. Before turning to those issues, however, it is necessary to discuss an application that Miller's made for the appeal to be dismissed for want of prosecution.

The application to dismiss the appeal for want of prosecution

[7] Miller's contended that the appeal should be dismissed for want of prosecution for three main reasons. The first was that the Forbeses had seriously delayed the appeal and had ignored filing deadlines laid down at the case management conference (the CMC). The second was that the record of appeal, which was filed after the time stipulated at the CMC, was in disarray, and deficient in a number of respects. The

third, Miller's said, was that there was no proper appeal before the court, as the order allowing Mr Cowell Forbes to represent his brother's estate was improper. These complaints will be addressed individually.

The delay in filing the record of appeal

[8] Mrs Taylor-Wright, on behalf of Miller's, submitted that the late filing by the Forbeses, of the record of appeal and their written submissions, had not been explained. She argued that there was not even an indication that they intended to apply for the late filing to be regularised. That application, she pointed out, was made by their counsel, Mr Braham QC, without any documentation, and only at the invitation of this court. Mrs Taylor-Wright submitted that the authorities made it clear that where there is no reason given for a breach, no indulgence should be granted.

[9] Mrs Taylor-Wright's submission is not without merit. The record and the submissions were, indeed, filed late, and there were defects in the record that was eventually filed. There was, however, an explanation tendered by Mr Cowell Forbes, who had retained different attorneys-at-law, for the appeal, from those who appeared for the Forbeses at the trial.

[10] The explanation was that the new attorneys had difficulty putting together the record of appeal. Although Mrs Taylor-Wright dismissed this explanation as untenable, it is not implausible as it was, unusually, after the CMC, rather than before, that the record was put together. Even then, **Peter Haddad v Donald Silvera** SCCA No 31/2003 (delivered 31 July 2007) indicates that although a proffered reason is not a

good reason, the court may still grant the indulgence requested, in an application to correct a breach of its requirements. Smith JA at page 12 of **Haddad** said in this regard:

> "...the absence of a good reason for delay is not itself sufficient to justify the court in refusing to exercise its discretion to grant an extension [of time]. But some reason must be proffered." (Underlining as in original)

Mangatal JA (Ag) (as she then was) pointed out in **Sylvester Dennis v Lana Dennis** [2014] JMCA App 11, that where there is merit in the appeal, the court will grant an indulgence despite the fact that the explanation for the delay, in conforming to the court's rules, was not a good one. She said at paragraph [52] of the judgement:

> "Notwithstanding the absence of a good reason for delay, in my view the proposed appeal has merit...."

The other members of the court agreed with her assessment.

[11] The fact that the explanation by the Forbeses was contained in an affidavit seeking to resist the application to dismiss the appeal for want of prosecution did not render that explanation unavailable to them.

The defects in the record of appeal

[12] Insofar as there were defects in the record that was filed, the court was only slightly inconvenienced, as Mrs Taylor-Wright had, very helpfully, put together a comprehensive bundle to which the court could refer.

The status of the appeal

[13] The final aspect of Miller's application was untenable. Mrs Taylor-Wright sought to submit that the order allowing Mr Cowell Forbes' representation of his brother's estate, was mistaken, having been made without considering a principle set out in a previously decided case. We refused to allow her to continue with that proposition. We took the view that, the order, being a decision of the court, and not a single judge of the court, could only be set aside upon a formal application, or alternatively, on an appeal made to Her Majesty in Council.

[14] For those reasons, Miller's application to dismiss the appeal for want of prosecution should fail. The application was, however, not completely unreasonable. It had some merit in respect of the filing of the record, and was itself filed on the same day that the record of appeal was filed. In fact, the application was filed some days earlier than the Forbeses' written submissions were filed. Miller's should, therefore, have the costs of the application and the costs thrown away in that regard, including the costs of the preparation of the bundle that it sought to have used as a substitute record of appeal. The substantive issues raised by the appeal shall be addressed hereafter.

The grounds of appeal

[15] The Forbeses filed 12 grounds of appeal. They are:

> "1. The Learned Trial Judge erred in failing to have any sufficient regard or at all to the Respondent's obligations under the Agreement(s) for Sale, transfer and mortgage to stamp and register same in the face

of the Appellants' financial discharge of their duties under all three, at the material time.

2. The Appellants were entitled to mesne profits from the Respondent, the sale of the property at issue having been completed and their becoming obligated to pay mortgage installments [sic].

3. The Appellants were entitled to set off those mesne profits against the balance mortgage owed to the Respondent as at August 31, 2001.

4. The learned trial judge erred in failing to find that the Respondent's Agreement for Sale with a third party purportedly entered the day before the day designated by the parties for the Appellants to settle their outstanding mortgage sum, was no basis to conclude that the Respondent had acted in bad faith.

