REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No. 1/2014

IN THE COURT OF APPEAL

OF

JOYCELYN ANN MUNGROO
(Legal Personal Representative of Arthur Mungroo, Deceased)

AND

ERIC SUDAMA

APPELLANTS

AND

TREVOR WESTMAAS

RESPONDENT

PANEL: **Mendonça, JA**
Smith, JA
Jones, JA

APPEARANCES: **Mr Anthony Manwah for the Appellants**
Mr Robert Boodhoosingh for the Respondent

DATE OF DELIVERY: March 12th , 2018

REASONS

Delivered by A. Mendonça, J.A.

1. On February 27, 2018, we dismissed this appeal and indicated then that we will give our reasons for so doing shortly. The following are my reasons for the dismissal of the appeal.

2. This is an appeal from the judgment of the trial Judge, Boodoosingh, J., directing the Registrar General to remove from the certificate of title with respect to a parcel of land in the ward of Arima (the mortgaged lands), (a) the memorial of a memorandum of mortgage notified on the certificate of title and (b) a memorial of the caveat lodged by the second appellant indorsed on the certificate of title. The outcome to this appeal turns on whether the sale of the mortgaged lands by the mortgagee pursuant to his power of sale under the memorandum of mortgage was a *bona fide* sale. The material facts in this matter and the context in which that issue arises I will now seek to set out.

3. The mortgaged lands were by memorandum of mortgage dated March 3rd 1980, mortgaged to George Ronalds (Ronalds), the then registered proprietor of the mortgaged lands. A memorial of the memorandum of mortgage was duly notified on the certificate of title and it is this memorial that is the subject of the order of the trial Judge referred to above.

4. The memorandum of mortgage was in favour of Arthur Mungroo. He is now deceased. He died on January 30th 1992. The first appellant, Joycelyn Ann Mungroo, who is his daughter is his legal personal representative and has been sued in these proceedings in that capacity. I shall hereafter refer to Mr Mungroo as the deceased.

5. By the memorandum of mortgage the statutory power of sale contained in section 39 of the Conveyancing and Law Property Act was conferred on the deceased but without the restrictions contained in the Act as to the giving of notice or otherwise. The memorandum of mortgage also provided, *inter alia*, that for the purpose of the exercise of the power of sale, the monies secured by the mortgage shall be deemed to have been due and payable immediately upon the execution of the memorandum of mortgage.

6. Ronalds defaulted in the payment of the sum secured by the mortgage and the deceased, in the exercise of the power of sale, caused the mortgaged lands to be advertised for sale by public auction. The auction was advertised in a newspaper of general circulation on eight occasions and was originally scheduled to take place on February 07th 1986.

7. On the scheduled day of the sale, according the first appellant, Ronalds delivered a cheque to the attorneys-at-law for the deceased in partial payment of the mortgage. In view of the tender of the cheque, the sale was adjourned. The cheque was, however, dishonoured when presented for payment. The sale was brought back and was scheduled for April 08th 1986. On this occasion, it was advertised on two occasions in a newspaper of general circulation.

8. On April 08th 1986, the mortgaged property was knocked down to the second appellant, Eric Sudama, at the price of $80,500, being the highest bid. The second appellant was one of five bidders present at the sale. On the same day the second appellant paid a deposit of $8,050, being ten percent of the purchase price, to the attorneys-at-law for the deceased who issued a receipt for same. The second appellant is the son-in-law of the deceased.

9. On May 30th 1986, Ronalds commenced proceedings in HCA 3198 of 1986 (the 1986 action) against the deceased and the second appellant, seeking among other relief a declaration that the sale of the mortgaged lands on April 08th 1986 was null and void and of no effect and an order that he be at liberty to redeem the mortgage.

10. The 1986 action was based on an averment that there was an implied term in the mortgage that before the power of sale could be exercised there must be some interest that became due (and remained unpaid) for at least two months prior to the exercise of the power of sale. In the alternative, Ronalds averred that there was a waiver by the deceased of his right to sell the mortgaged lands unless some interest was in arrear for a period of at least two months which he alleged was not so in this matter.

11. Both the deceased and the second appellant, Eric Sudama, filed a defence in the 1986 action. The second appellant also counter-claimed for the delivery up of the certificate of title with respect to the mortgaged lands, which he claimed was in the possession of Ronalds, "so that the necessary memorandum of transfer vesting the property in the [second appellant] could be endorsed thereon". He also claimed possession of the mortgaged property.

12. In his defence to the counter-claim, Ronalds admitted that requests had been made for the delivery up of the certificate of title relating to the mortgaged lands but he had refused to comply.

13. On March 31st 1987, the mortgaged lands were transferred to the respondent, Trevor Westmaas, by Ronalds. The transfer was duly endorsed on the certificate of title. The parties have treated this transfer as being subject to the mortgage in favour of the deceased.

14. By letter dated September 29th 1987, attorneys-at-law for the respondent wrote to the deceased, informing him that the respondent was now the registered proprietor of the mortgaged lands and was desirous of redeeming the mortgage. The attorneys requested a redemption statement. They were the same attorneys on record for Ronalds in the 1986 action.

15. To that letter, attorneys-at-law for the deceased and the second appellant replied saying that, "As you are well aware the subject property was sold by public auction to [the second appellant] and is also the subject matter of the [1986 action]".

16. In the 1986 action the second appellant issued a third-party notice to the respondent by which he sought a declaration that the transfer to the respondent of the mortgaged lands was null and void and of no effect, alternatively a declaration that the respondent held the parcel of land in trust for him.

17. The 1986 action was not pursued and was dismissed by operation on the rules of court relating to inactive matters (see O. 3 r 6 A of the Rules of the Supreme Court 1975).

18. In HCA 2412/2004 (the 2004 action), the respondent commenced proceedings, seeking an order for the removal of the memorial of the mortgage notified on the certificate of title relating to the mortgaged lands. This action was withdrawn on April 27th 2006.

19. On or about February 22nd 2007, the second appellant lodged a caveat forbidding the registration of any person or persons as transferees or proprietors of any instrument affecting the mortgaged lands. A memorial of the caveat was duly endorsed on the certificate of title.

