IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 2702 OF 2000

BETWEEN

BISHOP DANIEL MKHUMBWE...................................PLAINTIFF

AND

NATIONAL BANK **OF** MALAWI....................................DEFENDANT

CORAM: D F MWAUNGULU(JUDGE)

Kainja, Legal Practitioner, for the plaintiff

Mitole, Legal Practitioner, for the defendant

Matekenya, the official court interpreter

MWAUNGULU, J.

JUDGEMENT

The chargor applies for a permanent injunction. Mr. Mkhumbwe wants to prevent the National Bank of Malawi exercised its power to transfer a piece of property in the City of Blantyre. The National Bank sold the property by auction. On 18th August, 2000, I refused the order ex parte. I ordered the matter to be heard inter partes. On 22nd August, 2000 the plaintiff took out a writ of summons claiming reliefs akin to those in the ex parte application. On the same date the plaintiff issued a summons on the action claiming the same relief as in the writ. The summons was not heard.

The legal practitioners agreed to take an originating summons instead. The plaintiff served the affidavit with the originating summons. There is no notice of intention to defend on the file. This indicates the confusion on the record. The registry opened two files. The defendant served and the plaintiff accepted the affidavit in opposition. The

Registrar issued the notice for today's hearing.

The plaintiff wants the injunction because the sale is illegal. There are four grounds for illegality. First, the plaintiff contends the sale or threatened sale contravenes section 60(2) of the Registered Land Act. The chargor never gave the notice of demand under the section. Secondly, the plaintiff contends the chargor under section 68 (1) should have given one month grace period. The plaintiff further charges he was entitled to three months notice of sale under Section 68(1) of the Act. Finally, he contends the chargor could not sell the property without the land registrar approving the reserved price or conditions of sale under section 71(1).

Mr. Nkhumbwe owns property known as Blantyre West 2/27. The bank gave him two loans of K400,000 each on charges on the property dated 8th August, 1996 and 22nd July, 1997. The plaintiff has only paid K104, 000.00 since. The loan stood at K1,328,659.44 on 8th March, 2000.

The bank has been demanding payment. The bank did so on 15th December, 1998 through the accounts relationship manager. This demand required the plaintiff to pay the money forthwith and warned the plaintiff of legal action if the plaintiff never paid within 21 days. The plaintiff negotiated paying arrangements. The plaintiff never honoured the arrangements. On 13th January, 1999 the credit services manager wrote again. The bank reminded that the plaintiff never paid since the letter of demand of 15th December, 1998. The bank warned that it would sell the property if within 10 days the plaintiff never paid. On 7th September 1999 the bank's credit manager wrote about the plaintiff's failure to honour the arrangements. He warned the plaintiff of legal action if payments never commenced within 10 days.

On 9th February, 2000 the bank demanded immediate payment. The defendant had ten days to pay. The plaintiff proposed payments by March. He hoped a tenant would lease the property. Later two people offered to buy the premises. A bank official advised estate agents sell the property for the plaintiff. The bank on 9th February, 2000 required the plaintiff to pay by 31st March, 2000. The bank warned the plaintiff the property would be sold by public auction if by 31st March 2000 nothing happened. Trust Auctioneers sold the property on 17th August, 2000. The action is to stop the bank executing the sale because the bank never complied with the Registered Land Act.

This is not an easy matter at all. The plaintiff is in a difficult position. The indebtedness is expanding because of high interest rates. The plaintiff has difficulty paying back. He, however, clings to the property the security of the loan. The bank's situation is not any better. The loan escalates with little hope of repayment. It is commercially detrimental not to redeem the money. The bank has gone some length accommodating the plaintiff. It is difficult to reconcile these competing claims. The principles are however clear. They

are based on fairness and justice.

If a borrower fails to pay the lender, if there was security for the loan, justice demands that the lender recourse the security irrespective of the hardship on the borrower. Justice is never met by the borrower having the benefit of both the funds and the security. Conversely, the lender cannot lose both the funds and the security. The chargee's right to the security is underlined by statute. Once there has been default the right of the chargee or mortgagee to sue for the money is muted by the proviso to section 60 (3). The proviso reads:

"Provided that ... the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b) of this subsection, notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property."

The chargor must fail to pay the lender. Without a payment date, the chargor fails to pay when he ignores the notice of demand. Under section 60(2) the chargor is in default after three months of the notice. The chargee cannot exercise his rights against the chargor before the three months:

"A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.

Three months runs from the date of the notice. The chargor has not defaulted if she pays within months. She defaults after three months. In Barker v Illingworth, [1908] 2 Ch. 20, the deed provided for payment within six months of the agreement. The mortgagee, way after six months, gave notice of sale if the mortgagee did not pay after three months. Swinfen Eady, J., held the notice good. He considered section 20 of the Conveyancing Act, 1881, applicable to us as a statute of general application before 1902 but subject to the Conveyancing Act of 1908. Section 60 (2) of the Registered Land Act replaces word by word that section. The judge said:

"Sect. 20 only applies when this default has occurred. It requires by way of condition precedent to the exercise of the power that notice should be given requiring payment - that has been done - and that there should be default in payment for three months after such service. In my opinion there has been such default. There is nothing misleading about the notice, for it states that if the money is not paid within the three months the

mortgagees will then proceed to exercise their power of sale."