5. The learned trial judge erred in finding that the Appellants' equity right [sic] of redemption was extinguished in those circumstances.

6. Having found that the Respondent's agreement with the third party Duncarl Limited entered into on August 30th 2011 was at an undervalue, the learned trial judge erred in failing to make the consequential finding that the third party was not in all the circumstances, a bona fide purchaser *for value*.

7. The Learned Trial Judge erred in awarding interest at a commercial rate of 18% against the Appellants notwithstanding;

    a) The mortgage agreement rate was 15%.
    b) that the balance mortgage already held in escrow by Court order, *(which itself extinguished the mortgage rate)* was earning at commercial bank rate.

8. The Appellants having satisfied the judgment from the escrow account *(asserted by the Respondent to be the outstanding mortgage due)* ought properly to

be declared the legal and equitable owners of the property at issue.

9. The learned trial judge erred in awarding the Respondent the outstanding sum as damages, when the claim before her was for a declaration that the same sum was due and owing as mortgage by the Appellants.

10. Having held that the Appellants were not entitled to damages in the alternative, *(by virtue of the sale of the property being prevented by injunction)*, the learned trial judge failed to consequently declare them entitled to the property at issue upon settling the outstanding balance owing under the mortgage plus interest, in accordance with her own judgment.

11. The Learned Trial Judge having granted the substantive relief prayed in the Appellants' Originating Summons erred in pronouncing judgment with costs to the Respondent.

12. The Learned Judge erred in withholding judgment for some five years after taking evidence at trial thereby prejudicing the Appellants by her analysis of aspects of their Claim and extending their exposure to the excessive rate of interest awarded of 18% *(itself a ground of appeal)* [sic]."

[16] Not all the grounds were specifically argued by Mr Braham. None was however abandoned. Some of the grounds may be conveniently assessed together, as both counsel helpfully did in their respective written submissions. The groupings which will be used below may be identified by the following headings:

a. The regularity and effect of the instrument of mortgage.

b. The sum claimed by Miller's in its notice of default.

c. The sale to Duncarl and the tender by the Forbeses.

d. The damages awarded.

e. The effect of the judgment.

f. The delay in delivering the judgment.

The regularity and effect of the instrument of mortgage

[17] The complaints under this heading are encompassed in ground one of the grounds of appeal. The Forbeses complained that they were prejudiced by Miller's failure to have the instrument of transfer and the vendor's mortgage registered. The failure, they pointed out, resulted in the fact that the agreement for the purported sale to Duncarl did not indicate that Miller's was selling under powers of sale contained in a mortgage. Rather the agreement suggested that Miller's was selling as the registered proprietor.

[18] The learned trial judge considered the complaint. She found that there was no evidence that the Forbeses had suffered any loss as a result of the non-registration of the mortgage. The learned trial judge was correct in this finding. Mrs Taylor-Wright is also correct in her submission that the complaint is "baseless". Mr Braham did not stress the complaint in respect of this aspect of the appeal.

[19] The Forbeses also asserted that Miller's failure to register the mortgage prevented it from exercising powers of sale as prescribed by section 106 of the Registration of Titles Act (the ROTA). The only remedy that Miller's was entitled to have, the Forbeses argued, was that of foreclosure under the supervision of the court.

[20] The learned trial judge, after examining sections 63, 105 and 106 of the ROTA, found, at paragraph 13 of her written judgment, that the mortgage did not confer a

legal interest on Miller's. She found, however, that Miller's was an equitable mortgagee and that it did have the power, provided by the mortgage document, to sell (see paragraphs 13 and 15 of the written judgment).

[21] The learned trial judge was also correct in this finding. The position that an equitable mortgagee could only rely on the remedy of foreclosure, was subject to the agreement that the parties had concluded between themselves. Their Lordships, in **Jobson v Capital & Credit Merchant Bank Ltd and Others** (2007) 70 WIR 204, stated that this was permitted by the Conveyancing Act. Lord Hoffmann said at paragraph [21] of the judgment delivered on an appeal from a judgment of this court:

> "…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 s 21(2) [sic] of the Conveyancing Law 1889."

[22] Section 22(1) of the Conveyancing Act allows a mortgagee, where the mortgage is created by a deed, to sell the mortgaged property. Section 22(2) of the Conveyancing Act, to which their Lordships in **Jobson** seem to have been making reference, allowed the parties to extend the powers granted by that Act. The subsection states:

> "(2) The provisions of this Act relating to the foregoing powers, comprised either in this section or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and as so varied or extended shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences, as if such variation or extensions were contained in this Act."

It is true that the instrument of mortgage was not created as a deed. It was, however, no less an agreement between the parties. The document was capable of creating a contractual power of sale.