20. These proceedings were commenced by the respondent on June 23rd 2010 seeking the removal from the certificate of title with respect to the mortgaged lands the memorials of the mortgage and the caveat endorsed thereon. In his statement of case, the respondent averred, inter alia, that the deceased "purported" to exercise his power of sale in or around 1986 to the second appellant. He alleged that interest on the mortgage was paid until February 07th 1986 and "that was the last date on which interest and/or principal was paid". He averred that the property was again advertised for sale around December 2003 and that he discovered that it was advertised by the first appellant. He further pleaded (at para.11):

> "11. The claimant has been advised by his Attorney at Law that pursuant to Section 12 of the Real Property Ordinance Chapter 56:02 that any person entitled to or claiming any mortgage must make such claim within sixteen years next after the last payment of the principal or interest received by such mortgage".

21. It seems clear that the reference to S 12 of the Real Property Ordinance was really intended to refer to S 12 of the Real Property Limitation Act Chap. 56;03, which provides as follows:

> "It shall and may be lawful for any person entitled to or claiming under any mortgage whereby the legal estate in the land comprised in the mortgage shall be conveyed, to make an entry or bring an action or suit to recover such land at any time within sixteen years next after the last payment of the principal or interest money secured by such mortgage, although more than sixteen years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued."

22. The respondent further averred:

> "12. The time limit for the prosecution of the claim under the said mortgage has since elapsed.
>
> 13. That on or about 22nd February 2007, the [second appellant] filed a caveat in the office of the Register (sic)-General forbidding the registration of any person/persons as transferee(s) or proprietor(s) of and/or any instrument affecting the interest of the said second [appellant] in the said lands…

14. That the lifespan of the Caveat has expired on or about 21st August, 2007 and the said Caveat has not been renewed."

23. The appellants filed a joint defence. They averred, *inter alia*, that the mortgaged lands were mortgaged to the deceased by Ronalds, that he defaulted in the payment of the sums secured by the mortgage, and in the exercise of the power of sale, the mortgaged lands were sold by public auction to the second appellant.

24. In his reply, the respondent denied that the sale to the second appellant was a *bona fide* sale. He further averred that:

> "(a) the "purported sale" was to the second appellant, who is the brother-in-law of the first appellant, "so there is the perception, if not actual collusion between [the appellants]".
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> (b) the "purported sale" took place six months after the last uncontested payment of interest.
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> (c) the mortgaged lands were sold at an undervalue. He averred that the market value of the mortgaged lands was $300,000.

25. The trial seemed to proceed on the basis that the success or failure of the respondent's case depended on whether there was a *bona fide* sale of the mortgaged lands. The Judge, in his judgment, stated that the main issue to be decided was whether "the purported sale to the second [appellant] was one which could withstand the scrutiny of the Court's attention".

26. To address that issue, the Judge had before him, the evidence of the parties contained in their witness statements, which were received as their evidence in chief and on which they were cross-examined.

27. The Judge summarised the evidence in the following paragraphs of his judgment:

> "2. Mr Westmaas [the respondent] gave evidence as well as both [appellants]. Mr Westmaas in his witness statement filed 26 February 2013 set out his Report and Title. He set out as well, that in December 2003, 17 years after the last payment of principal and interest in respect of the mortgage payment set out in the report on title that the piece of land was advertised for sale under the caption "sale by mortgagee". He wrote a letter to have the mortgagee contact his attorney. By searches he discovered that the first named [appellant] was the person who had advertised the property for sale. There was a claim brought in respect of that matter. No settlement had been reached in respect of it and he submitted in his witness statement that under section 12 of the **Real Property Limitation Act, Chap. 56:03** that the time has expired for anyone to bring a claim in respect of that mortgage. He noted that a caveat was lodged on 22 February 2007 which prevents the registration of any person or persons as the transferee of the property and in respect of any instrument affecting the interest of the second defendant in the lands.
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> 3. …
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> 4. Joycelyn Ann Mungroo [the first appellant] gave evidence on behalf of the defendants. She gave evidence of the mortgage in relation to George Ronalds. She noted that in 1986, attorneys acting for her father wrote to Ronalds and notified him that the property would be put for sale by public auction for non payment of the moneys due under the mortgage. There was no response and the property was then advertised in April 1986 that a public auction was to take place on 8 April, 1986. A sale was conducted by the auctioneer on that day and she says that the property was sold to Eric Sudama for $80,500.00, which was the highest bidder. She said that Mr Sudama is her brother-in-law, married to her sister, and he had seen the advertisement in the newspaper and decided to bid on the property. He subsequently paid off for the property and the Memorandum of Transfer was prepared but could not be registered since Ronalds still had the Certificate of Title. She said in 1986 Ronalds had filed a claim to set aside the sale and in June 1987 Ronalds transferred the property to the claimant. This Memorandum of Transfer was prepared by Mr Hospedales, attorney at law. In 1987, Mr Hospedales wrote to her father advising that the claimant had purchased the property and wished to redeem the mortgage. It was brought up that the property had previously been sold to Mr Sudama. Eventually the claimant brought a claim and that claim was withdrawn. Subsequently this claim was filed.
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> 5. There was then evidence of Eric Sudama [the second appellant], who gave evidence that he saw the property being advertised for sale by public auction. It was being sold by Arthur Mungroo as the mortgagee. He

attended the sale in early April 1986. He bid the highest and he paid the attorneys $8,050.00 and was given a receipt as a deposit and he was subsequently advised. He said as well that he paid off the balance to Mr Mungroo and he instructed Kelshall & Co. to transfer the property to him. He was later advised that the transfer was signed by Mr Mungroo but it could not be registered because he did not have the Certificate of Title.

6. What is clear is that Mr Ronalds possessed the Certificate of Title and the property, according to the [respondent], was sold to him and transferred."