The plaintiff questions, on several grounds, the various notices the bank sent. The mortgagor attacks the notice of demand of 15th December, 1998. He agues that, under section 60 (2) the notice should indicate the three months in which to pay. Section 60 (2) never requires the mortgagee to stipulate to the mortgagor to pay within three months. A notice requiring immediate payment or intimating money be paid before expiration of three months from the date of service is effective. It is equally effective if it requires the mortgagor to pay at the end of the period since the three months notice begins to run immediately (Barker v Illingworth).

On correct construction of section 60 (2) the chargor has to prove two things. First, that the chargee demanded payment. Secondly, the chargor defaulted for three months from the date of notice. The chargee can stipulate the money be paid within three months. Section 60 (2) means the chargor is not in default until after three months. The chargee can demand immediate payment or within a short time. The mortgagor, however, has three months to pay. The chargee has three months before resorting to her remedies. In Metters v Brown, (1863) 33 L.J.Ch. 97., the court held the notice was valid because it required payment at a time less than required by the deed and Act. The notice of 15th December, 1998 never offended section 60 (2) of the Registered Land Act.

The Chargor, however, contends the fresh arrangement with the chargee evidenced in the letter of 7th September, 1999 affected the notice. A Chargor biding for time or alternative arrangements only seeks without consideration from him. The indulgence, unless the chargor acts to his detriment, should not be a waiver of notice obliterating the chargee's rights. This is supported by the decision of Pearson, J., approved by Cotton, Lindley and Lope, LJJ., in the Court of Appeal, in Pooley's Trustee v Whethan**, (1886)** 33 Ch. D. 111.

In Wood v Murton, the mortgagee gave due notice. Six days later he obtained a bill of exchange at three months for the amount from the mortgagor. The bill was dishonoured. The mortgagee sold the property without notice and brought an action for ejectment. The Court held that the defendant should give up possession. The giving of the bill operated as suspension of the remedy by sale and the running of the notice. Both revived when the bank dishonoured the bill. No further notice was therefore necessary. That is good law.

The notice of 15th December, 1998 is unaffected by the subsequent arrangements for payment. If they affected the notice, in my judgement, these arrangements only suspended the notice. The original notice revived when the mortgagor defaulted on those arrangements. The mortgagee was not obliged to give another notice.

The mortgagee gave further notices. On 13th January, 1999 the chargee informed the

chargor that for failure to comply with previous demand the chargor had ten days to commence repayments failing which the mortgagee would exercise his right to sell the property. This notice is being attacked on four grounds. First, that the demand was superseded by subsequent payment arrangements. Secondly, that the notice was signed by somebody other than that stipulated in the charge. Thirdly, the notice purported to give 10 days notice instead of three months as required under section 68 of the Registered Land Act. Fourthly, that the attempted variation of three months was not sanctioned by the Court as required under section 73 of the Act. The first ground was considered before. The Court has to consider the second, third and fourth grounds.

Clause 4 (v) of the deed invoked in aid of the chargor is in the following words:

"Any notice to be given hereunder or any demand for payment of the monies hereby secured may be a notice in writing signed by the Chief Executive or his Deputy or the Manager or Operations Manager for the time being of any branch of the Chargee at which the Borrower's bank account is then being maintained and the provisions of Section 150 shall apply to every such notice."

The chargor thinks the notice invalid because it was signed by the person other than the Chief Executive or his deputy or the Manager of Service Manager for the time being of any branch. This is an ingenuous argument. Section 60 (2) only requires that the demand be in writing by the chargee. All notices to the chargor were in writing. There is no doubt that they come from the chargee. The chargor, if I understand him correctly, suggests the chargee be heard to his stipulation in the charge. Obviously this is a contractual obligation. Parties can agree to arrangements beyond those in section 60 (2). This depends on what the parties intended. That hinges on construction of the deed.

The chargor contends the notice here is vitiated because no official mentioned in the agreement signed the demand notice. That is untenable on the proper construction of clause 4 (v). The word used in the clause is "may." The parties intended that desirably these officials should issue the demand notice leaving the possibility that others could effectively make the notice. The notice however had to be made by the bank. I cannot, in all fairness, construct clause 4 (v) another way.

Section 60 of the Registered Land Act does not require the chargor to stipulate in the notice the time when the chargee should pay. The section provides:

""A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee."

The chargor argues the bank could not intimate that the chargor pay within ten days. The chargee should have inserted three months instead. Section 68 never obliges the chargee to state the time to pay before invoking her remedies. Subsection 1 describes the notice. The chargee may in writing require the chargor, for the purposes of this case, to pay the money owing. That is all the chargee is to do. The section never requires the chargee suggest the time to pay. Consequently the chargee may require the chargor to pay immediately or within a given time.