[23] The learned trial judge quoted from a clause in the mortgage instrument to show that the instrument endowed Miller's with a contractual power of sale. Clause (i) on page four of the instrument of mortgage states, in part:

> "...and the Powers of Sale and of distress and of appointing a Receiver and all other powers, rights and remedies conferred on the Mortgagee by the act [sic] or any other statute or otherwise at all in reference to the exercise of the said powers of sale shall be conferred upon and be exercisable by the Mortgagee without any notice as prescribed by the Act or any other notice or demand to or consent by the Borrower in any of the following cases that is to say in case default shall be made for two calendar months in the payment of any of the monthly payments covenanted to be paid under any clause hereof...."

[24] Mr Braham submitted that the power of sale contained in the instrument of mortgage could only have had effect if the instrument had been registered. This, learned Queen's Counsel submitted, was because it referred to the power contained in the ROTA. He argued that the learned trial judge was wrong to have found that Miller's had a power of sale.

[25] The submission cannot succeed. The clause does not depend on the registration of the instrument of mortgage in order for the terms of the ROTA to be effective. The clause imports into its provisions, the relevant provisions of section 106 of the ROTA. The reference to "powers, rights and remedies conferred on the Mortgagee by…any

other statute or otherwise at all" supports that interpretation. The relevant portion of section 106, outlining the power of sale, is quoted for completeness:

> "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…by public auction or by private contract…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." (Emphasis supplied)

Miller's was given, by clause (i) of the mortgage instrument, the right to sell the premises and call upon any of the provisions of the ROTA that could assist it in that regard. The power exists, by way of reference, in section 106. This complaint against the learned trial judge's judgment cannot succeed. The next issue to be examined is Miller's purported exercise of the power of sale.

The sum claimed by Miller's in its notice of default

[26] Miller's exercise of the power of sale commenced with a notice that the Forbeses were in default in their mortgage payments. The notice was sent under cover of a letter dated 22 June 2001, penned by Miller's then attorneys-at-law. The letter alleged

that the "total now due to bring the mortgage up to date is $83,333.34 * 3 = $250,000.02. Plus interest". The letter also asserted that the "balance now due to settle the entire sum is $2,416,666.86". The notice attached to the letter required that unless the Forbeses "settle [their] account in full within THIRTY (30) DAYS of the date hereof [their] property…will be sold by public auction or by private treaty in accordance with the Powers of sale contained in the Mortgage dated the 15th day if [sic] September, 1993". The Forbeses denied that they were in default and contended that the sum demanded was incorrect.

[27] The dispute as to the sum claimed by the notice harkened back to the agreement of sale between the parties. A curious element of the transaction between Miller's and the Forbeses was that, although the formal agreement for sale and purchase of the premises was dated 14 September 1995, their dealings commenced in or about August 1993, and the Forbeses started making mortgage payments in October 1993. Despite that fact, Miller's remained in occupation of the premises for 10 months after the mortgage payments commenced.

[28] Another curious element is that that agreement for sale, although dated 14 September 1995, had an earlier completion date, namely, 31 August 1995. Despite those curious elements, neither side disputed the contents of the document, which had been duly stamped for stamp duty and transfer tax on the transaction.

[29] Grounds of appeal two and three, deal with this aspect of the case. The date for completion proved critical for the resolution of the first dispute as to fact between the

parties. The Forbeses complained that the sum demanded by Miller's in its notice of default was incorrect. They asserted that it did not reflect an amount of at least $450,000.00 by which Miller's should have reduced the Forbeses' debt. That reduction, they said, was as a result of Miller's occupation of the premises for 10 months. They contended that there was an agreement between them and Miller's, whereby Miller's would have been allowed to remain in occupation but would pay to the Forbeses the sum of $45,833.33 per month for Miller's use and occupation of the premises.

[30] Miller's countered by asserting that the agreement made in 1993, was that it could occupy the premises without payment until it found other accommodation. The Forbeses denied that assertion. They contended that it was agreed that a payment would be made, and they pointed to an unsigned document, which purported to reflect that agreement.

[31] The learned trial judge resolved the dispute by finding that there was no evidence that there was an agreement for a payment by Miller's. She also found that since the agreement for sale did not entitle the Forbeses to possession until 31 August 1995, they were not entitled to, and could not demand, payment, before that date, for Miller's occupation of the property. In fact, Miller's had vacated the property in or about October 1994. The Forbeses could, therefore, claim no credit for Miller's occupation. The learned trial judge's finding on this issue is recorded at paragraph 18 of her judgment. She said:

> "…Even if it could be said that in entering into this agreement, [Miller's] had surrendered its right and the [Miller's] was therefore bound by the agreement, the

> agreement was never signed. There was therefore no evidence that such an arrangement had been made between the parties. I therefore find that the [Forbeses] were never entitled to the sum that they allege was to be paid by [Miller's]."

