# JAMAICA

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NUMBER 113/2002**

**BEFORE:** **THE HON. MR. JUSTICE FORTE, P.**
**THE HON. MR. JUSTICE SMITH, J.A.**
**THE HON. MR. JUSTICE COOKE, J.A.**

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| **BETWEEN** | **DIANE JOBSON** | **APPELLANT** |
| **AND** | **CAPITAL AND CREDIT MERCHANT BANK LIMITED** | **1ST RESPONDENT** |
| **AND** | **RONALD TAYLOR** | **2ND RESPONDENT** |
| **AND** | **RONALD TAYLOR (Appointed by Order of the Court to represent CARMEN TAYLOR)** | **3RD RESPONDENT** |

**Ms. Carol Davis** for the Appellant

**Mr. Earl Witter** and **Mr. Errol Gentles** instructed by Gentles and Willis for the 1st Respondent

**Mr. Dave L. Garcia** and **Mr. Kwame O. Gordon** instructed by Myers, Fletcher and Gordon for the 2nd and 3rd Respondents

**February 28, March 1, 2, 3 and July 29, 2005**

**FORTE, P:**

Having had the opportunity of reading in draft the judgment of Cooke, J.A., I agree with the reasoning and conclusions therein and I have nothing further I wish to add.

**SMITH, J.A:**

I also agree with the reasoning and conclusions of my brother Cooke, J.A. and I have nothing to add.

**COOKE, J.A:**

1. The appellant, who at the trial described herself as a "farmer and retired attorney-at-law", was the registered proprietor of approximately 32 acres part of Tulloch Park in the parish of St. Catherine ("the land"). In 1988 Hurricane Gilbert caused damage to the land and the appellant secured a loan of $50,000.00 from Tower Merchant and Trust Bank for the purpose of rehabilitation. This loan was secured by a mortgage on the land. The mortgage instrument is dated the 8th September 1989. However, advances in respect of the loan were made prior to the execution of the mortgage instrument. The monthly sinking fund was $145.83 and the first installment became payable on the 8th October 1989. The appellant mortgagor did not honour her repayment obligations, as only one monthly payment was made. The mortgagee, then Tower Merchant and Trust Bank, purporting to exercise its power of sale, put the land up for auction and on the 26th April 1990 the 2nd respondent successfully made a bid of $260,000.00 for the land. There were about three or four other bidders. On that date he signed the Conditions and Particulars of Sale. On or around the 24th May 1990, the entire purchase sum was paid. On the 6th of October the 2nd and 3rd respondents were registered as proprietors of the land. The appellant continued to remain in possession of the land and the 2nd and 3rd respondents initiated action for possession and for damages. The record does not reveal the date when this was begun but there is a conditional appearance on behalf of the appellant dated 16th July 1992. There is an amended Defence and Counterclaim dated 2nd November 1992. On the 25th January 1994 on the appellant's application, Tower Merchant and Trust Bank Ltd. were joined

as a third party, and on the 21st June 1994 a Statement of Claim against the third party was filed. Consequent upon the death of the original 3rd respondent, the 2nd respondent was substituted for her, and the Writ of Summons and Statement of Claim were suitably amended. The trial commenced on the 11th December 2001, continued over many days, and was concluded on the 20th September 2002. Since this trial, Tower Merchant and Trust Bank have been acquired by Capital and Credit Merchant Bank Limited, which is now the 1st respondent.

2. The appellant complained that the mortgagee did not properly exercise the power of sale in accordance with sections 105 and 106 of the *Registration of Titles Act*, and in particular that the statutory requisite notice in writing to pay up the outstanding installments before selling the land had not been done. The third party (now 1st respondent) did make an attempt at the trial to say that notice had been given but that was rejected by the learned trial judge. Further, at the trial the 1st respondent submitted that clause 10 of the mortgage instrument relieved that mortgagee from the obligation to serve any notice of arrears – and thus failure to give that notice did not affect the exercise of the power of sale. This submission found favour with the court below.