Subsection 2 deals with the chargor's disregard of a subsection 1 notice. The chargee may resort to remedies in paragraphs (a) and (b) if, after 3 months of service of the notice, the chargor never complies. It is prudent, as the chargor contends, for the chargee to notify the chargor that the chargee may use his remedies after three months of notice. Nothing, however, in the section necessitates the chargee to stipulate the time as the chargor argues. A chargee, if he wants to give a notice under subsection 1, because, he does not have to, cannot invoke remedies in paragraphs (a) and (b) before three months of the notice. This is not, as it is argued, because he did not stipulate the time. This is because the chargor has, for purposes of this case, not paid as required by the notice under subsection 1.

Consequently, a notice stipulating immediate payment, no time or less time to pay is effective. The remedies, however, cannot be invoked within three months of notice. A notice therefore demanding immediate payment and giving ten days for the chargor to pay is effective three months after the ten days. The notice would be effective though it never states the chargee would only resort to his remedies in paragraph (a) and (b) after three months of the notice.

The fourth ground depends on whether the chargee altered anything in section 68 of the Act. The preceding paragraphs show the chargee did nothing requiring this Court's imprimatur under section 78 of the Act.

The chargor did not pay in the ten days. He has done nothing 1998 and 1999. The chargor, although not obliged, wrote other notices after 7th September, 1999. Nothing happened till 9th February 2000. That letter is attacked on the grounds just considered. It is unnecessary to reconsider the grounds. Suffice to say this letter offends neither section 60(2) nor section 68. It complies with both sections.

Section 60 (2) just states that if the deed never states the date of payment, the chargee must give a notice of demand. The notice can be for immediate payment or in a given time. It suffices if there is such notice. The section then states that, without the date, there

is default after three months. There was an earlier demand notice of 15th December, 1998 requiring the chargor to pay within twenty-one days. Under section 60(2) the defendant, giving the most generous interpretation to the Act and the notice, had three months after twenty-one days. The chargor had up to 17th March, 1999 to pay. He defaulted if he never paid by that date.

The indulgences the chargee gave never affected the default. It is unclear whether the chargor gave the indulgences in the three months after the expiration of twenty-one days of notice. The indulgence was without consideration. Even if it was a waiver, it only suspended the notice. The notice revived when the chargor overlooked arrangements he himself proffered. It was unnecessary to notify him. The chargee therefore gave notice under section 60 (2). The chargee however continued to give notices. All were breached. In all subsequent notices, including the 9th February, 2000 notice, the chargee stated he would sell to realise the debt. The notices offend neither section 60(2) nor section 68.

Section 68 of the Registered Land Act which the chagor contends the notices offend reads:

"(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may-

(a) appoint a receiver of the income of the charged property; or

(b) sell the charge property.

This section is worded as section 60 considered earlier. First it requires a default as in section 60. That default must persist beyond a month. The chargee must give the chargor time to pay. The section never stipulates the time the chargee must give. The time given however must be reasonable. Even if unreasonable the mortgagee will be protected if he allowed more time than the notice.

Subsection 2 only states what happens after default. It regulates the mortgagee's right to sell and appoint a receiver. The rights arise after three months after the chargor defaults beyond a month since notice. The chargee could sell or appoint a receiver after three

months after the chargor fails to comply. The chargee need not inform the chargor about the remedy he will deploy. The right springs immediately upon default in a subsection 1 notice. The chargee need not inform the chargor the chargee will sell the property or stipulate the time of sale. Under section 68, upon defaulting payment for over a month, the chargee could notify the chargor to pay. The chargee cannot appoint a receiver or sell the property until after three months of that notice. All the chargee's notices are impeccable. They complied with section 68.

There was a notice of demand on 15th December, 1998 which up to the time of the action on 22nd August, 2000 the chargor overlooked. For close to two years the chargor never complied with. Subsequent notices of demand never waived the notice. The chargor neglected all. The chargee, in words of Lindley, L.J., in Pooley's Trustee v Whethan, did "all that an unpaid creditor with a security like this could be expected to do." The chargee complied with sections 60 and 68 of the Registered Land Act. The chargor thinks the letter of 9th February, 2000 is the operative notice. The effective notice is the one for 15th December, 1998. The chargor defaulted on or about 17th March, 1999. The sale only took place this year in August, of course, after several notices to the chargor to pay and a leeway for the chargor to pay extending for a period of about two years. Justice is on the chargee's side.

The chargor could still sell even if the 9th February, 2000 notice is the appropriate one. The Court cannot stop the execution of the sale. Since the demand notice of 15th December, 1998 the money was effectively unpaid from 17th March, 1999. The chargee could issue the section 68 notice any time after that date. The chargee did this several times. The letter of 9th February, 2000 should be understood as the last one under section 68. The chargor defaulted for close to two years. The latest the chargee could sell the property was 19th June, 2000. The chargee sold in August 2000, clear of the earliest date he could sell. There is no reason in law or logic, however, why that notice should be preferred to earlier notices to the same effect. Consequently, the sale was clear of the periods required under sections 60 and 68.