28. The Judge then focused on the evidence of the second appellant and stated:

"7. As has been set out in the submissions of the attorneys the key or critical issue relates to the court's view of Mr Sudama's purported purchase of the property. I assessed Mr Sudama's evidence and particularly his evidence in cross-examination. Mr Sudama said that he saw the sale in the newspapers. Arthur Mungroo was his father-in-law. He said he recalled that Mr Mungroo was present and that he had the money on him. He said that in 1983 he had been injured in an accident with a brain injury which affected his memory. He had fallen off a horse while he was training. He had been a jockey. In 1986 he lived in Arima. He indicated that he went to the office and he paid the balance afterwards in cash. He did not have a receipt and no receipt had been put in these proceedings in respect of that. In response to the court, he noted that he did not work as a jockey after the accident. He has not worked since. He had worked at URP. He was married to Ms Mungroo's sister. He has a daughter and he is still married."

29. His assessment of the evidence is contained at paragraph 8 of his judgment which is as follows:

"8. My assessment of this witness is that up to this time he was unable to give details of the payment of the money (80,000.00) which he says was given. In all the circumstances, I found this witness' evidence to be suspicious in respect of whether he had actually purchased this property, whether he was capable of doing so based on his resources at the time, and whether this was not a convenient suggestion on behalf of the first defendant in order to avoid the consequences of this claim. It seemed odd to me that the defendants' witnesses gave the impression that Mr Sudama had seen the advertisement in the newspapers and he was acting as an arm's length purchaser. This I found somewhat incredible.

30. The Judge then referred to the evidence of the first appellant in the following terms:

> "10. In assessing as well Ms. Mungroo's evidence, I found that there were certain matters which she could not give clear evidence about. She said she was not present when the sale took place by public auction. She said that she was not involved in the transaction. She gave evidence that her father was the person who was in business for a long time. I found based on the cross-examination of Ms Mungroo that much of what she knew about this transaction would have been hearsay in any event and much of what she set out in her witness statement would have been hearsay. She also said that she had not found any document in relation to the payment of the balance of the purchase price."

31. The Judge also referred to the evidence of the respondent which he found reliable as it was essentially factual matters which could not be disputed in terms of his purchase of the mortgaged lands. The Judge then concluded:

> "12. In those circumstances, what the court was left with was the evidence of Mr Westmaas and the circumstances which showed that the period of sixteen (16) years had passed and therefore the time for bringing any claim in respect of the mortgage of the property between Mr Mungroo and Mr Ronalds had passed. In those circumstances, I have found that the claimant being the person to whom the Certificate of Title now rests with, that he would be entitled to the order in terms of paragraph 15(a) of his Statement of Case and secondly, that he would be entitled to an order that the caveat lodged on 22 February 2007 and registered in Volume 4869 Folio 447 of the Real Property Register should be removed. In any event, that caveat should be removed."

In the circumstances, the Judge granted the orders sought by the respondent and directed the removal of the memorials with respect to the mortgage and the caveat endorsed on the certificate of title relating to the mortgaged lands.

32. Before this Court, the parties proceeded on the basis that if the sale of the mortgaged lands was not a proper transaction, the trial Judge was correct to direct the removal of the memorials of the mortgage and the caveat. The thinking of the parties seemed to be that since the appellants

answer to the respondent's claim that the mortgage was unenforceable pursuant to S 12 of the **Real Property Limitation Act** because the last payment of principal and interest was made more than 16 years ago, was that the mortgaged property was sold in 1986, if that sale was not a proper one and cannot be supported, then the respondent's claim must succeed. I am prepared to proceed on that basis. This appeal therefore turns on whether the Judge's conclusion that the sale was not a proper transaction was one that was open to him.

33. I do not believe that there is any issue between the parties that what the Judge meant by his conclusion that he did not accept that the sale was a proper transaction is that he did not believe that the sale was a *bona fide* one. As the appellants in their written submissions argued "the [respondent] offered no evidence whatsoever on which the Court could have come to the conclusion that this was not a *bona fide* sale". The question, therefore, in this appeal is whether it was open to the Judge on the evidence before him to conclude that this was not a *bona fide* sale.

34. There is no doubt on the authorities that the mortgagee has an obligation to the mortgagor not to act in bad faith. Or to put the duty positively, the mortgagee is under a duty to act in good faith. He is also under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the time he chooses to sell it or as it has also been put to obtain the best price reasonably obtainable at that time (see ***Cuckmere Brick Co. Ltd & anor v Mutual Finance Ltd [1971] Ch 949*** and ***Michael v Miller [2004] EWCA Civ 282***).

35. I mention the mortgagee's duty to take reasonable care to obtain the true market value of the mortgaged property at the time he chooses to sell it, since as I have mentioned earlier, it was pleaded by the respondent that the mortgaged property was sold at an undervalue. There is,

however, no evidence of the value of the mortgaged lands at the time of the sale. Whether the mortgagor failed to take reasonable care to obtain the market price of the mortgaged property was not pursued in the Court below or before this Court and is not a live issue in this case.

36. The respondent also pleaded in his reply that the sale of the mortgaged property took place six months after the last uncontested payment of interest. This seems to be a complaint that the power of sale had not arisen at the time that the mortgaged lands were sold. If the mortgaged lands were sold by the deceased at a time when the power of sale had not arisen that would be an act of bad faith and, therefore, the sale would not be proper and be liable to be set aside.

37. The evidence in this regard is that the interest on the mortgage was paid until February 07th 1986. According to the evidence of the first appellant, a cheque was tendered by Ronalds on February 07th 1986 but was dishonoured. The Judge, made no finding in relation to that evidence. But taken on its face, even if a payment was made as alleged by the respondent, there is no averment or evidence that the mortgage payments were up-to-date. In those circumstances and having regard to the power of sale contained in the memorandum of mortgage, it is not arguable that the power of sale did not arise.

38. In coming to his conclusion that the sale was not *bona fide*, the Judge specifically identified the following:

    (a) He had concerns of the financial ability of the second appellant to purchase the mortgaged lands;

    (b) That despite the evidence of both appellants that the balance of the purchase price of the mortgaged lands had been paid, neither could produce a receipt evidencing that the payment had in fact been made. Indeed the first appellant admitted that she had not found any document in relation to the payment of the balance of the purchase price and the second appellant could not give any details

of the payment. I think it is fair to say that the Judge did not accept the appellants' evidence that the balance of the purchase price had been paid.

