



Fiji Law Reports

You are here: [PacLII](#) >> [Databases](#) >> [Fiji Law Reports](#) >> [2000](#) >> [2000] FJLawRp 17

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Khan v Fiji Development Bank [2000] FJLawRp 17; [2000] 1 FLR 11 (14 January 2000)

[\[2000\] 1 FLR 11](#)

IN THE HIGH COURT OF FIJI

MOHAMMED ISAQ KHAN

v

FIJI DEVELOPMENT BANK

High Court Civil Jurisdiction
Fatiaki, J
14 January, 2000
HBC 0149/98

Mortgage - equity of redemption - statutory notification of charge to be treated like mortgage upon default - whether Bank committed fraud in accepting lowest price on tender - duty of mortgagor - whether Bank took reasonable precautions to obtain the true market value of mortgaged property - interpretation of 'actually sold' - [Property Law Act](#) (Cap 130) s72, [Fiji Development Bank Act](#) (Cap 214) ss25, 27(2), 27(3), 79(3).

The plaintiff filed a Writ seeking to prevent sale of mortgaged property by defendant bank. The defendant rejected the plaintiff's offer of redemption as late as the defendant had entered into an unconditional agreement for sale. The plaintiff obtained an ex parte injunction to restrain the defendant bank from exercising power of sale pending determination of claim but the Court ordered payment into court pending judgment.

Held - The time within which mortgagor may exercise equity of redemption runs until transfer of mortgaged land has been registered by defendant Bank in pursuance of power of sale.

Court to consider final orders once counsel have perused judgment.

Cases referred to in judgment

cons *Cuckmere Brick Co. v Mutual Finance Co.* ([1971](#)) [1 Ch.D. 949](#)
ref *Kennedy v de Trafford* ([1896](#)) [1 Ch.D. 762](#), (1897) AC 180
ref *Tomlin v Luce* ([1889](#)) [43 Ch.D. 191](#)
foll *Walker v Jones* (1865) LR 1 PC 50 at 61-62
dist *Bank of Baroda v Joseph Nainima* [1996] (unrep) HBC 326/96
cons *Waring (Lord) v London and Manchester Assurance Co. Ltd.* (1935) [1 Ch.D. 310](#)
dist *Property & Bloodstock Ltd v Emerton* (1968) 1 Ch. 94
appl *Forsyth v Blundell* [[1973](#)] [HCA 20](#); ([1972](#)) [129 CLR 477](#)

folll *Jenkins v Jones* (1860) 128 RR 41
appl *Sinclair v Hope* (1982) 2 NSWLR 870
appl *Brewer v Papatoetoe Town Board* (1934) NZLR 774
appl *Life Interest and Reversionary Securities Corp. v Hand-in-Hand Fire and Life Insurance Society* (1898) 2 Ch. 230.

Joseph Maharaj for the plaintiff
Davenesh Sharma for the defendant

14 January 2000.

JUDGMENT

Fatiaki, J.

This case raises for determination the right of a mortgagor to redeem his mortgage vis-à-vis the exercise by the mortgagee of its 'power of sale'.

Although there appears to be a long chronology of events dating back to 1986 when the plaintiff first purchased the mortgaged land with the help of a loan from the defendant bank, the essential facts for present purposes are not in dispute and may be summarised as follows:

(1) In August 1986 with the help of a loan of \$38,000 from the defendant bank the plaintiff purchased eight (8) acres of agricultural land situated at Nasasa, Deuba and more particularly described in Certificate of Title (CT) No. 23120;

(2) The aforesaid loan was secured by way of a statutory Notification of a charge issued by the defendant Bank in terms of Section 25 of the [Fiji Development Bank Act](#) (Cap. 214) and registered on the land title on 24th March 1987;

(3) Since May 1987 the plaintiff has fallen substantially into arrears in his loan repayments resulting in several 'demand notices' being served on him in 1991, 1992 and 1997 requiring repayment of 'the whole of the principal, interest and other moneys owing' to the defendant Bank; The property was also publicly advertised by the defendant Bank for sale on several occasions with little success;

(4) In December 1991 in an effort to repay the loan arrears, the plaintiff with the agreement of the defendant Bank, proposed a subdivision of the land into smaller more disposable blocks. Town Planning approval to subdivide however, was not granted until mid October 1997;