The chargor insists the 9th February, 2000 notice was the one section 60 requires. The chargor submits that under sections 60 and 68 he had seven months from 9th February to pay the money. The sale in August was impermissible and is null and void. There is no reason in law and logic why the notice should be the section 60 notice.

The chargor then contends the chargee breached section 71. He charges the sale ineffective because the land registrar never approved the reserve price and the conditions of sale. He relies on the Supreme Court decision in New Building Society v Gondwe, Civ. App. No, 21 of 1994, unreported. That was a unanimous decision of Chatsika, Villiera and Mtegha JJA. The chargor relies on two statements by Chatsika, J.A. who delivered the Court's decision. The first is:

"In the present case, when one considers the provisions of sections 68 and 71 it becomes abundantly clear that the object of the legislature which is manifested in the real intentions of the sections of the Act under review was for the protection of the public interest, namely, to ensure that those who deal with charged property do so with full regard of the rights of other persons owning that property. Having come to this conclusion it must follow, as a matter of course, that any contract dealing with the sale of charged property which fails to comply with the provisions of section 68 and 71 is bad for illegality and is unenforceable in a court of law."

The second is:

"The chargee is required under this section [section 71 (1)] to sell the charged property by public auction and to have any reserve price approved by the Lands Registrar."

Supreme Court decisions bind this Court. Departure from them is at the peril of reasons. Per in curium decisions never bind this Court. Equally, this Court never follows decision overlooking statutory provisions. This Court also distinguishes binding decision on the facts or principle.

It is necessary to reproduce section 71 of the Registered Land Act. Subsection 1 provides:

"A chargee exercising his power of sale shall act in good faith and have regard to the interest of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the Registrar may approve, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby."

Subsection 71 (3) reads:

"A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

A close reading of the section 71(1) shows the chargee is not obliged to sell by auction. The section is over worded or overloaded. Remove the clauses, the section never prohibits sales other than by auction. It only allows sale by public auction. To be more precise it allows sale by action and private contract. It never requires the chargee to sell

by public auction. Without the extra words the section reads, emphasis supplied:

"A chargee exercising his power of sale ... may sell or concur with anybody in selling ... by public auction ... subject to such reserve price and conditions of sale as the Registrar may approve ..."

The section never comports the chargee 'shall' sell the property by public auction. The section is permissive, not prescriptive. The section, recast with the necessary wording, reads:

"A chargee exercising his power of sale ... may sell or concur with any person in selling the charged land ... by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the Registrar may approve ..."

'Or' in the section is disjunctive of the two activities 'sell' and 'concur with'. The clauses 'by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the Registrar may approve ...' can be read to qualify the two activities 'sell' and 'concur with anybody in selling.' That sense is undermined by the words 'concurring with any person in selling the charged land ... by public auction.' In that sense the word 'sell' is a distinct activity from concurring with any person in selling by auction. The words after 'concur with anybody' qualify the activity of concurring with any person in selling the property by auction. Consequently, the need to have a reserve price and conditions approved by the Registrar only arises when the chargee agrees with anybody that the sale should be by public auction. The section gives the chargee two rights. The first, the absolute one, is the power to sell. This power the chargee has at Common law, equity and previous statutes. The second, a development, is the power to agree with the chargor to sell by public auction. If the legislature intended the chargee to sell only by public auction the legislature would have been clearer by clearly stating that chargee "shall sell by public auction." The words that the chargee could "agree to sell" would be unnecessary. Agreement necessarily excludes compulsion.

The chargee could agree with the chargor or somebody other than the chargor for the property to be sold by public auction. Disputes on the amount the property would be solved by land registrar approving the reserve price and conditions of sale. The land registrar must guard the chargor's interest from predatory arrangements between the chargee and a person other than the chargor. The chargee's freedom to sell the property by auction by agreement is underscored by that he, under the section, can bid and buy the property and reaction it.

There are problems in requiring a chargee to sell only by public auction. If the chargee

cannot sell at the auction, she has no remedy. She cannot reach a private contract to sell to someone unwilling to go to the auction. Alternatively, a chargee with a willing purchaser offering more by agreement has to sell by auction at a price lower though the chargor endorses the arrangement. That serves neither the chargor's nor chargee's interest.

The common law recognised the chargee's right to sell the property. The chargee sold by private contract. A chargor could restrict that right by agreeing for a different mode. In Brouard v Dumaresque, (1841) 3 Moo PCC 457, the mortgagee agreed to sell by public auction, a sale by private contract was invalid. Lord Campbell stressed the mortgagee's right to sell by private contract subject to the mortgagor agreeing for another mode:

"The mortgagor might have very good reasons for guarding against a sale by private contract, and stipulating for some other mode whereby the mortgaged property might be rendered available for the benefit of the mortgagee."

If the chargee agrees to sell by public auction or private contract, the chargee needs not first offer the property at the auction. In Davey v Durant, Smith v Durant, (1857) 1 De G & J 535, Lord Justice Knight Bruce said:

"... [T]o hold that the mortgagee was bound in the first instance to put up the property bought for sale by auction would be to limit, cut down the power given by the deed, which expressly authorises a sale by public auction or private contract ..."

