

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2008/CLE/gen/FP00224
BETWEEN

CYRIL LIVINGSTONE MINNIS
Plaintiff

AND

COMMONWEALTH BANK LIMITED
1st Defendant

AND

ALMONDO TALBOT
2nd Defendant

AND

TIFFANY C. DENNISON
3rd Defendant

AND BETWEEN

TIFFANY DENNISON
Plaintiff in Third Party Proceedings

AND

ALMONDO TALBOT
1st Third Party Defendant
AND
TALBOTS ENTERPRISES LTD
2nd Third Party Defendant

BEFORE: The Honourable Mrs. Justice Estelle G Gray Evans

APPEARANCES: Mr Carlson H. Shurland for the plaintiff

Mr Robert K. Adams along with Mr Dwayne E. Fernander for the
1st defendant

Mr Raynard S. Rigby along with Ms Candice C. Ferguson for the 3rd
defendant

Mr Alton McKenzie for the third party defendants

HEARING DATES: 2015: 5 and 6 October;
2017: 12 April; 11 May; 29 June;

JUDGMENT

Gray Evans J.

1. This action started out as a claim by Cyril Livingstone Minnis, the plaintiff, against Commonwealth Bank Limited (“the Bank”), the 1st defendant, Almondo Talbot (“Mr Talbot”), the 2nd defendant, and Tiffany Dennison (“Mrs Dennison”), the 3rd defendant, for possession of documents of title, damages, interest and costs.

2. The plaintiff is a resident of Freeport, Grand Bahama and a businessman doing business within the Commonwealth of The Bahamas. The 1st defendant is a limited liability company licensed to carry on the business of, inter alia, banking and lending in the said Commonwealth of The Bahamas. The 2nd defendant is a resident of Freeport, Grand Bahama and a businessman doing business within the said Commonwealth of The Bahamas. The 3rd defendant is a counsel and attorney at law, practising in the City of Freeport in the Island of Grand Bahama aforesaid under the name and style of Dennison & Co.

3. Although not a party to these proceedings, Talbot Enterprises Limited aka Talbots Enterprises Limited aka Talbot’s Enterprises Limited (“TEL”) is a company beneficially owned and directed by Mr Talbot and at the material times was the owner of Lots 10, 11 and 12 Civic Industrial Area, Freeport, Grand Bahama (“the Property”), over which it had granted a mortgage to the Bank as security for a loan. The said mortgage is dated 26 November 1999 and recorded in the Registry of Records in Book 7692 at pages 339 to 356.

4. The plaintiff commenced this action on 1 October 2008, by a specially indorsed writ of summons in which he alleges that by a breach of contract by the 1st and 2nd defendants and the “illegal possession of documents” by the 3rd defendant he has suffered loss and damage for which he claims: Possession of the documents of title, damages, interest, costs and any other remedies which this Honourable Court may deem just.

5. The 1st and 3rd defendants, in their defence filed respectively on 10 December 2008 and 6 September 2011, deny the plaintiff’s claim.

6. No defence was filed by or on behalf of the 2nd defendant, who, instead, applied to have the claim against him dismissed. On 29 September 2011, the plaintiff’s claim against the 2nd defendant was, with the consent of the plaintiff, dismissed by order of this Court. However, on 17 April 2012, leave was granted to the 2nd defendant to add Mr Talbot and TEL as third parties to these proceedings.

7. After some delay, due to adjournments at the requests of the parties, for various reasons, the trial commenced on 5 October 2015.

8. At the close of the plaintiff’s case, his claim against the 3rd defendant was, on the application of the 3rd defendant, dismissed, leaving the 1st defendant as the sole defendant in this action.

9. Hereafter, references to “the defendant” and or “the 1st defendant” and or “the Bank” shall mean, unless the context otherwise requires, Commonwealth Bank Limited;

references to the "2nd defendant" shall, unless the context otherwise requires, mean Mr Talbot; and references to the "3rd defendant" shall, unless the context otherwise requires, mean Mrs Dennison.

10. As a consequence of the action being dismissed against the 3rd defendant, the third party proceedings also fell away.

11. The plaintiff did not amend his statement of claim.

12. Evidence on behalf of the plaintiff came from the plaintiff and the late Mr Hal O Tynes; and from Ms Denise Turnquest on behalf of the 1st defendant/Bank.