3. Sections 105 and 106 of the *Registration of Titles Act* are set out hereunder.

> **105.** A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge, or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee or annuitant, or his transferees, may give to the

mortgagor or grantor or his transferees notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book. [emphasis mine]

**106.** If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power. [emphasis mine]

4. Clause 10 of the Mortgage Instrument is now reproduced:-

10. That the Powers of Sale and of distress and of appointing a Receiver and all ancillary powers conferred on Mortgagees by the Registration of Titles Act shall be conferred upon and be exercisable by the Mortgagee under this instrument without any

> Notice or demand to or consent by the Mortgagor NOT ONLY on the happening of the events mentioned in the said Laws BUT ALSO whenever the whole or any part of the Principal Sum or the whole or any part of any monthly instalment of interest shall remain unpaid for THIRTY DAYS after the dates hereinbefore covenanted for payment thereof respectively or whenever there shall be any breach or non-observance or non-performance of any covenant or condition herein contained or implied and that immediately upon the happening of any of the events aforesaid the Principal Sum shall be deemed to become immediately due and payable and so remain until full payment and be recoverable by suit or otherwise as and for monies then payable under the covenants hereof AND FOR BETTER SECURING to the Mortgagee or the Mortgagee's transferee the payment of the monies intended to be hereby secured and every part thereof for principal interest costs expenses or otherwise the Mortgagor DOTH HEREBY MORTGAGE to the Mortgagee all the Mortgagor's estate and interest which the Mortgagor is entitled to transfer or dispose of in the mortgaged premises. [emphasis mine]

5. Sections 105 and 106 (*supra*) are complementary and must be construed together. They prescribe the ambit of the course which a mortgagee can take in respect of a defaulting mortgagor. Section 105 provides the circumstances in which the mortgagee "may give" to the mortgagor notice in writing to pay the money owing. Section 106 gives to the mortgagee the power of sale if having served a notice, one month elapses and the arrears are still outstanding. The court below was of the view that the words "may give" in section 105 were merely permissive. I do not agree. If this were correct, then that part of section 106 which deals with when the power of sale by a mortgagee becomes exercisable would have been quite unnecessary. It is my view that in construing both these sections the words "may give" in section 105 must be interpreted to mean "is entitled" if the power of sale is contemplated. Accordingly, the giving of a notice in writing, if the circumstances so warrant, is a

mandatory obligation placed on a mortgagee before the power of sale becomes exercisable.

6. Clause 10 of the mortgage instrument sought to exclude the statutory provision obliging the mortgagee to give notice in writing to the mortgagor before the exercise of the power of sale. It was submitted on behalf of the 1st respondent that it was lawful for the parties to come to an agreement which was not in conformity with sections 105 and 106. Therefore, by agreement, the appellant/mortgagor had waived any right to a written notice. This is not correct. This submission would render those parts of sections105 and 106 which deal with the exercise of the power of sale by a mortgagee of no effect. The statutory requirement for notice is for the benefit of the mortgagor – a last chance to protect his equity of redemption. It is impermissible "to contract out of" the mandatory statutory provisions.

7. Now, the appellant having succeeded in establishing that the exercise of the power of sale had not arisen, is it right that the consequence is that "the purported transfer of the property is void *ab initio*" and should therefore be set aside? This is what the appellant contends. This contention is met squarely by section 106, of which the relevant part states:-

> "...and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

This is for the benefit of the purchaser who buys the mortgaged land that has been sold by a mortgagee. The appellant's remedy would be "only in damages against the person exercising the power".

8. It was next argued that the protection given to the purchaser by section 106 is not absolute. Reliance was placed on ***Bailey v Barnes* [1894] 1 Ch. 25** and ***Lord Waring v London and Manchester Assurance Company* [1935] 1 Ch. 310**. In the former, significance was attached to the following excerpted passage at p. 30.