What he said later expresses the common law position:

"... [C]ertainly I am not prepared to hold, that a mortgagee is not justified in accepting a fair offer for the purchase of the mortgage property until he has advertised the property for sale."

At common law a mortgagee, therefore, could sell by private contract subject to agreement for a different mode. The chargee could agree to sell by public auction. He was not compelled to sell by public auction.

The Conveyancing Act of 1881 in England and Wales in section 19 (1) (I), (4) introduced a statutory power of sale. This was a statute of general application and applicable to Malawi. Of course in England and Wales the Law of Property Act, 1925 replaced the Conveyancing Act 1881. Section 101(1) of the Law of Property Act 1925 replaced word

for word section 19 (1) (I) (4) of the Conveyancing Act, 1881. The Conveyancing Act 1881 and the Law of Property Act, 1925 codified the common law position. The mortgagee could sell by private contract or public auction. That position, at least in England and Wales, is unaffected by statute. Courts enforce the power under the agreement independent of the Act.

Is the law under the Registered Land Act alter the common law? Before the Act the common law and the Conveyancing Act 1881 applied. The Conveyancing Act, on this aspect has been replaced by section 71(1) of the Registered Land Act. Section 71(1) is worded differently from the Conveyancing Act, 1881. The drafter's choice of words is conspicuous. There is however no difference in the effect of the two sections. The section in the Conveyancing Act reads:

"A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(I) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby."

This section confirmed the chargee's common law right to sell by private contract or any other mode. In particular, it gave the mortgagee the right to sell by private contract or public auction. Section 71 (1) does not refer to the right to sell by private contract. The section does not prohibit sale by private contract. The section permits the mortgagee or chargee to sell by public auction. The use of the word 'may' means the chargee can sell or agree to sell by public auction. That is the common law position. That was the law before the Registered Land Act. Both the Conveyancing Act 1881 and the Registered Land Act in the statutory power created wanted to expand the chargee's common law right to sell by private contract by allowing him the power to sell by auction as of right and the power to agree with the chargor to sell by public auction. Both provisions refer to the chargee's 'power to sell or concur ... in selling.' What the chargor at common law could only do by agreement with the chargee, namely, selling by public auction, she could now do under statutory power.

The conclusion that the chargee was bound to sell the property by auction was based on interpreting the section on the purpose of the statute. That purpose was that those who deal with property should regard the rights of others. The mortgagor's and mortgagee's

rights may be served better by the chargee selling by private contract as happened in Davey v Durant, Smith v Durant. The law should be fair to the mortgagee who could lose money if the security is undersold. The law should also protect purchasers who buy without notice of defects in the chargee's exercise of power of sale. The interpretation should be fair to the chargee, chargor and purchasers.

Section 71 is not mandatory as to the mode of sale. It is a clear section. It uses the word 'may.' There is no ambiguity. If there was ambiguity the interpretation should have gleaned the common law, previous legislation or practice (Young &Co v Royal Leamington Spa Corp. (1883) 8 App. Ca. 517,565; South Eastern Railway Co. v Railway Commissioners, (1880) 5 QBD 217,240 and Welham v Director of Public Executions, [1960] 1 All ER 805, 807). The common law and practice and previous statutes show the chargee can sell by private contract or public auction. Section 3 of the Registered Land Act provides:

"Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act ..."

Selling by private contract subject to agreement to sell by public auction has been the practice at law and equity. This practice is not inconsistent with section 71 (1) of the Registered Land Act which provides that the chargee may, not shall, sell or concur to sell by auction. Section 71(1) was meant to forestall an omission in the common law by giving the statutory right to the chargee to sell the property by public auction. At common law the chargee had a right to sell by private contract. Other modes were only permitted by agreement between the chargee and the chargor. The chargor could restrict the chargee's right to sell by private contract by agreeing to sell by public auction. The Conveyancing Act 1881, the Law of Property Act, 1925 and our Registered Land Act meant to allow the chargee by statute to sell by public auction. I am bound by the Supreme Court's interpretation of section 71(1) of the Act. That interpretation leaves less protection to the mortgagor than the Supreme Court assumed. The Supreme Court, however, never interpreted the section the way it should. The first approach is to look at the wording and the statute. This the Supreme Court did not do. Instead the Supreme Court started with the mischief rule. The wording and the section is very clear and supported by the Common Law and Statutes provisions to the Act. Sale by private treaty some times gives better protection than a public auction. The construction that gives the chargee a choice to sell by private treaty and public auction and freedom to concur to sell by public auction with any person, including agreeing with the chargor, is more generous to the chargor than thought. That interpretation is supported by the wording of the section and the mischief the legislature wanted to forestall in the section.