13. In his witness statement filed 2 May 2012 the plaintiff averred as follows:

- 1) Sometime in August of 2006 Mr Almondo Talbot discussed with me the sale of his property situate at Lots 10, 11 and 12 Block K Civic Industrial Area. This property was mortgaged to Commonwealth Bank and the mortgage payments were in arrears.
- 2) I entered an agreement with Mr Talbot to pay off the outstanding balance of the mortgage to the Bank. The said agreement was executed by Attorney Hal Tynes. I will rely on the express and implied terms of the agreement for its full term and effect.
- 3) On or about 15th August 2006 I attended a meeting at Commonwealth Bank with Mr Davis, Mr Talbot, Attorney Hal Tynes and Phenyala Minnis, my daughter. The substance of the meeting relevant to this matter was that I would pay off Mr Talbot's mortgage and within 14 days of the receipt of the monies the Bank will provide me and/or my Attorney with a satisfaction of mortgage and the conveyance to the property and all documents that the Bank was holding as security for the said Mortgage.
- 4) Mr Davis as the agent and/or servant of Commonwealth Bank gave me an undertaking that the Bank would comply with this Agreement when I gave the Bank a check in the amount of \$103,258.69 to extinguish the debt.
- 5) After I paid my money to the Bank I never received the Satisfaction of Mortgage, conveyance or any other documentation from the Bank. I made requests to Mr Davis but he ignored my repeated requests for the satisfaction of mortgage and information.
- 6) I made numerous calls to Mr Davis for a period of 1 year and his excuse for not sending me the documents and Satisfaction of Mortgage was that Commonwealth Bank had given the documents to Tiffany Dennison, Attorney-at-law, and that she refused to return the documents to the Bank.
- 7) I then made attempts to speak with Mr Roberts, the Manager of Commonwealth Bank and he never gave me an appointment.
- 8) I then spoke with Mr Brent Symonette a Director and shareholder of Commonwealth Bank and explained to him the situation; and he gave me certain directives one of which was to contact Mr Hugh Sands, President of the Bank.
- 9) I spoke with Mr Sands and explained to him the situation and he directed me to speak with Ms Turnquest. I spoke with Ms Turnquest and she wrote a letter.

- 10) I state that Ms Turnquest confirmed that the documents were sent to Ms Dennison and numerous attempts were made by the Bank to have Ms Dennison return the documents and she refused to comply with the request.
- 11) I was later informed and I verily believe by an agent and/or servant of the Royal Bank of Canada that the conveyance of the said property was being sued [sic] by a Mr Lowe of Kelly's as security for financial facilities from the Royal Bank of Canada.
- 12) I was informed and I verily believe that Ms Tiffany Dennison would have orchestrated through her office a sale for the said property to Mr Lowe without the express authority of Mr Talbot and/or Commonwealth Bank.
- 13) I state that I have paid the Bank in respect of this loan \$103,258.69 and to date have not received as promised from the Bank the satisfaction of mortgage and the Conveyance.
- 14) Further, that I have not received any documentation from the Bank and Mr Talbot has defaulted in his agreement. As a consequence I have no security for my investment and I have lost opportunities to recover my investment through the repossession and sale of the said property.
- 15) I further state that Mr Almondo Talbot is willing and ready to convey the property to me as satisfaction for the monies that were given to Commonwealth Bank to extinguish his mortgage.
- 16) As a result of the above I have sustained damages loss and legal costs.

14. Under cross examination the plaintiff said that he had had multiple discussions with Mr Talbot prior to 15 August 2006 in regard to the Property; that during those discussions he expressed an interest in purchasing the Property. He said that in August 2006, Mr Talbot told him that the Property was available for sale because the person who had had an interest therein "did not pay him one cent".

15. According to the plaintiff, he told Mr Talbot that "the matter appeared to be a little complicated" and suggested he take Mr Talbot to a lawyer "to discuss the issues on the Property". They went to see the late Mr Hal Tynes. The plaintiff denied that Mr Talbot told him or his attorney that he and/or TEL had a contract with Kelly's for the sale of the Property to them.

16. The plaintiff said that he understood the "challenges" of which Mr Talbot spoke to be the problem he had raising funds to pay the Bank and his fear that the Bank would re-possess the Property.

17. In response to counsel for the 1st defendant's question as to whether Mr Talbot told the plaintiff that the Property was available, that is, not under contract, the plaintiff responded: "The Bank also told me that it was available when they accepted my money".

18. When asked by counsel for the 1st defendant whether his agreement with Mr Talbot and/or TEL through Mr Talbot was that he would pay off the balance of TEL's loan with the 1st defendant, the plaintiff responded: "No, no. That is not so, sir. It was not so. The agreement that we had was an agreement which my lawyer draw up that was

the official agreement...so whatever he draw up that is the one that I honoured and that is the one that I took to the Bank.”

19. When counsel for the 1st defendant asked the plaintiff whether his statement at paragraph 2 of his witness statement that he “entered an agreement with Mr Talbot to pay off the outstanding balance of the mortgage to the Bank” was inaccurate, the plaintiff responded: “It is accurate. That is the layman terms. That is not legal terms. The legal terms is [sic] when I went to my attorney.”