> "Under these circumstances Mr. *Lilley* relies on the provisions of sect. 21, sub-sect. 2, of the *Conveyancing Act*, 1881, which are as follows: "Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power." I think that Mr. *Lilley* is entitled to the benefit of these provisions unless it can be made out that he had notice that the powers of sale contained in the mortgages of 1888, were improperly or irregularly exercised by *Barnes*. If he had such notice, then, in my opinion, the decisions on similar provisions actually introduced into mortgage deeds (as, for example, ***Parkinson v Hanbury*** [1 Dr. & Sm. 143] and ***Selwyn v Garfit*** [38 Ch.D. 273] ought to be applied. I think that to uphold the title of a purchaser who had notice of impropriety or irregularity in the exercise of the power of sale would be to convert the provisions of the statute into an instrument of fraud."

In the latter, Crossman, J. at p. 318 said:-

> "Of course, if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment, he gets no good title on taking the conveyance."

9. It was the appellant's evidence that sometime towards the end of April and the beginning of May 1990 she went to the office of the mortgagee to satisfy in full her financial obligations in respect of the mortgage. She was then told of the sale of the land by auction and of the identity of the purchasers. She contacted these persons and endeavoured to have them withdraw from the contract of sale. She tendered a cheque of $50,000.00 to the purchasers' attorney-at-law and undertook to pay their expenses. (The down payment was $65,000.00). This was rejected. As regards the evidence as to what took place between the appellant and the purchasers (2nd and 3rd respondents) the learned trial judge made the following findings as to which there is no challenge:-

1. That the first plaintiff had testified that his late wife told him that the defendant had asked them to withdraw the purchase of the property.

2. That his said wife also told him that the defendant said something was wrong with the sale and that the Bank had no authority to sell her place.

3. The first plaintiff said he did not agree to withdraw as he thought that he had bought the property legally and that it was ideal for his business.

4. Under cross-examination he admitted that he had seen notes that were written by the defendant. These notes were admitted in evidence as Exhibits 6 and 7. The essence of them was the defendant's assertion that the property was sold behind her back.

5. Under further cross-examination he had said that he had seen the place advertised in the Gleaner so he could not believe that Miss Jobson never knew about it.

The appellant argued that these findings demonstrated that –

> "The respondents (2nd and 3rd) were aware that the appellant's contention that the premises were sold in circumstances where she had received no

> notification from the bank and further that the bank's purported exercise of their power of sale was void wrongful and therefore fraudulent."

10. I do not agree with the conclusion which the appellant seeks to derive from the findings of facts of the learned trial judge in paragraph 9 (*supra*). To say that the property "was sold behind her back" is an amorphous assertion, which, within the context of this case is without value. A perusal of the notes reveals plaintive pleas for mercy, compassion and understanding from the purchasers. There were not "any facts showing that the power of sale is not exercisable" (***Lord Waring v London and Manchester Assurance Company*** (*supra*)). Similarly, there is no evidence that the purchasers had notice that the power of sale was "improperly or irregularly exercised" (***Bailey v Barnes*** (*supra*)). Accordingly, in this case the conversion of the provisions of the statute (section 106) into an instrument of fraud does not arise.

11. There is section 70 of the *Registration of Titles Act* which makes a registered title indefeasible, subject to certain exceptions. See ***Frazer v Walker* [1967] A.C. 569**. Fraud is the most prominent exception. In dealing with the issue of fraud the Privy Council in ***Assets Company Ltd. v Mere Roihi* [1905] A.C. 176** in delivering its advice at p. 210 said:-

> "Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189, and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified

> under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him."

12. Having regard to the guidance given by the Privy Council in ***Assets Company Ltd. v Mere Roihi*** (para. 11 *supra*), there was no dishonesty on the part of the purchasers. Further, if it can be said that the purchasers were "claiming" through the mortgagee, I am of the view that the mortgagee was not fraudulent in its behaviour. It proceeded under clause 10 of the mortgage instrument as to which I have already expressed an opinion. I would say that to honestly proceed on an erroneous understanding of the law is not evidence of fraud. Therefore it was impossible for the purchasers to have any knowledge of a state of affairs which then did not obtain.