[32] Mr Braham submitted that the learned trial judge's resolution of the issue was inadequate. He argued that the existence of the unsigned document suggested that there was an agreement for Miller's to pay for its occupation of the property. He submitted that the learned trial judge should have so found. Learned Queen's Counsel also pointed to a letter written to Miller's by the Forbeses' attorneys-at-law, which demanded compensation for Miller's occupation of the premises. He submitted that that letter amounted to a revocation of any agreement to allow Miller's to occupy the premises and obliged it to pay for its use and occupation.

[33] The submissions cannot succeed. The learned trial judge was entitled to reject the unsigned, unstamped document. Similarly, as the tribunal of fact, who saw and heard the witnesses, she was entitled to say which account she accepted on a balance of probabilities. There could, therefore, be no deduction from the sum that Miller's claimed as due, of any sum representing compensation for Miller's use and occupation of the premises. This is despite the fact that the Forbeses were paying mortgage instalments during that time. The next aspect of Miller's impugned exercise of its power of sale is its entry into an agreement with Duncarl.

The sale to Duncarl and the tender by the Forbeses

[34] The issues of Miller's entry into an agreement with Duncarl and its rejection of the payment tendered by the Forbeses, are covered by grounds four, five and six. The learned trial judge dealt with these issues under the heading of whether the Forbeses' equity of redemption had been extinguished.

[35] The term "equity of redemption" is a term belonging to what Australian lawyers term "the old system", as distinct from the Torrens system of registration of titles to land. The old system included the relevant statute law, the common law and the relevant principles of equity as they affected interests in land. Under the common law, a mortgagee became the owner of the property. Equity, however, allowed the mortgagor, upon repayment of all monies due under the mortgage, to redeem the property and regain ownership of it. The mortgagor was therefore said to have, an "equity of redemption". Where the mortgagee sold the property, however, the mortgagor's equity of redemption was extinguished.

[36] Under the Torrens system of registration, the mortgagor remained the legal owner of the property. The term "equity of redemption", therefore, has a different implication under the Torrens system. It speaks to the mortgagor's right to have the encumbrance to his title, created by the mortgage, removed. Some principles of the old system do, however, apply conveyancing practice under the Torrens system. An informative discourse on the differences between these systems of law with respect to mortgages, is set out in **King Investment Solutions v Hussain** [2005] NSWSC 1076

(27 October 2005) at paragraphs 45-82. The ROTA is modelled on the Torrens system of registration of titles to land.

[37] The question of whether the Forbeses' equity of redemption was extinguished turns largely on the facts of the case. As was outlined above, the notice attached to the letter required the Forbeses to settle their account in full within 30 days of the date of the notice, failing which the premises would be sold. The 30 days would have expired on 22 July 2001.

[38] No payment was made within the time specified in the notice. Mr Cowell Forbes testified that, in August 2001, he spoke with Miller's principal, Mr Sydney Miller, and told him that the Forbeses would settle the debt on 31 August 2001. He said that on 31 August he had someone deliver a cheque to Mr Miller in the sum of $2,416,666.86. Mr Miller, however, returned the cheque on 1 September 2001, asserting that Miller's had, on 30 August 2001, entered into an agreement to sell the premises.

[39] The learned trial judge found that the Forbeses' equity of redemption was extinguished. Mr Braham, in arguing the complaint against this finding, considered it under the following aspects:

a. whether the notice was sufficiently specific to allow Miller's to act on it;
b. whether there was an agreement for the payment to be made on 31 August 2001;

c. whether the sale to Duncarl was made in bad faith, having regard to, the limited advertising of the premises, the sale price, the timing of the sale agreement and the fact that Miller's did not indicate that they were selling as mortgagees;

[40] In respect of the first aspect, Mr Braham criticised the notice as being deficient. He said that it did not state the sum to be paid at the end of the notice period. He, however, did not provide any authority for such a requirement. Nonetheless, the notice and the covering letter, combined were specific. The Forbeses would have been in no doubt as to the sum that they were required to pay and when they were required to pay that sum.

[41] In respect of the second issue, the learned trial judge recognised the question of fact that arose from Mr Miller's denial of having agreed with Mr Forbes to accept a payment on 31 August 2001. She also recognised that Mr Miller denied having accepted the cheque as payment. In resolving the conflict on the evidence, the learned trial judge found that Mr Cowell Forbes' affidavit evidence on the point was not definitive. She stressed that Mr Forbes stated that when he told Mr Miller of the intention to pay on 31 August 2001, Mr Miller, "appeared to be satisfied".