The next question is whether failure to comply with section 71(1) in not having the reserve price and conditions of the sale approved by the Lands Registrar nullifies the contract. The Supreme Court decided that the contract is null and void. The Supreme Court accepted the submission that such a contract is illegal. The grounds for counsel's submissions for illegality are not apparent from the record. The Supreme Court decided the Registered Land Act prohibits the contract. The question then and now is whether from reading the Act as a whole the legislature intended to proscribe sales not complying with section 71 (1) requiring the land registrar to approve the reserve price and conditions of sale.

The approach is one the Supreme Court of Appeal laid in Bazuka & Company v. Blantyre & Estate Agency Limited, [1981-83] 10 M.L.R. 173 This Court approached the matter similarly in Mobil Oil (Malawi) Limited v Sacranie, Civ. Cas. No. 106 of 2000, unreported. Does the statue expressly or impliedly prohibit the contract? The Registered Land Act never expressly prohibits the sale. If it had, cadit questio. The sale is unenforceable. In St John Shipping Corporation v. Joseph Rank Ltd [1957] 1 Q.B.267, 283, per Devlin, J., said:

"The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute."

The Act not expressly vitiating the sale, on true construction, does the Act impliedly proscribe the sale? Lord Devlin in Archbolds (Freightage) Ltd. v. S Spanglett Limited, [1961] 1 Q.B.374, said:

"The statute does not expressly prohibit the making of any contract. The question is therefore whether a prohibition arises as a matter of necessary implication."

The various tests are but guides and inconclusive. Much depends on the intention of the legislature and the purposes of the statute judging from the words used, the mischief the legislature wanted to arrest and goals the legislature wanted to attain. Generally where the Act does not expressly remove the plaintiff's civil remedies, one should ask the question whether from the purpose of the Act, the circumstances in which the contract is made and to be performed, it is against public policy to enforce the contract (Geismar v. Sun Alliance and London Insurance Ltd.[1978] Q.B. 383). Even where public policy is a concern one must be aware of the remarks of Lord Devlin in St John Shipping Corporation v Joseph Rank Ltd, [1957] 267, 274. The plaintiff's solicitor made the following submission:

"For the defendants to succeed the court must decide that canons of public policy require this particular contract to be declared illegal. From time to time in the books one finds warnings about extending the ambit of the doctrine of public policy: see the words of Lord Wright in Vita Food Products Inc. V. Unus Shipping Co. and the speech of Lord Atkin in Fender v. St. John-Mildmay."

Devlin J., said:

"I accept the view that public policy is not a doctrine which ought to be extended in the sense of making new heads, but this is not that sort of case."

One first looks at the statute itself. The statute must expressly or impliedly proscribe the contract from the generality of the Act. The Registered Land Act never proscribes the sale. It does not by implication. Neither does it exclude the chargor's civil remedies. On the contrary section 71(3) specifically emphasises the chargor's remedies in case of irregularity: the remedy redounds in damages against the person exercising the power. The intention was not to vitiate the sale. In New Building Society v Gondwe the Supreme Court never considered the subsection. Subsection 3 provides:

"A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been dully exercised, any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

The legislature never intended irregularities vitiate the sale. There is no canon of public policy that I can think of that would require non-enforcement of such a contract.

That irregularities should not nullify the sale is based on fairness and public policy. The legislature provided an elaborate mechanism for resolving irregularities. First the Act requires the transfer be made in a particular form. Secondly, it gives the land registrar power to register or refuse to register the transfer. Thirdly, it gives finality to the registration itself even if the power to sell was exercised irregularly. Fourthly, it prescribes the chargor's remedies. Fifthly, it prescribes against who these remedies should be had. Finally, it protects the rights of innocent purchases. The second aspect is significant. It allows the land registrar to consider the sort of defects that are being raised here. The Registrar could refuse registration if the mortgagee, having opted for sale by auction, does not ask for the land registrar's approval. This intricate procedure is to save the sale rather than nullify it. All this is in furtherance of public policy.

That public policy is manifested in the length section 71 (3), like the English section 104

of the Law of Property Act, 1925, goes to protect innocent purchasers. It protects a bona fide purchaser without notice. A purchaser with notice of the defect is unprotected (Jenkins v Jones, (1860) 2 Giff 99, 29; Bailey v Barnes, [1894] 1 Ch. 25). In In re Thompson and Holt, (1890) 38 Ch. D. 492, the chargee sold before the section 20 of the Conveyancing Act, 1881, the equivalent of section 60 of the Registered Land Act, notice expires. Kekewich, J., rejecting the argument the sale was invalid, said:

“The prima facie answer to that is, that the restriction on the exercise of the power is for the benefit of the mortgagor, as between himself and the mortgagee. But in this case the purchaser had notice of this fact, and that the argument is not very material.”

Therefore, for purchaser without notice, the sale cannot be impeached because there was no notice to the mortgagor. The protection is based on public policy. Section 71 (3), like section 104 of the Law Property Act, 1925, in England, protects the innocent purchaser.