13. At the trial there was the contention that the sum of $260,000.00 for which the land was sold was far below its true market value and the relief sought was that the sale should be set aside. The relevant grounds of appeal were:-

> 8. The Learned Trial Judge erred in failing to find that the advertisement for sale of the mortgaged premises was improper and/or inadequate, and that the said improper and/or inadequate advertisement was evidence of the negligent and/or reckless exercise of the 1st Respondent's power of sale.
>
> 9. The Learned Trial Judge erred in failing to find that the 1st Respondent neglected to set a proper reserve price, and/or that failing to set a proper reserve price was evidence of reckless and/or negligent exercise of

the power of sale and/or that in failing to obtain a current and up to date valuation before proceeding to sale, the 1st Respondent had acted recklessly and/or negligently in the exercise of the power of sale.

10. The Learned Trial Judge erred in failing to permit Counsel to examine the working papers of Conrad Harriot, on which the witness Dwight Phillips said he had examined and on which he based his evidence. In the circumstances the Learned Trial Judge erred in finding that the most cogent evidence with respect to the valuation was that of Dwight Phillips to that of the Defendant's valuators.

11. The Learned Trial Judge erred in permitting Dwight Phillips to give evidence based on the working papers of Conrad Harriot, in circumstances when the said working papers had not been disclosed to the Defendant despite an Order for Discovery duly made by the Court.

14. This court in ***Moses Dreckett v Rapid Vulcanizing Company Limited* (1988) 25 J.L.R. 132** adopted and followed ***Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.* [1971] 2 W.L.R. 1207**. Therefore the guiding principle is that a mortgagee in exercising the power of sale owes a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decided to sell. It would seem to me that if the land was sold at a true market value, then the question of whether or not the mortgagee took reasonable precautions to achieve that result becomes academic. It is impossible to fix a stated selling price to be the true market value. The considerations of a purchaser may well include factors which are personal to such purchaser and have nothing to do with any market forces. It is my view that in the quest for objectivity the use of a reliable valuation in most cases, as in this, will provide an important criterion in determining what was the true market value of the mortgaged property. In particular, from the evidence it appears that the "forced sale" price is to be regarded as the reserve price. Now then, was

the sale price of $260,000.00 in harmony with the true market price of the land?

15. The answer to the question posed at the end of the last paragraph is to be found by the evaluation of the evidence of the three entities who gave evidence as regards the "forced sale" price of the land. The following is a synopsis of the treatment of the evidence relevant to the valuation of the land by the learned trial judge. C. D. Alexander Company, who the learned trial judge described as "a well established real estate company in Jamaica", in its valuation of the land in September 1989 put a market value of $350,000.00 and a "forced sale" price of $280,000.00. This company, which had been retained by the mortgagee based its opinion on an inspection of the land at that time. D. C. Tavares Finson Realty (retained by the mortgagor) did an inspection of the land in September 1990. Here, there was a valuation of $925,000.00 on the open market and a "forced sale" price of $750,000.00. Mervyn Downs was the person who did the valuation on behalf of this company. In his evidence he expressed the view that the market value of the land in September 1989 would have been between $550,000.00 and $650,000.00 with a "forced sale" price of between $400,000.00 and $450,000.00. A value of $500,000.00 was placed on the land itself. The learned trial judge observed that –

> "... he had no record of his notes and information as to how he arrived at the price per acre of the land".

In an overall assessment of the evidence of this witness (who he saw and heard), the learned trial judge said:-

> "I must say having considered Downs' evidence that it is based also on some level of uncertainty".

David DeLisser and Associates (retained by the mortgagor) in a valuation done in July 1990 placed a market value of $927,000.00 with a "forced sale" price of $695,000.00. David DeLisser gave evidence on behalf of

David DeLisser and Associates. The July valuation was not done by him – but by his son. In the opinion of David DeLisser, the land would have had an approximate value of $670,000.00 in September 1989 and in April 1990 (at the time the land was sold) the value of the property was $900,000.00 with a "forced sale" value of $765,000.00. This is how the learned trial judge dealt with the evidence of David DeLisser:-

> "Under cross-examination DeLisser testified that the average price per acre of the property was $17,041 in July 1990. He also said that it would have been $14,488 per acre in September 1989. He was unable however to assist the Court on the breakdown of values for 1989. He could not say either what method was used to arrive at these values. He had arrived at the price per acre in September 1989 by using a calculation of 15% below the 1990 value. He agreed that if there was a faulty calculation for 1990 and the average price was incorrect it would have affected his calculations."