(c) He disbelieved the second appellant's evidence, that he had seen the advertisement of the sale of the mortgaged lands in the newspapers and that he was acting as an arm's length purchaser;

(d) The second appellant was related by marriage to the deceased.

39. The Judge made no express findings that there was collusion between the deceased and the second appellant or corruption on the part of the deceased. He, however, found the case to be one of grave suspicion. As he indicated, referring to the evidence of the second appellant, "I find this witness' evidence to be suspicious in respect of whether he had actually purchased this property, whether he was capable of doing so based on his resources at the time, and whether this was not a convenient suggestion on behalf of the first [appellant] in order to avoid the consequences of this claim".

40. The Judge could have referred specifically to other evidence that would have heightened his suspicion. This evidence was to the effect that the appellants had done very little over the years to try to complete the sale. The 1986 action became inactive and was not pursued and was dismissed by the operation of the rules of court. No other step was taken to obtain the duplicate certificate of title, which according to the appellants, was all that was required to complete the sale. No attempt was made by the second appellant to obtain possession of the mortgaged lands, which, according to him, he had bought and paid for. There was also the admitted fact that the mortgaged lands were again advertised for sale by the first appellant in 2003. If this property was sold in 1986, the fact that it was again advertised for sale requires an explanation, but none was forthcoming.

41. Mr Manwah for the appellants argued that the Judge appeared to have shifted the burden onto the appellants to prove that the sale was *bona fide*. I believe there is merit in this.

42. The Judge, as I have mentioned, made no finding of collusion or corruption. Indeed, he made no specific finding of any impropriety on the part of the mortgagee or the second appellant. He, however, had concerns about the transactions and raised suspicions about the sale. It seems to me that the Judge was of the view that the suspicions had to be dispelled by the appellants. I believe this is apparent from his remark that he did not "accept the contention of the [appellants] that there was in fact a proper transaction in respect of the sale" of the mortgaged lands. In those circumstances, as Mr Manwah submitted, it seems to me that the Judge placed the burden on the appellants to show that they acted in good faith and not on the respondent to prove as he alleged that the sale was not a bona fide transaction.

43. There are, however, instances where a claim is made against the mortgagee and or the purchaser that sale is not a bona fide sale that the burden of proof is reversed and the burden falls not on the claimant but on the mortgagee and/or the purchaser to show that they acted in good faith and that the sale was *bona fide*. So the question, therefore, is was this such a case and if so, has that burden been met?

44. ***Farrar v Farrars Ltd (1888) 40 Ch. D. 395*** was such a case where the burden fell upon the mortgagee. In that case, the mortgaged property was sold to a company which was promoted by one of the mortgagees and in which he had a substantial interest as a shareholder and for which he became the solicitor. In an action by the mortgagors against the purchasing company to set aside the sale on the ground that it was a sale at an undervalue and was collusive and

fraudulent, it was held that the burden was on the purchaser to uphold the transaction. Lindley L. J., who gave the judgment of the Court, stated (at pp 409-410):

> "The other ground relied upon was of a much more serious character. It was alleged by the Plaintiffs in their statement of claim that the sale was fraudulent and collusive and at an undervalue. Mr Justice Chitty decided that this allegation was not proved, and he gave judgment for the Defendants. The Plaintiffs, on appeal did not question the view of the judge, that there was no fraudulent sale at an undervalue, but they contended that fraud or no fraud, undervalue or no undervalue, the sale could not stand, inasmuch as it was in substance a sale by mortgagee to himself and others under the guise of a sale to a limited company.
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> If this proposition were true, the sale could not stand as against the mortgagor. It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself:…;nor to anyone employed by him to conduct the sale:…A sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of the trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction.
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> A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by an ordinary power of sale, and in our opinion, such a sale is warranted by such a power, and does not fall within the rule to which we have at present referred. But although this is true, it is obvious that a sale by a person to an incorporated company of which he is a member may be invalid upon various grounds, although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an undervalue or it may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction, and the company may be unable to prove it. Fraud in the present case is not alleged; it was alleged in the Court below, and was then clearly disproved. But, for reasons which will appear presently, the circumstances attending the sale were such as, in our opinion, throw upon the company the burden of sustaining the transaction. The circumstances alluded to are shortly as follows:-
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> Mr John Riley Farrar was a solicitor, he was one of three mortgagees with a power of sale, he acted for his mortgagees. He sold to a company, more or less promoted by himself, in which he had a substantial interest as a shareholder, and whose

> solicitor he was. Such a transaction has a suspicious appearance, and at the time of the sale there was apparently such a conflict of interest and duty on the part of Mr Farrar, and such notice to the company of that conflict, as to throw upon the company the burden of upholding the sale. But the sale cannot be set aside on the simple ground that Mr Farrar was a trustee for sale, and was a promoter of and shareholder in the company which was purchased from him. It is necessary to see what his duties to his mortgagors were, and what he really did.
>
> A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed:…"

The Court was of the view that given the apparent conflict of interest and duty on the part of one of the mortgagees, the burden was thrown upon the purchaser, to prove the validity of the transaction.

45. The ***Farrar*** case was followed in ***Hodson v Deans [1903] 2 Ch 647***. The facts are sufficiently set out in the head note of the case and are as follows:

> "In 1899 the plaintiff mortgaged certain property to the trustees of a friendly society to secure an advance. In 1902 they, in exercise their power of sale, which had arisen, put up the property for sale by auction, such sale being directed and entirely managed by a committee of the society, whose duty it was to realise mortgage securities. Previous to the sale D., a member of the committee, had on his own account inspected the property. He knew the reserve, if he had not himself fixed it, and he took part in instructing the auctioneer, who was nominated by him. He attended the auction and bought the property for himself – the plaintiff, who had only accidently heard of the sale three days before it took place, being present and bidding against him. The sale was at a small undervalue."

In an action against the trustees of the society and D., to set aside the sale, it was held that the sale was invalid, and that the plaintiff was still entitled to redeem the mortgage.