Section 71 (3) talks about when a transfer occurs. A contract of sale of land, however, creates a right in equity. The transfer in section 71 (3) is to be in a prescribed form. The chargor concedes the sale took place. He has not shown whether there is a transfer in terms of section 71 (3). He has not shown that there is no transfer under the section. This is understandable but not explicable. The mortgagor wants to stop the execution of the sale. The mortgagor can only do that if he shows that a transfer in terms of section 73 (1) has not taken place. This is because after the transfer his remedies are only in damages against the person exercising the power. This court has still to consider whether it can stop the mortgagee to transfer before the mortgagee obtains a transfer under section 73 of the Registered Land Act.

The starting point is a passage in Halsbury Laws of England, 4th ed. Butterworth, 1980, para. 725:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagee has begun a redemption action, or because the mortgagee objects to the manner in which the sale is arranged.”

The case cited is Anon, (1821) 6 Madd. 10. An injunction to stop the sale on want of notice was refused by Leach, V-C. The Vice Chancellor thought that the sale should not be stopped because “considering that if the ex parte case was true, the Plaintiff might relieve himself by giving notice to the purchaser.”

There are other decisions of later import. There is a Queens Bench decision of Crossman,

J., in Lord Waring v London and Manchester Assurance Co Ltd, [1935] Ch 310 approved by the Court of Appeal in Property and Bloodstock Ltd v Emerton, [1967] 3 All ER 321.Lord Waring v London and Manchester Co. Ltd is four walls with this case.

A company entered as mortgagee into a contract for the sale of mortgaged property. The mortgagee gave many opportunities to pay money due under the mortgage. At the mortgagor's request and undertaking to put the property up for sale by auction, the company refused a good purchase offer. When the mortgagor put the property up for sale by auction (when the period within which he had undertaken to do so was past) no acceptable bid was received. After a long period during which he was to the company's knowledge negotiating with a third party for a fresh loan on the security of the mortgaged property, and during which the company, to help him as much as possible, postponed selling, the company ultimately contracted to sell the property for an amount less than that it refused at his request and upon his undertaking.

On a motion by the mortgagor for an injunction to restrain completion because there was no sale until conveyance and that the contract had been entered bad faith at a gross undervalues, and for leave to redeem the property upon paying into Court, as he claimed to be able to do, the moneys due under the mortgage the court held, that a mortgagee's exercise of his power under s. 101, sub-s. 1, para. (I), of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that the mortgagee exercised it in bad faith. Crossman, J., said:

"The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgement, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside."

He expressed the reason for the rule:

"In my judgement, s. 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extra-ordinary result would follow that every purchaser from a mortgagee

would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor."

In the Court of Appeal in Property and Bloodstock Ltd v Emerton Dancwerts, L.J., Sachs and Sellers L.J.J., agreeing, said:

"The actual decision of CROSSMAN, J., in Lord Waring's case (4) was: (I) that a mortgagee's exercise of has power under s. 101 (1) (I) of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith; and (ii) that the fact that a contract for sale was entered into at an undervalue is not by itself enough to prove bad faith. Counsel for the borrower contended in his initial argument that this case was wrongly decided and that we should overrule it. The decision has stood for thirty-two years without (so far as I know) any criticism. This, I would suppose, is a discouraging start for counsel's arguments, but counsel is certainly entitled to distinguish the case from the present one, because CROSSMAN, J., expressly stated at the beginning of his judgement that the contract was (5) "an absolute contract, not conditional in any way," always supposing that the contract in the present case is really a conditional contract, and that, if it is, the fact that it is subject to a condition makes any difference, having regard to the express terms of s. 101 (1) (I) of the Law Property Act, 1925."

Section 71 (3) has the same effect as section 101 of the Law of Property Act, 1925 in England. It has the same effect as a conveyance to transfer the legal title to the purchaser. It is independent from the power of the mortgagee or chargee to sell. Where there is a an absolute contract to sell between the mortgagee and a purchaser the court cannot stop the sale. Just as it cannot stop the chargee from placing the transfer for the approval of the land registrar. As the authorities show once there is a sale, the Court will not stop the sale, even if the chargor tenders the money and costs except of course where there is collusion or fraud. Moreover, irregularities in the exercise of the power to sell the property only affect a purchaser who has notice of the defects in the exercise of power.

This does not suggest that a court never grants an injunction. Where there are sufficient grounds for relief, courts interfere in favour of the mortgagor to restrain a mortgagee's improper exercise of powers and remedies. This happened in Whitworth v Rhodes, (1850), 20 L.J. Ch. 105.

The situation where the chargee exercises his power of sale and sells the charged property to another needs closer legal analysis. Ultimately, the chargor's claim to an injunction to

stop the sale is an equitable remedy. Another situation in equity arises under a contract to sell realty. In equity title passes for which a court can grant specific performance to clothe the equitable interest with a legal title. With these conflicting equitable interests, the court has to decide whether to grant the injunction the chargor wants. The effect of these conflicting equitable interests on the chargee offers the solution to the conflicting interest. Granting the injunction means the chargee is liable in damages to the purchaser for breach of a contract. Refusing the injunction means the chargee is liable to the chargor in damages. The question is which equitable interest should prevail. This is resolved by principles of equity.