[42] The learned trial judge resolved the issue by accepting Mr Miller's account. She said, at paragraph 21 of her judgment:

> "...I therefore find that on a balance of probabilities, [Miller's] did not agree to the settlement of the mortgage debt with

> the Forbeses and did not accept the cheque as full and final settlement of the debt. Consequently, the sum that was sent by cheque could not be regarded as tender. In any event, this sum was insufficient to satisfy the sums owed."

There is no basis for interfering with that finding.

[43] She also opined that the agreement must have been in train on 22 August 2001, making it unlikely that Mr Miller would have agreed to accept payment by the Forbeses on 31 August 2001. This was in reference to the evidence that the agreement between Miller's and Duncarl was signed on 30 August 2001.

[44] Mr Braham criticised the learned trial judge's reasoning on this latter finding. He submitted that a sale on 30 August 2001 did not necessarily mean that negotiations were ensuing on 22 August 2001. On this aspect, learned Queen's Counsel is undoubtedly correct. Agreements for sale can be made and formalised overnight, or even in the course of a day. That error in the learned trial judge's reasoning does not, however, warrant setting aside her decision that there was no agreement to accept payment on 31 August 2001. She is the tribunal who saw and heard the parties. This is an issue that an appellate court would not substitute its findings for those of the trial judge.

[45] In respect of the third issue, a critical principle that is applicable is that once a mortgagee enters into an agreement to sell the mortgaged property, the mortgagor's equity of redemption is extinguished, unless the mortgagee has acted in bad faith. Once extinguished, the equity of redemption cannot be revived. Those principles have been extracted from the decision in **Waring v London and Manchester Assurance**

Company Limited and Others [1935] 1 Ch 310. They apply under the old system as well as under the Torrens system. That case has been accepted in this jurisdiction as accurately setting out the relevant law.

[46] In **Lloyd Sheckleford v Mount Atlas Estate Ltd** SCCA No 148/2000 (delivered 20 December 2001), Forte P cited **Waring** as being of assistance although it was not a case dealing with the Torrens system. The learned president went on to state the principle representing the law in Jamaica, in respect of registered title. He said at page 16 of the judgment:

> "...the express restriction in section 106 [of the ROTA], 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...." (Emphasis supplied)

[47] On this third issue, the learned trial judge found that there was clear documentary evidence that the agreement for sale with Duncarl was signed on 30 August 2001. The learned trial judge also found that there was no bad faith involved in the exercise of the power of sale.

[48] Mr Braham criticised this finding. He argued that the sale to Duncarl was at such a low price that it must be considered to be a gross undervalue and presumptive that it was done in bad faith. Learned Queen's Counsel categorised the sale to Duncarl as "recklessness" on Miller's part. On his submission, the learned trial judge ought to have found that there was bad faith and consequently, order it to be set aside.

[49] The fact that a mortgagee sells the mortgaged premises at an undervalue is not, by itself, evidence of bad faith. Crossman J so held in **Waring**. The principle has not been criticised. At page 319, he quoted, with approval, dictum from **Warner v Jacob** 20 Ch D 220, at page 224:

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

In **Waring**, the property was sold by the mortgagee for £186,000 although it had been previously put up for auction with a reserve price of £220,000. The attempt at auction was unsuccessful. Crossman J rejected the contention that it had been sold at a gross undervalue.

[50] In the present case, the sale price in the agreement for sale with Duncarl was $8,000,000.00. The premises had been sold to the Forbeses for $5,000,000.00. Mr Miller gave evidence that the Forbeses had told him that they were trying to sell them themselves but were unable to secure an offer better than $8,000,000.00. Less than a month after entering into an agreement with Duncarl, however, the premises were valued at $12,000,000.00.

[51] Having considered all this evidence, the learned trial judge held that there was no bad faith involved in the sale. She concluded, therefore, that the Forbeses' equity of redemption was extinguished. She said at paragraph 22:

> "There was no bad faith on the part of [Miller's] and therefore no basis on which [Miller's] should be restrained from completing the sale of the property [to Duncarl]. The equity of redemption was therefore extinguished."

The finding was not unreasonable. As a result, there can be no interference with the learned trial judge's findings in respect of these issues and therefore the grounds in relation to them fail. The next issue is the question of damages.

The damages awarded

[52] Grounds seven and nine address the issue of damages. There are three aspects to this issue. The first is that the learned trial judge found that Miller's breached its duty of care to have secured the best possible price at the time that it sold the premises. She found, however, that as the Forbeses had secured an injunction to prevent the sale (which injunction is still in force) they were not entitled to any damages. The second aspect with respect to damages is that the learned trial judge found that Miller's was entitled to damages as a result of the imposition of that injunction. The third aspect is that the learned trial judge awarded interest on the sum due to Miller's at a rate higher than that agreed in the mortgage instrument. The Forbeses have complained about the learned trial judge's findings in respect of all these aspects.