46. The Judge was of the view that it fell upon the mortgagee and the purchaser to uphold the sale.

He stated:

> "Now what is the law in a case of this sort? It is true that the mortgagee is not a trustee for sale in the ordinary sense. He has rights of his own, but he is under certain obligations to the mortgagor, especially where the security is ample. The mortgagee in this case is not an ordinary individual, but a society, an artificial person acting through the agency of the committee. A mortgagee may, under certain circumstances, sell to his own solicitor; but the solicitor or agent managing the sale cannot as against the mortgagor sell to himself. In *Farrar v Farrars Ltd*, supra, Lindley L. J. said: "It is perfectly well settled that the mortgagee with the power of sale cannot sell to himself either alone or with others, nor to a trustee for himself…nor to anyone employed by him to conduct the sale…A sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power…
>
> Upon the evidence in this case I find as a fact that the property was sold at an undervalue, not of itself so great so as to invalidate the sale, but still at an undervalue. The investment committee could not have sold privately to themselves either as representing the society or as individuals at a price fixed by themselves, nor could they, I think, have so sold to one or more of their number. It is said that any such objection is cured by the fact that the sale was by auction. I do not think so. At all events, the principle laid down in *Farrar v Farrars Ltd* applies to this case, and the onus is on the defendants to show that everything was done fairly and bona fide. Fraudulent conspiracy amongst all the defendants has not been proved, but the result of the evidence has been to make me distrust all the persons who were mixed up in the sale. I think that the plaintiff has not been fairly and honestly dealt with. How can it be said that there was no collusion between the committee and the purchaser when he was an active member of their body – the only member who attended the sale? Further, where his interest was in conflict with that of the plaintiff, I have not the slightest doubt that he preferred his own. Upon the admitted facts the case was one of grave suspicion, and that suspicion has not been lessened by what has transpired in the course of the trial …"

47. In ***Mortgage Express v Mardner [2004] EWCA Civ 1859***, the burden was cast on the mortgagee to show that the sale was in good faith and that he took reasonable steps to obtain

the best price reasonably obtainable at the time of the sale in circumstances where the sale was to a company with whom the mortgagee was associated.

48. In ***Corbett v Halifax plc & ors [2002] All ER (D) 283***, the rule in ***Farrar v Farrars Ltd.***, was applied in circumstances where the sale was to an employee of the mortgagee. The burden was put upon the mortgagee and the purchaser of showing that the sale was *bona fide*. It was held that they had discharged the onus of showing that there was no impropriety.

49. The Court explained the rule in ***Farrar v Farrars Ltd.***, in these terms:

> "Farrar was a case in which the sale was to a company in which the mortgagee had an interest. The rule is based upon the duty of all persons concerned with the sale to avoid a conflict of interest that will arise if they seek to purchase from the mortgagee. They must not place themselves in a position where duties and interest conflict but if there is in fact no such conflict the sale will not be set aside."

50. It is I think clear from those cases that in a claim against the mortgagee and or purchaser of the mortgaged property where the circumstances are such as to suggest that the mortgagee and purchaser placed themselves in a position where their duties and interest conflict, that the burden will shift to the mortgagee and/or the purchaser to prove the validity of the sale.

51. It is well established that the mortgagee may not sell to himself alone or with others. He must act *bona fide* and there must be no collusion between mortgagee and the purchaser. In my judgment, the circumstances of this case justify a reversal of the burden and require the appellants to establish that the sale was a *bona fide* one. The circumstances of this case suggest collusion between the mortgagee and the purchaser with a view to obtaining the property for the mortgagee. The second appellant was not truthful when he described the circumstances

in which he learnt of the sale. He attended a sale to bid for a property he apparently could not afford and one that he appeared to have little interest in. He has made little attempt to pursue the completion of the transaction and indeed little attempt to obtain possession of the property, which according to him he has fully paid for. The appellants allowed the 1986 action to become inactive and be dismissed by operation of the rules of court and they have taken no action on their own to see to the completion of the transaction. Further, both parties misrepresented the fact that the purchase price was paid by the purchaser. They went so far as to claim the memorandum of transfer to the second appellant was prepared but did not produce it. Then there is the fact that the mortgaged property was again advertised for sale in 2003. If the property was sold in 1986, why was it re-advertised? These circumstances required an explanation by the appellants; one that would show that the sale was bona fide. They have however failed to do so, and in the absence of such an explanation, it was open to the Court to find, as the trial Judge did, that the sale was not a *bona fide* one.

52. In the circumstances, the appeal is dismissed.

53. With respect to costs, we are minded to order that the appellants pay the respondent's costs of the appeal determined at two-thirds of the costs below; that is to say two-thirds of $14,000. However, if the parties are of the view that some other order made with respect to costs should be made, they must file written submissions within fourteen days of the date of these reasons.

A. Mendonça
Justice of Appeal

Delivered by G. Smith, J.A.

54. At the end of the trial, Boodoosingh J, came to his decision based on the totality of the evidence before him. He chose to disbelieve the case as presented by the Appellants' witnesses and believe the case as presented by the Respondent's witnesses.

55. In doing this, he was not plainly wrong for the reasons stated by both Mendonça J.A. and Jones J.A.

56. I agree with their decisions and have nothing to add. I too, would dismiss this appeal.

G. Smith
Justice of Appeal

Delivered by J. Jones, J.A.

57. I have arrived at the same conclusion as the President of the Court Mendonca J.A. but for slightly different reasons. Because my route to my decision is somewhat different to that taken by my brother Mendonca I have repeated the facts but with my own emphasis.

58. The Respondent is the registered proprietor of a parcel of land described in Volume 1383 of the Real Property Register ("the land"). This is an appeal from the decision of the trial judge whereby he directed the Registrar General to (a) remove from the Respondent's certificate of title a memorandum of mortgage dated the 7th March 1980 on the ground that it had been

abandoned and/or extinguished and /or discharged; and (b) to remove a caveat lodged on the 22nd February 2007 by the second appellant as purchaser of the land.

59. The basic facts are not in dispute. The land was on 7th March 1980 mortgaged by the Respondent's predecessor in title to Arthur Mungroo deceased ("the deceased"). The first appellant ("Mungroo") is the daughter and the legal personal representative of the deceased. The mortgage fell into arrears and pursuant to the power of sale granted to him by the mortgage the land was put up for sale by public auction by the deceased in 1986. On 8th April 1986 at the public auction the second appellant ("Sudama"), the son in law of the deceased, paid the sum of $8,050.00 on account of the purchase price of $80,500 of the land and was issued a receipt for the payment from the deceased's attorneys at law.