(5) A fortnight earlier on 22nd September 1997 the defendant bank wrote to the plaintiff advising him that it had 'received an offer to purchase your mortgaged property ... comprised in CT 23120 ... for \$50,100.00 which the Bank intends to accept'. The plaintiff's debt then stood at \$70,923.95;

(6) The plaintiff immediately wrote requesting further time to complete the subdivision but this was declined by the defendant Bank in its letter of 17th October 1997, with an indication that it was '... now proceeding to accept the offer \$50,100.00 on hand and have the property sold' despite the \$20,000 shortfall;

(7) On 9th February 1998 the plaintiff's son for reason(s) that remain unclear, registered a caveat against the title to the land which remains outstanding;

(8) In early March 1998 the plaintiff again wrote to the defendant Bank stating '... I have got a better proposition from another person who wishes to buy this property for the sum of seventy thousand dollars (\$70,000)' which would effectively '... clear up my whole

debts which presently I am owing Fiji Development Bank';

(9) A week later the plaintiff issued a Writ out of the High Court seeking to prevent the sale of the mortgaged property by the defendant Bank;

(10) In early August 1998, the plaintiff again offered to redeem his mortgage for the full amount then owing to the defendant bank namely, \$70,154.00 but the offer was rejected as according to an official of the defendant Bank '... the Plaintiff has lost his equity of redemption and further the Bank has now entered into an unconditional agreement to sell the mortgaged property';

(11) On 27th August 1998 the plaintiff obtained an ex-parte injunction restraining the defendant Bank from selling or transferring the mortgaged property pending the determination of the plaintiff's claim. Attached to the plaintiff's affidavit in support was a F.N.P.F. cheque for \$70,154 made payable to the defendant Bank;

(12) On 2nd October 1998 this Court ordered that the cheque for the sum of \$70,154.00 be paid into Court pending the outcome of the plaintiff's application to redeem the mortgage.

In light of the foregoing and with the approval of counsel a preliminary issue was framed as follows:

'Whether on the agreed facts and chronology of events, the plaintiff has an equity of redemption in terms of Section 72 of the [Property Law Act](#) (Cap. 130)?'

I am grateful to counsel for the very full and comprehensive written submissions and chronologies filed for the assistance of the Court.

Before turning however to deal with counsel's submissions it is necessary to briefly trace how the 'power of sale' arises in this case given the rather special nature of the security granted to the defendant bank.

As earlier pointed out the nature of the security in this case is a statutory notification of a charge under Section 25 of the [Fiji Development Bank Act](#) (Cap. 214) ('the Act') which shall be released on repayment of all amounts due to the Bank (see: Section 26).

The Act further relevantly provides in Section 27(1) (b) that:

'if any farmer ... defaults in the payment of any moneys payable by him to the Bank and secured under the provisions of this Part ... then

(i) if the land specified in the notification is the subject of an instrument of title registered under ... the [Land Transfer Act](#), the provisions of Sections 75 to 81 inclusive of the [Property Law Act](#) shall mutatis mutandis, apply as though the charge created ... were a mortgage registered under the provisions of that Act.'

Section 27(2) then provides that:

'Every sale made in pursuance of powers of sale conferred by Subsection (1) shall be by public auction or by private treaty as the bank may consider appropriate, and notice of such sale shall be given-

(b) ... by advertisement appearing at least three times in any one newspaper published and circulating in Fiji';

and finally Section 27(3) provides that:

'The Bank may, at any time before any sale advertised under ... subsection (1), postpone such sale either generally or to some specified day or cancel such sale.'

From the foregoing it is plain, and common ground between the parties, that the defendant Bank's security is to be treated as a 'mortgage' to which Section 79(1) of the [Property Law Act](#) implies a statutory 'power of sale' in the following relevant terms:

'If default in payment of the mortgage money ... continues for one month after the service of the (statutory demand) notice, the mortgagee may sell or concur with any other person in selling the mortgaged property ... by public auction or by private contract..., and subject to such conditions ... as the mortgagee thinks fit, with power to vary any contract for sale ... or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby ..., and may make and sign such transfers and do such acts and things as are necessary for effectuating such sale.'

and Section 79(3) provides that:

'Where a transfer is made in purported exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground (amongst others), that the power was otherwise improperly or irregularly exercised, but any person damnified by any unauthorised, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.'