Dwight Phillips gave evidence on behalf of C. D. Alexander Company. There was no question as to his experience and his academic qualifications as a valuator. He did not do the September 1989 valuation. That was done by Conrad Harriot who was then employed with C. D. Alexander Company. He had access to the working papers of Harriot. He was quite familiar with the area where the land was situated and had recently visited the land. He was in agreement with the opinion of Harriot as to the figures set out in the September 1989 valuation. This is how the learned trial judge dealt with the evidence of Phillips:-

> "It was further the opinion of Phillips that the values arrived at for the land by both DeLisser and Associates and D. C. Tavares Finson Real Estate Company were high. He contended that of the 32½ acres only 12 acres was relatively level. The balance of the land was precipitous. He testified that where the characteristics of the land is different one had to apply different rates and that the report prepared by C. D. Alexander had done this. In arriving at the price per acre for the 12 acre plot it was fixed at $8,000.00

> whereas the remaining land was fixed at $1,700.00 per acre. David DeLisser had valued the total land for $552,500 and this meant that it was calculated at $16,000 per acre across the board. In his view, that figure was high. When one compared the values arrived at for the buildings he agreed that the valuations were somewhat similar. Phillips said he had worked out the price of the land in the Tavares Finson report to be $15,000.00 per acre but that figure was also high.
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> Phillips was further of the view that the difference in time explained to some extent the difference in the price of the land. He explained that from June to July 1990 there were massive devaluations and the rate of the inflation was running at about 80%. This he said triggered an increase in demand for real estate that was considered a "hedge against inflation". He further testified that between September 1989 and April to May of 1990 there were marginal increases running between 1% per month. Phillips further opined that having regards to the high rate per acre arrived at by both DeLisser and Associates and D. C. Tavares Finson, this would have affected the forced sale value they both quoted.
>
> I am of the view that the most cogent evidence with respect to the valuation was that of Dwight Phillips. I do believe that his evidence, when compared with that of the valuators called on behalf of the defendant, was on much firmer footing. He knew the area. He had done valuations there and had visited the same lot."

There is no reason to fault the conclusion of the learned trial judge.

16. Ground 9 (para. 13 *supra*) complains that:-

(a) there was the failure to set a proper reserve price and;
(b) there was the failure to obtain an up to date valuation before proceeding to sale.

As to (a) the reserve price was $115,000.00. This was based on the mortgagee's computation of (i) balance due on principal; (ii) the arrears

of interest due; and (iii) the interest that would accrue to the date of completion of sale. To use this method to set the reserve price is palpably wrong. This computation bears no relationship to the true market value of the land. In ***Cuckmere*** (*supra*) at p.141 this court per Carberry, J.A. citing ***Colson v Williams* 61 LT 71; [1989] 59 LJ 539** with approval, expressly disapproved of the formula utilized in this case for setting the reserve price. In this case the $115,000.00 set as the reserve price is of no practical significance, as the selling price far exceeded this figure. In respect of (b) it is true that immediately prior to the sale the mortgagee did not obtain a valuation specifically for that exercise. The valuation which the appellant challenged was done for the purpose of granting the mortgage. This was in September 1989. The report of C. D. Alexander Company said that the valuation was good for six months. By my calculation the property was sold in the eighth month after the valuation. Accordingly, it was submitted, there was no valid valuation at the time of sale. I regard this submission as somewhat pedantic. There was no evidence to indicate that in respect of the land there were any factors arising between the sixth and the eighth month which could cast doubt on the validity of the September 1989 valuation. It is my view that, bearing in mind the valuation which the mortgagee had in hand it was not imprudent on its part in not obtaining a "current" valuation. There is no complaint that if the "forced sale" figure of $280,000.00 was acceptable, the selling price of $260,000.00 was not representative of the true market value of the land. What was contended was that the evidence of the valuations tendered by the appellant should have been preferred to that of C. D. Alexander Company. The learned trial judge thought otherwise.