The first principle is he who comes to equity must come with clean hands. The principle does not help the chargor. The chargor will not have paid the chargee by the time of the sale. The second principle is that equity favours the innocent purchaser without notice, per Lord Lordborough, L.C., in Jerrard v Saunders, (1794) 2 Ves. 454, 458. The third principle is that equity regards as done which ought to be done. This principle does not help the chargor either. The chargee's power of sale is absolute and unconditional. The effect of the conveyance is to kill the chargor's equity of redemption. Equity would perfect the process in favour of the chargee. The application of the principle where there is a purchase of realty is that equity will regard the conveyance to the purchase as perfected and grant specific performance. That is why Crossman. J., in Lord Waring v London and Manchester Assurance Co Ltd, said:

"After a contract has been entered into, however, it is, in my judgement, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside."

A court will however restrain a selling if the chargor tenders the principal and interest, even if the costs are unpaid, before the sale. In Jenkins v Jones, Sir John Stewart, L.C., in setting aside the sale said:

"It is well settled that, though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purposes for which it is given. A mortgagee with such a power stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagee of any surplus that may remain. Upon the weight of evidence in this case I must hold that the power of sale was oppressively exercised, because, after the Plaintiff had offered to pay the principal and interest, the Defendant persisted in his determination to sell.

The Lord Chancellor emphasysed the importance of the interest of the purchaser in exercising the court's power to restrain the sale

“It is not seriously contended - at least there is no evidence to shew - that there was any doubt about the payment. The whole object seems to have been to have a sale at all hazards, and to pay the surplus monies, if any, into Court, under the Trustee Relief Act. As regards the mortgagee, therefore, I must hold that the sale was oppressive, and must be set aside, if it can be done, without injustice to the purchaser.”

In that suit the purchaser was not one the court protects. The Lord Chancellor said this about the purchaser:

“The purchaser contends that, as a bona fide purchaser for value under a power of sale so framed as to relieve him from the duty of making any inquiry, he is entitled, according to the rules of this Court, to hold the property against all claimants. But, although a power of sale so framed, relieves the purchaser from all obligation to make inquiries, yet the terms in which this clause is expressed would seem to shew that, though a purchaser under a power [109] of sale need make no inquiries, yet if circumstances which put in question the propriety of the sale are brought to his knowledge, and he purchased with that knowledge, he becomes a party to the transaction which is impeached. In this case the purchaser was present, and saw the struggle to redeem, and he must have known that the effect of his act would be to destroy that right to redeem which the Plaintiff was endeavouring to establish while the sale was pending. This knowledge on the part of the purchaser puts him in exactly the same situation as the persons from whom he was about to purchase.”

The present case is not complex if one considers principles of fairness and justice that inform this body of laws. The law should be evenhanded between mortgagors and mortgagees. It is for this reason that this case is important. A law leaning for powerless mortgagors against powerful and affluent mortgagees is devastating against powerless mortgagees. Conversely, a law would not be evenhanded if all it recognised was the protection of powerless mortgagors. The law has also to regard the financial and commercial ramifications of the law.

Financial institutions, building societies and banks, rely on charges or mortgages to secure funds they lend. A law recognising the risk and cost of collection of money is important. Under banking and building society law, financial institutions hold depositors’

funds. They lend on a return to depositors and financial institutions. An uneven handed law affects business efficacy and confidence. Financial institutions pass the risk to borrowers in high interest rates.

These interest rates affected the plaintiff considerably. The loan stood at K1,328,659.44 on 8th March, 2000. The chargor has considerable problems paying. Every time he negotiates new arrangements, the situation gets worse than better. Banks lend at 7% above the base rate. This means, at times, interests above 50%. These are war time and inflationary rates. If the premises are not sold, the chargee may never recover the money at all. The chargee acted with much indulgence to the chargor. The mortgagee gave the appropriate notice, suspended it at the mortgagor's request and generally condescended. The mortgagee did forgo his right to sell the property and allowed the mortgagor to sell the property. The mortgagee allowed the mortgagor for more time to get a tenant. It is not suggested that the price is unreasonable. A chargee, it has been said is not a trustee for the chargor. As long as the chargee acts in good faith, he need not scale the market to look for the best price. The chargee did all a reasonable chargee would do. Giving more time to the chargor just swells the latter's indebtedness.

On these considerations and principles I have stated, I refuse to grant the injunction. If there is any damage to the chargor in the exercise of the power, the chargor has rights in damages. The statute envisages damages as adequate remedies. In those circumstances the damage is on the face of it reparable. A court seldom grants injunctions where damages are an adequate remedy. If the price is unreasonable or real irregularity, the land registrar may refuse the transfer. That power has been given to the land registrar under section 71 (3) of the Registered Land Act. It is a power that has to be exercised in the light of the situation of a purchaser who, as a matter of law, is not bound to enquire into the mortgagee's right to sell the property. In any case the chargor himself wants to sell and he has failed to do so. The bank could be stopped to sell on any principle that I know. I refuse the injunction.

I dismiss the application with costs.

Made in Chambers this 10th Day of November 2000.

D F Mwaungulu

JUDGE