I turn next to consider counsels' submissions. In brief, the plaintiff's position is that:

'... the acceptance of a tender in question by the defendant (bank) does not deprive the plaintiff of the opportunity of redeeming his land because under the law, a mere acceptance of a tender, as in this case, does not constitute an actual sale, (as required by Section 72 of the [Property Law Act](#) Cap. 130 nor does it constitute a sale under the case laws). At the time the tender was accepted, and up to this point in time, the plaintiff's land remains unsold ...' (and alternatively) ... 'it can be said that the tenderer's amount is so low, for a land of over 8 acres and subdivided, that there is at least evidence of bad faith and unconscionability towards the plaintiff. It can equally be said that the inadequacy of the amount is also evidence of fraud'.

The defendant bank's equally brief position:

'is that it accepted a tender for \$50,100.00 for the purchase of the property in CT 23120 on 1st September 1997. As at that date the plaintiff had not made any repayments and neither had he rectified his default. The purchaser paid his deposit. He had obtained necessary finance. The defendant entered into an unconditional sale with the purchaser. Transfer documents were signed, stamped and ready for registration. The defendant submits the plaintiff has lost his equity of redemption'.

In this latter regard other than what is deposed in para, 4(k) of the affidavit of a Bank Officer of the defendant Bank, no correspondence with the tenderer; no newspaper advertisement(s); no deposit receipt; no sale and purchase agreement; and no executed and stamped transfer documents evidencing the defendant Bank's acceptance of the successful tender has been provided to the Court although these would plainly have been readily available for perusal.

In any event, it is common ground that no transfer of the land has been registered such as to raise the protective provisions of Section 79(3) earlier referred to. Indeed, on the defendant Bank's own correspondence referred to at (5) and (6) above, by late October 1997 the successful tender had not yet been accepted. Counsel's submission in that regard is plainly inaccurate and the matter remains unresolved.

As to the suggestion of 'fraud' defence counsel whilst conceding that the successful tender is less than the amount then owing under the mortgage to the Bank and less than the plaintiff's offer to redeem, nevertheless writes:

'There is no evidence of fraud on the part of the defendant ... the whole process of sale was transparent in that demand was served, the property was advertised and the highest price on tender was accepted. The fact that the low price is received on tender does not in itself amount to fraud.'

In this latter regard it is worth noting at this stage the decision of the Court of Appeal (U.K.) in the leading case of *Cuckmere Brick Co. v. Mutual Finance Co.* (1971) 1 Ch.D. 949 in which it was:

'Held: (1) that a mortgagee, when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price (or per Salmon L.J. 'the true market value').'

In the leading judgment delivered by Salmon L.J., his lordship examined the nature of the relationship that exists between a mortgagor and a mortgagee exercising his 'power of sale' and categorised them as 'neighbours', and then after closely examining the judgments of the Court of Appeal and the House of Lords in *Kennedy v. de Trafford* (1896) 1 Ch.D. 762 (1897) AC 180; and in *Tomlin v. Luce* (1889) 43 Ch.D. 191 concluded, *birth on principle and authority*, (at p.968):

'... that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it.'

In the present case, can it be said of the defendant Bank, given the mortgagor's offer to redeem for the full amount then due under the mortgage, that it took 'reasonable precautions to obtain the true market value of the mortgaged property (which had been effectively subdivided) at the date on which the successful tender was accepted?'

The *Cuckmere Brick* case is also factually interesting in that it was decided at first instance and upheld in the Court of Appeal, that the mortgagee was in breach of its above-mentioned duty in selling the property by public auction without adequately publicising the planning approval granted in respect of the property, and further, in refusing to postpone the auction sale to enable the property to be re-advertised.

In that regard the present case has some similarities in so far as it is common ground, that approval had been given by the defendant Bank and the Director of Town and Country Planning for the land to be subdivided and indeed, a subdivision survey plan by a registered surveyor had been prepared and was awaiting final approval after minor corrections. In the absence of the relevant newspaper advertisement it is unknown whether the 'planning approval' regarding the mortgaged land was adequately disclosed in this instance and, if not, could that failure or omission amount to a breach of duty by the defendant Bank?