20. When counsel for the 1st defendant suggested to the plaintiff that no agreement had been made between him and the 1st defendant, or Mr Davis on behalf of the 1st defendant, that the 1st defendant would transfer its mortgage with TEL to him, the plaintiff responded “yes, he did. If he read it and asked for the cheque that means, yes.”

21. On another occasion, on the issue of the Bank’s alleged agreement to transfer its mortgage to the plaintiff, when asked by counsel for the 1st defendant whether he maintained that there was an agreement made with the Bank through Mr Davis to transfer the mortgage, the plaintiff responded: “it was to send all documents to his office and he would execute the sale between me and Mr Talbot.” When pressed on the issue by counsel for the 1st defendant, the plaintiff said “when Mr Davis read the letter, he read it and the cheque was presented to him, he in turn gave me a receipt and he in turn said it would be sent to me in 14 to 15 days time.”

22. The plaintiff eventually agreed with counsel for the 1st defendant that, according to Mr Tynes’ aforesaid letter, the plaintiff had an agreement to pay off Mr Talbot’s mortgage. However, he disagreed that that agreement called for TEL to give him, that is, the plaintiff, a mortgage. According to the plaintiff, the agreement was for him “to take over”; and when asked “take over what?” the plaintiff responded as follows:

“The Property...because me and his agreement was completely different from this portion. So basically, it was a sales agreement where first you had to satisfy the Bank and that is the reason why we requested him to send the other documents so that my lawyer could make sure that everything goes into my name...the agreement was that I purchase the Property. That is the most important thing...”

23. In response to Mr Adams’ suggestion that the Bank merely agreed to provide a satisfaction and undertook to get the title documents, the plaintiff said: “Then what you saying to me is, I was that ignorant; it means I loan Mr Talbot my money. That is what you are saying. What you are saying is I lend and I saying, no sir.”

24. The plaintiff said that although he became aware of the sale of the Property to Kelly’s after this action commenced, at the time he paid the aforesaid funds to the Bank, he was not aware that Mrs Dennison was representing Mr Talbot in a sale of the Property, or that the Property had been sold to Kelly’s.

25. The plaintiff agreed with counsel for the 1st defendant that his understanding of the obligations of the Bank were set out in the fifth paragraph of his 8 September 2008 letter to Mrs Turnquest as follows:

“It is also noted that you are aware of the obligation of your institution “to provide a Satisfaction of Mortgage” in this transaction, and it is my hope that your

institution is aware that a "Satisfaction of Mortgage" by definition, must include a return of the documents of conveyance involved in the Mortgage Agreement, and although it is more than two years since this loan was "paid in full", the creation of a legal obligation owed by your institution to satisfy and honour the retirement of the debt by presenting to the mortgagor the relevant documents, remains outstanding."[underline added]

26. On re-examination the plaintiff said that the written agreement to which he referred was the one written by Mr Tynes on 15 August 2006 which he understood to be saying that the satisfaction of mortgage and all documents ought to be sent directly to his lawyer, Mr Tynes; and that Mr Tynes "in turn" with him and Mr Talbot would "transfer the conveyance" to him.

27. By agreement between the parties, the late Mr Tynes' sworn witness statement filed on 3 May 2012, was allowed into evidence. In that statement, Mr Tynes averred as follows:

- 1) That I am an attorney-at-law and a member of the Bahamas Bar practicing in Freeport, Grand Bahama.
- 2) That on the 14th day of August 2006, I was retained by Mr Cyril "Boxer" Minnis in a property transaction.
- 3) That as a result of my instruction I phoned Commonwealth Bank Limited and spoke to Mr Davis, the Assistant Bank Manager, and informed him that my client was interested in paying off the mortgage loan of Mr Almondo Talbot and I asked him for the pay-out figure as at that date.
- 4) That on the 15th day of August 2006, I called Mr Davis and asked him for the pay-out figures on that date which he gave me as \$103,258.69.
- 5) That this information was passed on to Mr Minnis who along with myself, Mr Almondo Talbot and his daughter, went to Scotia Bank Limited and Mr Minnis got a bank draft in the amount of \$103,258.69.
- 6) That we then proceeded to a meeting at Commonwealth Bank Limited with Mr Davis. At the meeting, I expressly told Mr Davis that Mr Minnis was paying off this debt with the understanding that the Bank would transfer and/or assign the mortgage to Mr Minnis along with the original title documents and a Satisfaction of Mortgage. Mr Davis informed us and I believed him that the bank would provide a Satisfaction of Mortgage in short order.
- 7) That at no time did Mr Davis make us aware that there was a pending sale or any other encumbrances against this loan and/or the bank's inability to provide us with the documentation.
- 8) That on 11th January 2007 after an inordinate delay in receiving the documents requested in my letter of 15th August 2006, I again wrote to Commonwealth Bank requesting the original Title documents.
- 9) That to date, I have not received the original documents.