60. On 31st March 1987 the respondent purchased the land from his predecessor in title subject to the mortgage. In December 2003 the property was advertised for sale by Mungroo, as mortgagee, in a daily newspaper. In February 2007 Sudama filed a caveat forbidding the registration of any person as transferee or proprietor of the land. At some time prior to the public auction the duplicate original copy of the certificate of title was given to the respondent's predecessor in title by the deceased and, pursuant to an earlier order, was lodged with the court by the respondent.

61. In addition there were two High Court actions, in 1986 and 2004, instituted by first the respondent's predecessor in title seeking to set aside the sale to Sudama and then by the

respondent seeking the same orders sought in these proceedings. Both actions were dismissed by the effluxion of time. Nothing turns on either of these two actions.

62. The judge found that the sole issue for determination by him was whether the payment of the sum of $8,050.00 by Sudama was pursuant to a bona fide sale of the land or was a sham. As put by the judge: "was this sale one that could withstand the scrutiny of the court's attention". If the sale was a bona fide sale then the equity of redemption contained in the mortgage would have been blocked: **Waring (Lord) v London and Manchester Assurance Company Limited [1935] Ch.310** and the respondent not entitled to the relief sought.

63. According to Crossman J in the **Waring** case:

> " The law, as stated by Kay J in Warner v Jacob[1] is very clear. The learned judge there says "……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 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."

64. The judge rejected the evidence of the appellants; determined that the transaction was not a proper transaction and found that the respondent was entitled to the orders sought. The notice of appeal challenges the judge's findings of fact on the grounds that it cannot be supported by the evidence and that it is against the weight of the evidence.

[1] 20 ChD 220 at 224

65. This then is an appeal from findings of fact made by the trial judge. In this regard the law is clear as to the proper approach when deciding whether to interfere with the trial judge's conclusion on a disputed issue of fact:

> "(1) where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen or heard the witnesses, could not be sufficient to explain or justify the judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the judge are not satisfactory, or because it unmistakably appears so from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.": per Lord Thankerton in **Thomas v Thomas [1947] AC 484** at pages 487-488.

66. It is only in a rare case therefore that an appellate court will interfere with a trial judge's findings of primary fact. Such a case will include: (a) one in which there is no evidence to support the findings; (b) a decision which is based on a misunderstanding of the evidence; and (c) a decision which no reasonable judge could have reached: **Attorney General v Garcia Civil Appeal 86 of 2011 per Bereaux JA at paragraphs 15-17** following the decision of the Privy Council in **Beacon Insurance Company v Maharaj Bookstore [2014] UKPC 21.**

67. A proper assessment of the trial judge's finding of fact has been made more difficult by other factors. The record of appeal has been improperly prepared. Some exhibits are either missing or ineligible. In addition the evidence presented in the case, both in chief and by way of cross-examination, was scant and lacking in detail. In fairness to the attorneys however rather than a verbatim transcript of the evidence in the case taken from the FTR the notes of evidence presented to the court are typewritten copies of the judge's actual notes as extracted from the

judge's notebook. Understandably these notes are not full notes. In circumstances where the appeal is on the findings of fact made by the judge a full and accurate note of the cross-examination is advisable and the FTR facilities made available to judges employed.

68. In the absence of full notes, as in this case, an appellate court is at a disadvantage when called upon to determine an appeal on the judge's assessment of the evidence on a disputed issue of fact. The parties however made no issue with respect to any ambiguities or inaccuracies in the notes of evidence and accordingly we were left to interpret the evidence as best as we could.

69. Evidence was adduced from the respondent and the two appellants. The respondent gave no evidence of the sale except that a report on title commissioned by him revealed that there was a sale of the land to Sudama, a relative of the deceased by marriage, in April 1986. Clearly the respondent, not having been present at the sale and learning of it from a report on title, could give no evidence of the circumstances of the sale.

70. The judge accepted the evidence of the respondent. He found that he had no reason to doubt his evidence which, according to the judge, was essentially on factual matters that could not be disputed in terms of the respondent's purchase of the property.

71. Understandably, given the circumstances, the evidence on the sale came from the appellants. The evidence of Mungroo was that she was intimately familiar with all of the deceased's transactions as he always discussed them and kept her abreast of the status of all the transactions. She said that in 1985 her father handed over the certificate of title to the

mortgagor and it was never returned. With respect to the sale she stated that the property was put up for sale by public auction on two dates: 7th February 1986 and 8th April 1986. With respect to both dates there were advertisements in the newspapers. She said that on 8th April the land was sold by public auction by the auctioneer, Leo Cowie, to Sudama for $80,500.00. On that date Sudama paid the sum of $8,050.00 to the deceased's lawyers and was given a receipt. A copy of that receipt was tendered into evidence through her.

72. According to Mungroo Sudama subsequently paid off for the land and a memorandum of title was prepared but could not be registered because the respondent's predecessor in title still had the certificate of title. Under cross-examination Mungroo denies that the sale to Sudama was a sham and states that the memorandum of transfer was done in 1986 and the cheque paid in the same year. This, presumably, is the cheque for the balance of the purchase price. She admits however that she was not present when the property was sold to Sudama and that she "did not find anything for the balance". The judge took this evidence to mean that she found no document confirming the payment of the balance of the purchase price.

73. In assessing Mungroo's evidence the judge found that there were certain matters on which she could not give clear evidence. Based on her cross-examination he concluded that much of what she knew about the transaction was hearsay. He particularly noted, however, Mungroo's statement that she had not found any document in relation to the balance of the purchase price.

74. The evidence in chief of Sudama was simply that he saw the property advertised for sale by public auction in January and February 1986 and again in April 1986. He says that it was

being sold by the deceased. He says he attended the sale and bid on the land. There were about 3 other bidders. He bid the highest and the land was sold to him by the auctioneer Leo Cowie. He said he was told that the payment had to be made to the deceased's attorneys and on the same day he paid the deposit of $8,050.00 to them. He received a receipt and annexed a copy. According to him he subsequently paid off the balance to the deceased and instructed the attorneys to act on his behalf to transfer the property into his name. He says that he was later advised by the Attorneys that the transfer was signed by the deceased but that it could not be registered because they did not have the certificate of title.