It is clear from counsels' respective submissions that the parties differ fundamentally on the meaning and effect of Section 72(1) of the [Property Law Act](#) (Cap. 130) which gives statutory expression to the principle enunciated by Turner L.J. when in delivering the judgment of the Privy Council in *Walker v. Jones* (1865) LR 1 P.C. 50 his lordship said at p.61-62:

'It is also clear that every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt.'

Section 72(1) provides:

'A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all monies due and owing under the mortgage at the time of payment.'

Given the circumstances of this case and the particular wording of the Section, the issue earlier framed narrows down to a consideration of what is the meaning and effect of the words 'before the same has been actually sold by the mortgagee under (his)

power of sale' which encapsulates the statutory limitation to a mortgagor's entitlement to redeem.

In this regard defence counsel submits:

'... that the very moment the mortgagee exercises its power of sale and enters into a contract for sale, the mortgagor loses his or her equity of redemption. The mortgagor had all the time prior to acceptance of the tender to redeem the property.'

With all due regard to counsel the submission is a little confusing in so far as it appears to recognise three (3) different stages at which the mortgagor's 'equity of redemption' is lost, the first being, from 'the very moment the mortgagee exercises its power of sale', does this mean once the power is enlivened by the expiry of the statutory demand notice? or is it at the closure date of the public advertisement calling for tenders?; the second being, the acceptance of the successful tender; and, thirdly, the entry into a contract for sale with the successful tenderer.

What's more the High Court decision cited in support of the above proposition namely, *Bank of Baroda v. Joseph Nainima* Civil Action No. 326 of 1996 is of little or no assistance at all to the present case. In the first place as counsel correctly points out, the case concerned an application by a mortgagee for vacant possession under Section 169 of the [Land Transfer Act](#), but more relevantly, the sole issue before the Court was whether a registered mortgagee had 'locus' to bring an application under the Section as the 'last registered proprietor' of the land. After referring to several authorities including *Fraser v. Walker* the Court concluded there was 'locus'.

Be that as it may there is authority that appears to answer the question earlier posed in the defendant Bank's favour namely, the judgment at first instance of Crossman J. in *Waring (Lord) v. London and Manchester Assurance Co. Ltd.* [\(1935\) 1 Ch.D. 310](#) in which it was:

'Held (1) that a mortgagee's exercise of his power of sale under S. 101(1)(i) of the Law of Property Act 1925 to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith;

(2) That the fact that a contract for sale was entered into at an under value is not by itself enough to prove bad faith.'

Crossman J. in rejecting counsel's submission that notwithstanding the existence of a signed contract for sale, the 'equity of redemption' was not extinguished pending completion by conveyance, said at p.317:

'In my judgment, (the Section), which gives to a mortgagee power to sell the mortgaged property is perfectly clear and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance ; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract (subject to the mortgagor's equity of redemption) ... 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.'

As for the submission in that case, that the sale could not be allowed to stand because it was made at a gross under-value, an under-value which would entitle the mortgagor to have it set aside, Crossman J. said at p.319:

"I can find no evidence showing anything like lack of good faith in the company's conduct with regard to the sale. The law as stated by Kay J. in *Warner v. Jacob* [20 Ch.D. 220](#) is perfectly clear. The learned judge there says (at p.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 realise 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 is very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud'

... It is impossible on the facts of this case to conclude that the price is so low as in itself to be evidence of fraud."

The second authority is the judgment of the Court of Appeal (U.K.) in *Property & Bloodstock Ltd. v. Emerton* (1968) 1 Ch. 94 which approved the above judgment of Crossman J. and where it was:

'Held: dismissing the appeal (despite the contract being a conditional one) (1) that the entry by a mortgagee into an unconditional contract for the sale of the mortgaged property pursuant to Section 101(1)(i) of the Law of Property Act 1925 (which is in substantially identical terms to our Section 79(1) op.cit.) barred the mortgagor's right of redemption so long as the contract subsisted.'