17. In respect of grounds 10 and 11 (para. 13 *supra*) there is a touch of irony in that neither David DeLisser and Associates nor D. C. Tavares Finson

Realty (called on behalf of the appellant) produced "working papers". Therefore it cannot be said that the production of "working papers" was a bar to the determination of a proper evaluation of the land. The critical dispute between the contending valuations was in respect of the value of the land. There was broad agreement as to the structures on the land. As to the valuation of the land, it was the report of C. D. Alexander Company that revealed the most discriminating approach as to the topography of the land. In this report, it was pointed out that there was a main area of about 12 acres which was fairly level –

> "but descends to a deep depression that circumscribes this portion, the remainder rises from the depression to a low ridge on the North then descends into the river".

Whereas, the valuation of the land prepared by C. D. Alexander and Company distinguished between the characteristics of the land and attributed a value accordingly in respect of different parts of the land, the other two valuations used a standard price for all the land. This is clear from the respective reports. I am therefore at a loss to appreciate how cross-examination on the "working papers" could be of any assistance to the court.

18. Ground 8 (para. 13 *supra*) pertains to the advertisement for the auction of the land. There is no complaint that there was any misdescription of the land. The advertisement appeared in *The Gleaner*, a national newspaper on the 26th April 1990, the same day on which the auction took place. This is inadequate. Apparently, the general practice is to have two inserts in suitable publications. Enough time was not given to persons who may have been interested. Such persons may well have wished to view the land. However, despite this inadequacy, the selling price of the land was representative of the true market value.

19. The respondents were awarded special damages "in the sum of $298,234.00 with interest thereon at the rate of 6% per annum from the 24th day of May 1990 up to today". This sum reflects the amount of money which was paid for rental of alternative accommodation, the appellant having prevented the purchasers from taking up possession of the land. The purchasers wished to live there and engage in farming. The appellant challenges this award on the basis that –

> "the normal measure of damages is the market value of the property occupied or used for the period of wrongful occupation or user" – see *McGregor on Damages* 17th Edition para. 34 - 041."

The contrast was drawn between "an urban apartment in St. Andrew" which was rented and "the loss of deep rural premises in Above Rocks, St. Catherine". The respondents had sold their home just prior to attending the auction. The land was secured for them to reside thereon. The rental of alternative accommodation is the direct result of the appellant's refusal to give up possession of the land. She employed self-help and obtained an injunction from the court to maintain her possession. In these circumstances, "the normal measure of damages" is not applicable. The learned trial judge was not wrong in awarding special damages on the basis of expenses for necessary alternative accommodation. However, I do not think it is right that interest should be awarded as of the 24th May 1990. The Particulars of Special Damages shows that rental was claimed as of December 1990. Therefore interest should begin to run as of the end of December 1990.

20. In the conclusion of his judgment the learned trial judge made comments which bear repetition:-

> "It is most unfortunate for the defendant to have lost her property for such a small loan but she has no one to blame but herself. She ought to have monitored the monthly mortgage payments and ensure that they were paid promptly. I do recall Mr. Ramsey

> testifying that had she come in to pay even at the fall of the hammer he would have cancelled the sale.
>
> Her conduct after the sale calls also for scrutiny. It was not until some three years after the plaintiffs became the registered owners that she took steps to assert her claim in court."

The chronology of the court proceedings outlined in paragraph 1 demonstrates the concern of the learned trial judge in the last two sentences of his conclusion.

21. Finally, I would dismiss the appeal and affirm the judgment of the court below save for a variation as to when interest should begin to run in respect of special damages. It should begin as of the 31st December 1990. There will be costs to the respondents to be agreed or taxed.

**FORTE, P.**

**ORDER:**

1. The appeal is dismissed.
2. Judgment of the Court below is affirmed save for a variation as to when interest should begin to run in respect of Special Damages. It should begin as of December 31, 1990.
3. Costs to the respondents to be agreed or taxed.