[53] It is not entirely clear why the learned trial judge found that, because of the existence of the injunction, the Forbeses did not suffer any loss due to Miller's failure to secure the best price available at the time. Since she found that the sale to Duncarl was not made in bad faith, there is no basis, on her reasoning, for having that sale set

aside. The sale will eventually have to be concluded at the contracted price. If that price were contracted in breach of Miller's obligations as a mortgagee, then the Forbeses would be entitled to be paid the market value of the premises, net of all sums due to Miller's. They would also be entitled to interest on that sum for the period that they were kept out of that money. They, however, would have had the benefit of the income from the property during that time and would have had to set off that income against the sum due to them by Miller's as a result of the sale. That an accounting must be done was recognised by the learned trial judge. She intimated that there should be an accounting, albeit that she did so in a different context, namely the sums which may become due to the Forbeses. She said at paragraph 31:

> "..upon the sale of the property by the mortgagee, the mortgagee is only entitled to the amount owing to him and is required to hand over any remaining amounts of the purchase price to the mortgagor...."

It is curious, therefore, that she did not order an accounting to be done, in the context of deciding the damages that would be due to Miller's.

[54] It may be that the learned trial judge was of the view that the Forbeses' occupation (by way of letting to tenants) of the premises, without having made any further payments, would have offset any loss that they suffered as a result of Miller's breach. This can be inferred from her statement at paragraph 31 where she stated that the Forbeses "as equitable owners would therefore be entitled to keep the sums obtained from the rental of the property".

[55] It would seem, nonetheless, that the learned trial judge erred in this regard. She should have ordered an accounting to be done. There was evidence that the premises were valued in September 2001 at $12,000,000.00. There was also evidence that the Forbeses had let out the premises for the sum of $100,000.00 per month. These figures could be used as the foundation of any accounting to be done.

[56] That accounting is, with respect to the learned trial judge, a separate exercise from the enquiry into damages suffered by Miller's as a result of the imposition of the injunction. That enquiry would normally have taken into account Miller's liability to Duncarl as a result of the delay in completing the sale.

[57] The learned trial judge, however, adopted a different approach. Instead of ordering an enquiry to be done by the registrar of the Supreme Court, or at any rate, at a later date, she awarded Miller's damages for the loss occasioned by the imposition of the injunction pending the conclusion of the trial. She held that this "would include the outstanding sum that was owed under the mortgage agreement plus the costs incurred in the sale plus interest and not the balance purchase price plus interest" (see paragraph 31).

[58] As was mentioned above, the enquiry as to the loss, if any, suffered by Miller's as a result of the imposition of the injunction should have been an exercise separate and distinct from the issues arising from the trial. The registrar of the Supreme Court normally conducts that exercise.

[59] The third aspect of the issue of damages concerns, in part, the fact that although Miller's and the Forbeses had agreed, in the instrument of mortgage, that the interest rate on sums outstanding on the mortgage debt should be at the rate of 15% per annum, the learned trial judge awarded interest at the rate of 18% per annum. She did so in the context of awarding damages to Miller's for the loss suffered as a result of the injunction. The learned trial judge reasoned that rate to be applicable on the basis that "interest should be [calculated] at a commercial rate since this is commercial property and should be to the date of judgment" (paragraph 31).

[60] The Forbeses have criticised this departure. Although there was no expansion of the ground of appeal in either oral or written submissions, the point does require some examination.

[61] The parties are bound by their agreement concerning the rate of interest to be applied in respect of the mortgage debt. In the event of a breach, the innocent party is entitled to be put in a position as if the contract had been performed. The court should not, therefore, attempt to substitute another rate of interest unless the rate agreed is unconscionable or is otherwise unenforceable. In this case, the rate of 15% per annum should remain as the applicable rate on the outstanding sums due under the mortgage.

[62] The court is entitled, however, by virtue of section 3 of the Law Reform (Miscellaneous Provisions) Act, to stipulate the rate of interest it considers applicable on an award of damages. That is what the learned trial judge sought to do in her award of damages. She, however, with respect, erred in including the outstanding mortgage

debt in that award. Section 3 of the Law Reform (Miscellaneous Provisions) Act also restricts awarding interest where interest is payable as of right. The section states:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given **interest at such rate as it thinks fit on the whole or any part of the debt or damage** for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section-
>
> (a) shall authorize the giving of interest upon interest; or
>
> (b) **shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise**; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

The learned trial judge's award of interest, at 18% per annum, should be maintained with respect to any other damages to which Miller's is entitled.