Danckwerts L.J. in delivering the first judgment in the appeal said, at p.114:

'in my view, it is significant that Sections 101 and 104 deal quite separately with the exercise of the mortgagee's power of sale by a contract of sale and the completion of the sale by conveyance. Section 104(2) [which is equivalent to our Sections 79(2) and (3)] is obviously intended to give protection to a purchaser, and absolves him from inquiries as to the exercise of the mortgagee's power of sale before conveyance.'

As to this observation I would merely note that the 'significant' separation in the U.K. legislation is not followed in our [Property Law Act](#) which includes both the mortgagees power of sale and the protection of the purchaser in the same section.

Sachs L.J. whilst agreeing with the result, nevertheless, left open the question whether, in the case of a conditional contract for sale of mortgaged property where the condition had not yet been satisfied or fulfilled, the mortgagor's right of redemption could still be exercised pending fulfilment of the condition. After all his lordship observed at p.123:

'The (mortgagee's) real interest is in the recovery of the money he has lent, which redemption effects.'

On the law however, I confess to a preference for the scholarly judgment of Walsh J. in *Forsyth v. Blundell* [1973] HCA 20; (1972-1973) 129 CLR 477 where a mortgagee had acted in disregard of the interests of the mortgagor to obtain the best price reasonably available by failing to pursue a scheduled auction where a firm offer for a lesser amount had been received. The High Court of Australia:

'Held (2) that in the circumstances it was proper to restrain the mortgagee from completing the sale, notwithstanding that at the date of the contract (the purchaser) was unaware of the impropriety of the transaction between the mortgagee and mortgagor.'

and further per Walsh and Mason J.J.:

'Section 94(2) of the Real Property Ordinance 1925-1961 [which is to the same effect as our Sections 79(2) & (3)] does not give to a purchaser from a mortgagee any greater protection than that given by the general law.'

Walsh J. in rejecting the statement of Kay J. in *Warner v. Jacob* (referred to in *Lord Waring's case* and set out at p. 11 above), as exhaustive of the rights of a mortgagor to set aside a mortgagee sale, said at p.496-497:

'There may be an improper exercise of the power of sale (that is one which constitutes a breach of the duty owed by the mortgagor) where although there is not any actual fraud (in the ordinary sense of the term) or any collusion between the mortgagee and the purchaser, there is improper conduct which goes beyond mere negligence in carrying out the sale. There may be impropriety of various kinds. What has sometimes been described as a fraud on the power and sometimes as a wilful or reckless disregard of the interests of the mortgagor or sometimes as sacrificing of the interests of the mortgagor does not necessarily involve in my opinion, the commission of fraud. ... I think it is in accordance with authority and that it should be affirmed that there may be conduct which amounts to reckless sacrificing of the interests of a mortgagor, although it is not shown that there is an actual intention to defraud him or that there is corruption or collusion with the purchaser.'

I do not doubt that as between (the mortgagor) and his mortgagee who has conducted himself in that way in entering into a contract of sale, a mortgagor is entitled to invoke the aid of the Court to prevent the completion of the contract. As between those parties the proprietary right of the mortgagor will be protected against such a wrongful alienation by the mortgagee.'

and later in p.497 his Honour said of the mortgagor's right to set aside a completed contract entered into in breach of the mortgagee's duty:

"In my opinion if the mortgagee does not exercise the power of sale 'in good faith' (in the sense explained above) and the purchaser has knowledge of the facts which show the lack of good faith, the purchaser cannot obtain a right superior to the right of the mortgagor. Even where a contract made in such circumstances is carried to completion, in many cases the transaction may be set aside, or alternatively, the conveyance or transfer treated as operating only as a transfer of the mortgage and of the debt secured by it, and not as a transfer of the mortgagor's interest: See: *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (In Liquidation) [\[1965\] HCA 17; \(1965\) 113 CLR 265](#) at pp.274-275."

Further Walsh J. whilst accepting 'as applicable and as correct' the decisions in Lord Waring (op.cit) and Emerton (op.cit) to a contract of sale which was not affected by any impropriety on the part of the mortgagee in exercising his 'power of sale', nevertheless rejected the proposition at p.499 that:

'a contract is binding before completion upon a mortgagor, even if the mortgagee acted in bad faith, unless he acted in collusion with the purchaser, or, alternatively, unless the purchaser had knowledge at the date of the contract of the facts which affected the propriety of the sale.'