75. Under cross examination he admits that the deceased was his father-in-law but denies that he spoke to him about the sale. He accepts however that the deceased was in the office at the time. He said that nobody told him to pay the money to Kelshall. He had the money on him. According to him he paid the balance afterwards in cash but did not have the receipt on him. Later in the cross-examination he says that he had the receipt at home. It was put to him on two occasions that the sale never took place and he denies it on both occasions.

76. Under cross-examination it transpired that prior to 1983 Sudama was employed as a jockey and worked for $60.00 a ride and $200.00 for a win and tips. In 1983 he suffered a brain injury when he fell off a horse. This affected his memory and body for about 5 years and he never worked as a jockey after that. He says he used to work with the unemployment relief program.

77. The judge was not impressed with Sudama's evidence. He found his evidence to be suspicious in respect of whether he actually purchased the property, whether he was capable of doing so

at the time based on his resources and whether this was a convenient suggestion on behalf of Mungroo in order to avoid the consequences of the claim. According to the judge he found it incredible that the appellant's witnesses gave the impression that Sudama had seen the advertisement in the newspapers and that he was acting in an arm's length transaction. According to the judge, in all of the circumstances and on a balance of probabilities, he did not accept the contention of the appellants that there was in fact a proper transaction in respect of the sale of the property to Sudama.

78. The appellants submit that the judge was plainly wrong in concluding that the sale was not a proper transaction because:

    (i) the respondent admitted the sale in his pleadings therefore this was not an issue for the court's determination;

    (ii) the case put to the appellants in cross-examination was different than that pleaded by them; and

    (iii) the judge wrongly shifted the burden of proof onto the appellants. The burden of proof, they submit, was on the respondent to establish the lack of bona fides of the sale and the only evidence led by the respondent was that it was a sale to the deceased's brother in law.

The admissions in the pleadings

79. With respect to the sale there is no admission by the respondent in his statement of case that the sale took place he merely states that a purported sale was revealed in a report on title. By their defence the appellants aver that on 8th April 1986 the second appellant bought the land which was sold by public auction by auctioneer Leo Cowie. In his reply the respondent denies that the public auction for the sale of the land on 8th April was a bona fide sale.

80. The position of the respondent therefore has always been that the sale was not bona fides. While he does not deny that there was a public auction of the land by Cowie he alleges that whatever took place was not a genuine sale of the land to Sudama.

81. What was in dispute therefore was the effect of the transaction that took place on 8th April. This is the very issue that the judge identified as being whether the purported sale to Sudama was one which could withstand the scrutiny of the court's attention. In the circumstances while there was no denial that something in the form of a sale took place there is no merit in the submission that there was an admission of sale that what took place was in fact a bona fide sale. The bona fides of the transaction was always in issue.

The case put to the appellants was different than that pleaded

82. By his pleading the respondent challenged the bona fides of the sale on the basis of the relationship between Sudama and the deceased; that it took place 6 months after the last payment of interest due on the mortgage and that it was for an under value. No evidence was led by the respondent on the value of the lands neither did he treat, in his evidence or in his submissions, with the time of the sale in relation to the last payment of interest. Insofar as this was not the case presented at trial or put to the appellants in cross-examination they are correct.

83. The case presented by the respondent at trial was simply that the sale was not a bone fide one. According to the respondent in chief the sale was to the brother in law of the deceased. In cross-examination in response to a question from the appellants he states that he did not accept

that the deceased sold the land to Sudama. According to him however he only knew of the auction after the fact.

84. In the absence of a verbatim transcript of the evidence it is difficult to determine exactly what questions were put to the appellants. This is particularly important in this case where the respondent had no knowledge of what occurred at the public auction. In the absence of instructions as to what occurred at the auction therefore there were no specific facts that could have been put to the appellants by the respondent. In the circumstances of this case therefore the respondent had to rely on facts disclosed by the appellants.

85. The judge's notes reveal that, with respect to the sale, what was put to the appellants was, in the case of Mungroo, that the sale to Sudama was all a sham and to Sudama that the sale never happened or took place. This corresponds with the case as pleaded that what took place was not a bona fide sale. In the circumstances it would seem that the case as put to the appellants did accord with the broad case as pleaded and the limited evidence given by the respondent.

The burden of proof

86. "The legal burden (or the burden of persuasion) is a burden of proof which remains constant throughout the trial; it is the burden of establishing the facts and contentions which support a party's case, or persuading the tribunal of the correctness of a party's allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this burden is usually clear from the statements of case, it usually incumbent upon the claimant to prove what he contends.

The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue: the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side. It has been said that the evidential burden shifts from one party to another as the trial progresses according to the balance of evidence given at any particular stage, but it may be more accurate to say that it is the need to respond to the other party's case that changes."

Halsbury's Laws of England, Fifth Edition, volume 12 page 11 paragraph 702. See also **Brown v Rolls Royce Ltd. [1960] 1 All ER 577** and the observations of Lord Denning at page 581.

87. The judge concluded that "in all of the circumstances and on a balance of probabilities I do not accept the contention of the [appellants] that there was in fact a proper transaction to [Sudama]." Stated in that manner the judge certainly gives the impression that he was placing the burden of proof on the appellants to establish that the sale was a bona fide sale. In the instant case however the burden of proof was on the respondent to establish that the sale to Sudama was not a bona fide one. To succeed the respondent had to establish, on a balance of probabilities, that there was some element of corruption or collusion between the deceased and Sudama.

88. It cannot be disputed that if the only facts under consideration came from the respondent's evidence alone this burden would not have been discharged. This, however, was not the case. The judge was entitled to take the whole of the evidence, including evidence disclosed by the

appellants, into consideration in determining whether the respondent had discharged the legal burden of proof, or burden of persuasion, on him.