[63] The other aspect of the complaint contained in the ground of appeal, seems to be that the sum placed in escrow, as security for the undertaking in respect of damages for any loss suffered as a result of the grant of the injunction, was already earning interest at a commercial rate. It seems that the Forbeses are of the view that the rate of interest being earned by those funds binds the court as to the award of interest that it may make. It seems also, that the Forbeses are of the view that the escrow payment was designated as being a payment to extinguish the mortgage debt.

[64] If those assessments of the latter aspect of ground of appeal seven are correct, then that aspect of the ground is untenable and correctly omitted from any arguments in support of the appeal. The rate of interest that the sums earn cannot bind the court as to the rate of interest to be applied to damages that it awards. Secondly, the escrow payment was, as mentioned above, security for the undertaking as to damages. It was not a payment of the mortgage debt.

[65] Ground seven, therefore, succeeds in part.

The effect of the judgment

[66] There is no doubt that the learned trial judge gave judgment for Miller's. She ordered as follows:

> "a. Judgment for [Miller's] in the sum of the amount owing under the mortgage [later increased to $3,637,984.26] plus interest @ the rate of 18% per annum (commercial rate from September 21, 2001 to the date hereof).
>
> b. Costs to [Miller's] to be taxed, if not agreed."

Nonetheless, the learned trial judge, at one point in the course of her reasoning, seemed to have been heading toward a different conclusion. The relevant portion of paragraph 31 states that the Forbeses should have the premises. It states:

> "I would therefore hold that [Miller's] is entitled to an enquiry into damages, such damages being for loss that is reasonably foreseeable. This would include the outstanding sum that was owed under the mortgage agreement plus the costs incurred in the sale plus interest and not the balance purchase price plus interest. The basis for this award is that, upon the sale of the property by the mortgagee, the mortgagee is entitled only to the amount owing to him and is required to hand over any remaining amounts of the

> purchase price to the mortgagor....The Forbeses as equitable owners would therefore be entitled to keep the sums obtained from rental of the property. **Of course, since [Miller's] is still registered as owner, in all fairness to the claimants, it must be required to effect a transfer of the property**." (Emphasis supplied)

[67] It is not entirely clear what the final sentence of the paragraph was intended to convey. A comprehensive view of the judgment suggests, however, that the learned trial judge found that the equity of redemption had been extinguished and that the sale to Duncarl could proceed. The only benefit that the learned trial judge found to have inured to the Forbeses was that they were entitled to have had the market value used by Miller's. The sentence identified above cannot be said to supplant these findings.

The delay in delivering the judgment

[68] The Forbeses have cited inconsistent reasoning in the judgment as being a consequence of the five years that the learned trial judge took to consider and deliver her judgment. The final sentence in the last quotation from the judgment could provide some fodder for the Forbeses' complaint. It cannot be said, however, that the judgment has generally suffered from the delay. The reasoning was, other than for the errors identified above, thoroughly sound. The findings of fact reflected careful thought by the learned trial judge. Similarly, her explanation and application of the relevant law was accurate and apposite.

[69] This court must, however, condemn the delay. It has clearly worked injustice on, not only these parties, but the third party, Duncarl, as well. None of these parties

has been able to get on with their respective businesses, which depend on the outcome of this case.

[70] Delay cannot be a basis for setting aside a judgment, however, unless it is shown that it has prejudiced the judgment. Their Lordships in **Geoffrey Cobham v Joseph Frett** PCA No 41/1999 (delivered 18 December 2000); [2001] 1 WLR 1775, stated that it must be demonstrated that the delay prejudiced the result. They stated at page 1783H of the reported judgment:

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. **The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant**." (Emphasis supplied)

[71] **Cobham** has been relied upon for that principle by this court in **Desmond Bennett v Jamaica Public Service Co Ltd** [2013] JMCA Civ 28 (see paragraph [72]). The court of appeal of Belize also cited **Cobham** with approval in **Arthur Hoy Jr and Another v Aurora Awe and Others** Civil Appeal No 2/2006 (delivered 27 October 2006) (see paragraphs 14 and 18).

[72] For the reasons expressed above, it cannot be said that delay has rendered the judgment unsafe or that it would be unfair to the Forbeses to allow it to stand. This ground must also fail.

Post judgment activities

[73] The case took another curious twist after the learned trial judge delivered her judgment. The attorneys-at-law for Miller's took from escrow, the monies that had been placed there as security for the damages which may have been incurred as a result of the imposition of the injunction. The attorneys-at-law then took steps with a view to registering the instrument of transfer to the Forbeses, the instrument of mortgage from them and an instrument of discharge of the mortgage. These were all with a view to registering an instrument of transfer to Duncarl.