His Honour also rejected the analogy sought to be drawn between a mortgagee exercising his 'power of sale' and an agent acting within his ostensible authority but in breach (unknown to the purchaser) of his duty to his principal, saying at p.500:

'The mortgagee in making a sale is acting on his own behalf and primarily in his own interests. The sale is not one by which the mortgagor, through the medium of an agent is disposing of his own property. It is one by which his property is being divested from him. If the power vested in the mortgagee is properly exercised the mortgagor is bound. But if it is not exercised in good faith there is, in my opinion, no reason that can be derived from any general principle for holding that before completion the purchaser gets a good title as against the mortgagor.'

Then at p.505 in upholding the lower Court's 'order for payment in', his Honour said:

'The deposit of the securities was made in accordance with a condition imposed on the mortgagor by the Court, for the benefit of the mortgagee and as a means of doing justice between the parties.'

and further:

'... the Court could have provided as a term of the order that as from the date of the payment in, the interest should cease to run.'

Finally in rejecting a not dissimilar submission to that of defence counsel regarding the necessity to seek an order setting and the 'contract of sale' between the defendant Bank and the successful tenderer, Walsh J. said at p.504:

'... in my opinion, the relief to which the plaintiffs are entitled (namely an injunction to restrain completion) could properly be granted without first setting aside the contract. What is of importance to the plaintiff is that the parties should be restrained from completing the contract, thereby depriving (the mortgagor) of his proprietary interest. The question whether the contract is set aside or remains on foot as a possible source of rights and obligations as between (the mortgagee) and (the purchaser) is one which concerns those parties only and which was not fully litigated in the action. In my opinion it is not necessary to make an order setting aside the contract.'

Mason J. for his part in agreeing with what Walsh J. had written, specifically reserved at p.511 *ibid* any expression of opinion:

'as to the correctness of the proposition [stated in the *Waring* and *Emerson* cases (op.cit)] that an exercise by the mortgagee of his power of sale is binding on the mortgagor before completion, unless the power of sale was not exercised bona fide.'

Earlier his honour had observed of the facts of the case at p.510:

'I am left with the overwhelming impression that (the mortgagee) determined willy nilly on a sale to (the purchaser) for a price which would cover the money owing to it, notwithstanding that there was real possibility of selling at a higher price to (an interested third party) and despite its knowledge that (the interested third party) would take over the mortgage and preserve the mortgagor's equity, if the need arose.'

In similar vein Stuart V-C in setting aside the mortgagee sale in *Jenkins v. Jones* (1860) 128 RR 41 which produced a substantial surplus and where the mortgagor had tendered the principal and interest (but not the costs which were then unascertained), said at p.47:

'... the defendants resolved that there should be no redemption, but that there should be a sale. This is precisely that of which the plaintiff complains, and which this Court, which alone recognises the right to redeem, must regard as oppressive. Before the surplus could be paid into Court, there must necessarily be a sale, which could not be effected consistently with that redemption which the plaintiff desired.'

Even if the case rested there, enough is proved to show such a settled determination to defeat, thwart, and discourage the redemption, that this Court is bound to regard with great jealousy any subsequent proceedings against the mortgagor's endeavour to redeem.'

A fortiori, how much more is needed to satisfy a Court where the sale price produces substantially less than the monies owed under the mortgage and there is a genuine tender by the mortgagor of an amount sufficient to meet the entire debt due at the time of the tender and what's more, not result in the total displacement of the mortgagor from the land. Needless to say in light of the above dicta the so-called 'transparency' with which the defendant bank exercised its 'power of sale' is, in my opinion, neither conclusive of the matter nor does it necessarily negate a breach of its duties in that regard.

I have thus far covered as much of the case law as I desire for the purposes of this case and I turn to consider in more detail the statutory entitlement of a mortgagor to redeem the mortgaged property under Section 72 of the [Property Law Act](#) (Cap. 170).

At the outset the Section provides that the entitlement to redeem may occur '... at any time before (the mortgaged property) has been actually sold'. It should be noted that the words are not 'sells' but rather 'has been actually sold'. On the basis that every word in a section ought to bear some meaning I am driven to the view that 'actually' when used in conjunction with 'sold' means that the sale in the exercise of the mortgagee's 'power of sale' has been 'effectuated' by a registered transfer of the mortgaged property such as to raise in the purchaser's favour, the protective provisions of Section 79(3).