89. With respect to the sale, on the pleadings before the judge, the following facts were undisputed:

    (i) Sudama was the deceased's son in law;

    (ii) there had been a public auction of the land in April 1986 at which the appellants claimed that Sudama purchased the land;

    (iii) the sale was never completed because the respondent's predecessor in title refused to return the certificate of title;

    (iv) no steps were ever taken by Sudama to recover the certificate of title from either the respondent's predecessor in title or the respondent;

    (v) in March 1987 the respondent purchased the land and his memorandum of transfer was registered on 23rd June 1987; and

    (vi) in December 2003 Mungroo, as mortgagee, advertised the land for sale.

90. The facts identified at (i) to (vi) raised at least a rebuttable presumption that the transaction was not a proper one. At trial the case presented by the appellants was not that the sale had not been completed but rather that Sudama was the owner of the land by virtue of the sale. These facts were sufficient to require a response or explanation from the appellants. These were facts identified in the pleadings or disclosed by appellants and which, if there were explanations, the appellants had a duty to place before the Court. At this stage given the undisputed evidence the appellants needed to respond to this case.

91. The most telling of these facts was the attempt by Mungroo to put the land up for sale in 2003. The appellants' evidence was that the memorandum of transfer had been signed by the deceased but never registered because the certificate of title was in the possession of the

respondent's predecessor in title. If, as was contended by the appellants, there was a bona fide sale to Sudama by the deceased in 2003 Mungroo could not have been the mortgagee of the land at the time nor could she have sold the land.

92. The appellants provided no explanation for the advertisement for sale by Mungroo as mortgagee. Further insofar as they did provide some evidence as to the sale the judge rejected that evidence. In particular the judge rejected the evidence of Sudama. He doubted that, given his income or lack of it, Sudama could have been in a position to pay the sum of $80,500.00 for the purchase of the land. Further he could produce no receipt for the payment of the balance of the purchase price. Neither could he produce the memorandum of transfer. The judge was particularly troubled over the impression given by the appellants that Sudama had seen the advertisement in the papers and that this was an arm's length transaction. The judge clearly did not accept this position. The appellants have not in their submissions before us sought to challenge these findings. Their challenge is merely to the burden of proof.

93. It is in these circumstances that the judge's statement that in all of the circumstances and on a balance of probabilities he did not accept the contention of the appellants that there was in fact a proper transaction to Sudama makes sense. There were facts that required a response or an explanation by the appellants and they had failed to provide any.

94. Of some concern however, although not specifically raised in that context by the appellants, is the lack of cross-examination on these facts. In the case of **Chen (Appellant) v Ng (Respondent) (British Virgin Islands) Privy Council Appeal No. 0072 of 2016,** the Privy

Council had occasion to deal with a submission grounded on the rejection of the evidence of a party by the trial judge based on matters on which the party had not had the opportunity of giving an explanation by reason of there being no suggestion in the course of the case that his story was not accepted.

95. In the context of the option of a rehearing of the matter in these circumstances in their joint judgment Lord Neuberger and Lord Mance at paragraphs 54 and 55 of the judgment stated:

> " ….It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.
>
> At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimizing cost in litigation, on the one hand and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material being put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements and other relevant places and in some cases, the plausibility of the notion that witness might have satisfactorily answered the grounds."

96. In the context of our case it is obvious that the issue was relevant indeed it went to the crux of the case of the respondent. It is also clear that the judge disbelieved Sudama on the basis of the answers given by under cross-examination. While there seems to have been no cross-examination on the facts identified at (iv) and (vi) of paragraph 32 these were facts that were raised on the pleadings, in some instances by the appellants themselves, and, in most of the

instances, related to acts admitted to have been done by the appellants and done in the absence of the respondent. These therefore were facts that were not known by the respondent.

97. The rule as to the requirement of putting one's case to the opposing witness is explained by **Phipson, 12 Ed, paragraph 1593** as follows:

> "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share ... If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account and he will not be allowed to attack it in his closing speech, nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point ... Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit ... Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character."

98. In these circumstances therefore, despite the brevity of the cross-examination, it is difficult to conclude that the respondent in cross-examination ought to have given the appellants an opportunity to proffer an explanation for their actions. These were facts either adduced by the appellants themselves or known to and admitted by them. The failure to put these facts to the appellants in cross-examination did not therefore affect the fairness of the trial.

99. It cannot be said therefore that, presented with the facts identified at paragraph 32 above and determining that: (i) the evidence of Mungroo did not assist with respect to the core issue for his determination and (ii) the evidence of Sudama was not to be believed, the judge was plainly wrong in concluding that the purported sale was not one that could withstand the scrutiny of

the court's attention and that in all the circumstances on a balance of probabilities there was not a proper transaction in respect to the sale of the property to Sudama.

100. There was ample evidence before him to support such a finding. The sale was to Sudama who was the deceased's son in law. Despite the family relationship, and the deceased's presence at the sale, Sudama maintained that he never spoke to the deceased about the sale. He purchased the land at a public auction without sight of the certificate of title. Sudama was at that time a retired jockey who had not been employed as such since 1983 and whose only means of income was the unemployment relief programme. Although he was able to produce a receipt for the deposit he could produce no receipt for the payment of the balance of the purchase price. He claimed that the receipt was at home but the list of documents produced on his behalf does not disclose such a receipt. No steps were pursued by him to recover the certificate of title from the respondent or his predecessor in title. And finally after a sale that the appellants say extinguished the mortgage the land was advertised for sale by Mungroo as mortgagee.

101. The fact that the judge did not in his written reasons specifically identify all the evidence does not detract from the validity of his conclusions. In this regard Lord Hoffman in **Piglowska v Piglowski [1999] 1 WLR 1372** had this to say:

> "First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Plc.* [1997] R.P.C. 1, 45:
>
> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because

> specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
>
> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account."

102. In this case the judge prefaced his final determination by the words "in all the circumstances" the assumption being that he took all the relevant facts and circumstances into account. The evidence referred to above was sufficient for the judge to conclude that the sale was not a bona fide one and that, on a balance of probabilities, there was collusion between the deceased and Sudama. It cannot therefore be said that the judge was plainly wrong in his determination. In the circumstances therefore, for slightly different reasons, I agree that the appeal ought to be dismissed and the decision of the trial judge affirmed.

J. Jones
Justice of Appeal