[74] It is accepted that these steps cannot impugn the judgment. It must, however be noted that if an instrument of discharge is filed indicating that the mortgagee has "been fully paid and satisfied all principal interest and other monies secured by [the premises]" and as a result the premises are discharged from the mortgage, it is difficult to see how an exercise of a power of sale contained in that mortgage can thereafter be achieved. It is to be noted that section 106 of the ROTA speaks to the nature of the instrument of transfer to be used in exercise of the power of sale. It states, in part:

> "...the Registrar upon production of **a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage**..." (Emphasis supplied)

[75] None of the instruments mentioned above have yet been registered. There is therefore room for adjustment to the procedure. The Registrar of Titles, no doubt, would give guidance, if requested, as to the proper procedure to be used in achieving the intention of the learned trial judge's judgment.

Costs

[76] Although both parties have secured a measure of success, Miller's has, on this assessment, had the judgment in its favour upheld. The majority of the issues have been determined in its favour. It should be awarded two-thirds of its costs of the appeal.

Summary and conclusion

[77] The application to dismiss the appeal for want of prosecution, although not without merit, should fail in light of the corrective actions taken by the appellants and the fact that the court had been placed in a position to hear an appeal that had a real prospect of success.

[78] The learned trial judge found that Miller's had properly exercised its power of sale contained in the instrument of mortgage executed by the Forbeses. She also correctly found that, as a result of the sale to Duncarl, the Forbeses' equity of redemption was extinguished and could not be revived. The learned trial judge also found that the sale to Duncarl, although effected at below the market value, was not done in bad faith.

[79] The learned trial judge was entitled to make all these findings based on the evidence before her. For those reasons, the judgment of the learned trial judge was correctly in favour of Miller's. There were, however, some difficulties with the manner in which the judgment would have been given effect. This was so particularly with the order in respect of damages.

[80] The sale of the premises entitles the Forbeses to an accounting from Miller's. That accounting must, however, take into account the market value of $12,000,000.00 rather than the actual sale price.

[81] There must also be an enquiry into the damages suffered by Miller's as a result of the Forbeses remaining in the premises after the sale to Duncarl, particularly by virtue of the injunctions granted by this court. The fact that the Forbeses have been earning an income from the premises should be taken into account in calculating the damages. The interest rate of 18% awarded by the learned trial judge should be applicable to any sum awarded to Miller's as a result of that enquiry. Fairness requires that the same rate of interest should be applied to any sum found due to the Forbeses as a result of the enquiry.

[82] Miller's should be required to provide the accounting to the Forbeses and the registrar of the Supreme Court within 42 days of the date hereof. Miller's should also be required to file and serve its claim for damages on or before the expiry of 42 days of the date hereof.

SINCLAIR-HAYNES JA

[83] I have read, in draft, the judgment of my brother, Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[84] I have also read the draft judgment of Brooks JA, and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

(1) The application to dismiss the appeal for want of prosecution is refused.

(2) The appeal is allowed in part.

(3) The judgment of the Supreme Court granted herein on 17 December 2010 is set aside in part.

(4) The judgment in favour of the respondent Miller's Liquor Store (Dist) Limited is affirmed.

(5) The sum awarded in favour of the respondent with interest thereon is set aside.

(6) It is declared that the sum due to the respondent, as being outstanding on the mortgage debt, shall be calculated at the rate of 15% per annum as agreed between the parties in the instrument of mortgage dated 15 September 1993.

(7) It is declared that the respondent was entitled to have exercised the power of sale contained in the said instrument of mortgage.

(8) The respondent shall, on or before 22 February 2016, file and serve an accounting of its exercise of the power of sale under the said instrument of mortgage.

(9) The respondent shall, on or before 22 February 2016, file and serve its claim, if any, for damages resulting from the injunctions granted by Anderson J on 25 September 2001 and on 18 October 2002 and by this court on 18 June 2012.

(10) The registrar of the Supreme Court shall conduct an enquiry of the sums due to the appellants, if any, as a result of the sale by the respondents under the powers of sale contained in the said instrument of mortgage. The market value of $12,000,000.00 shall be used for the purposes of the enquiry. Interest shall be awarded at the rate of 18% per annum on any sums due to the appellants as a result of that enquiry.

(11) The registrar of Supreme Court shall conduct an enquiry of the damages due to the respondent as a result of the injunctions granted by Anderson J on 25 September 2001 and on 18 October 2002 and by this court on 18 June 2012. Interest shall be awarded at the rate of 18% per annum on any sums due to the respondent as a result of that enquiry.

(12) Liberty to apply is granted.

(13) The respondent is awarded the costs of the application to dismiss the appeal for want of prosecution and the costs thrown away in that regard, including the cost of the preparation of the judge's bundle. Such costs to be taxed if not agreed.

(14) The respondent is awarded two-thirds of its costs of the appeal. Such costs to be taxed if not agreed.