As was said by Walsh J. in *Forsyth v. Blundell* op.cit at p.498:

'The mortgagor's interest was, of course, prior in time to any interest acquired by the purchaser. The right of the mortgagor was not merely an equity of redemption. The mortgages did not operate as transfers of his title to the land: See the Ordinance S.93 [which is identical to Section 63 of our [Land Transfer Act](#) (Cap. 131)]. His title could be divested by a transfer in pursuance of a contract of sale made by the mortgagee in the exercise of the power of sale. But until that occurred, he retained a legal interest in the land.'

What's more the legal interest retained by the mortgagor in the mortgaged land is an equitable interest sufficient to support a caveat to prevent the completion of a voidable contract for the sale of the land entered into by the mortgagee in exercise of his power of sale See: *Sinclair v. Hope Investments Pty Ltd* (1982) 2 NSWLR 870.

In *Brewer v. Papatoetoe Town Board* (1934) NZLR 774, Fair J. speaking of the meaning and effect of the word 'actual' in the phrase 'actual occupation' said at p.777:

"... the word 'actual' when used in conjunction with the word 'occupation' is effective to exclude any constructive, legal or notional occupation which might otherwise arise, and which does not completely correspond to the fact which it indicates. 'Actual occupation' means occupation in fact as distinguished from constructive occupation: *R. v. Inhabitants of St. Nicholas, Rochester* (1834) [11 ER 773](#), 776."

In this regard too in the rather unusual case of *Life Interest and Reversionary Securities Corp. v. Hand-in-Hand Fire and Life Insurance Society* (1898) 2 Ch. 230 where the purchaser in a 'contract of sale' entered into under a mortgagee sale, sought to question the propriety of the mortgagee's exercise of its 'power of sale', and where objection was taken to the purchaser's requisition on the basis of Section 21(2) of the Conveyancing and Law of Property Act 1881 (U.K.) [which is in almost identical terms to Section 79(3) of the [Property Law Act](#) (Cap. 130)], Stirling J. in over-ruling the mortgagee's objection said (of the wording of the Section) at p.238:

"That gives protection only to a purchaser who has obtained a conveyance. The protection accrues only after the conveyance has been made ... It appears to me that this provision is not applicable until after a conveyance is made, or, in other words, (the Sections) confer protection only on a purchaser who has obtained a conveyance without knowledge of any irregularity ... The provisions of Section 21 are, I think, for the protection of the purchaser, and not for the benefit of the vendor."

It is significant in my view that the protection afforded to a purchaser under Section 79(3) 'where a transfer is made ...', not only covers a lawful exercise of the mortgagee's power of sale but also extends to a 'purported exercise of the power of sale' and even where the power is 'improperly or irregularly exercised'.

One is tempted to ask if it was truly intended that the mortgagor's 'equity of redemption' should be irretrievably lost upon the execution of an unconditional contract of sale, why then did the legislature not extend the statutory protections in Section 79(3) to the contract? and why draw the particular distinction between 'a sale' of mortgaged land and 'a transfer' for the purposes of protecting the one and not the other? and what happens to the 'equity of redemption' if the 'contract of sale' is not carried out? Can it be said in such a case, that the mortgaged land 'has been actually sold'? and if not, then where is the line to be drawn if not at the point where the legislature says the sale becomes 'unimpeachable'?

In light of the view expressed above as to the meaning and effect of Section 72(1) of the [Property Law Act](#) (Cap. 130), I would answer the question earlier posed at p.3: 'Yes, the plaintiff retains his statutory right to redeem the mortgaged land until such time as a transfer of the mortgaged land has been registered by the defendant bank pursuant to the exercise of its power of sale.'

I hasten to add however, that no findings have been made regarding the defendant bank's actions in exercising its 'power of sale' in this instance, or the enforceability or otherwise of the 'contract of sale' entered into with the successful tenderer who remains unknown at this stage. These questions must be left to be answered if at all, in another action between the appropriate parties and after full evidence has been received.

I shall hear counsel on the appropriate final orders to be made in this case after they have had time to properly consider this judgment and its implications.

Equity of redemption allowed.

Marie Chan