28. In her witness statement filed 5 October 2015, Denise Turnquest, the Bank's Senior Vice President, Credit Risk, states:

- 1) I make this witness statement based upon my knowledge and my review of the records maintained by Commonwealth Bank ("the Bank") in connection

with Almondo Talbot and Talbot Enterprises Limited in this Action, which I verily believe to be true and correct.

- 2) The Bank is a limited liability company duly licensed to carry on the business of, inter alia, Banking and lending in The Bahamas.
 - 3) That on or about 15 February 2008 I prepared a letter addressed to Almondo Talbot advising him of the outcome of an investigation I conducted concerning the mortgage account of Talbot Enterprises Limited.
 - 4) Subsequently, I received a letter of response from Mr Talbot dated 15 August 2008.
 - 5) Thereafter, sometime in the month of September 2008, I received a letter dated 8 September 2008 from T&M General Construction Ltd signed by Cyril Minnis, the plaintiff in this matter.
 - 6) The Bank is still in possession of the executed original Satisfaction of Mortgage and has delivered the original to its attorney Graham Thompson in preparation for trial.
29. The contents of the letters referred to by Ms Turnquest are set out hereunder:
February 15th 2008

Mr Almondo Talbot

...

Dear Mr Talbot:

Re: Talbot Enterprises Limited Mortgage Loan

We refer to our numerous conversations (Talbot/Turnquest) regarding the subject and particularly the documents of title related to the property which was mortgaged to us.

As promised, we have completed an investigation regarding this matter which included review of our files and interviews with Bank personnel, the Bank's attorneys, Ms Tiffany Dennison and Ms Constance McDonald. We also perused the Supreme Court Order handed down by the Honourable Mr Justice Norris Carroll in 2006.

Our files clearly reflect that the documents were sent to Ms Tiffany Dennison in escrow on May 9th 2006 to facilitate completion of a sale of the property to Kelly's Freeport Limited. Ms Dennison was acting for both Talbot Enterprises Limited and Kelly's Freeport Limited in the transaction. We confirm that there is an agreement for sale on our file duly executed by you.

Our files further reflect that the loan outstanding to Commonwealth Bank was repaid in full on August 15th 2006 by a manager's cheque drawn on the Bank of Nova Scotia by order of Cyril Minnis. Bank personnel have confirmed that you came in along with Mr Minnis and attorney Hal Tynes to effect the payment.

On August 15th 2006, Mr Lyndon Davis, Senior Assistant Manager of our Freeport Branch wrote to Ms Dennison requesting that she return the original

documents which she was holding in escrow to us. On August 31st 2006, Ms Dennison wrote to us acknowledging that the loan had been repaid in full but confirmed that she would continue to hold the documents in escrow as the matter was the subject of a Supreme Court Action.

We are advised by Ms Dennison that, as directed in the Supreme Court Order, the sale of the property was completed. Kelly's Freeport Limited financed the purchase with The Royal Bank of Canada and as a result, The Royal Bank of Canada is now holding the documents of title.

With regards to your claim that you have not been paid the proceeds of sale which has resulted in our demand for return of the documents, Ms Dennison advises that all costs as outlined in the Supreme Court Order were deducted from the proceeds of sale and a portion of the proceeds were used to complete the purchase of another property by Talbot Enterprises Limited (Ms Dennison acted for Talbot Enterprises Limited in this other matter also). Ms Dennison advises that the remaining funds were forwarded to Ms Constance McDonald, the attorney acting for you at the time by way of a Manager's cheque drawn on the Royal Bank of Canada, along with an accounting of the disbursement of the proceeds. This was also in accordance with the directive outlined in the Court Order. Ms McDonald has confirmed receipt of the Manager's cheque and advises that it is in your file in her office.

In conclusion, we confirm that the Bank is not in possession of your documents of title but rather these are (we are advised) held by The Royal Bank of Canada in support of a loan granted to Kelly's Freeport Limited to complete the purchase of the property from Talbot Enterprises Limited. Ms Constance McDonald is in possession of the remainder of the sales proceeds along with a detailed accounting of the disbursement of the sale proceeds. Presumably, these funds are being held to your order.

We are advised by our attorneys that the Supreme Court Order has not been set aside and therefore remains in effect. The sale of the property to Kelly's Freeport Limited was completed by the attorney representing you in that transaction in accordance with the terms of the Supreme Court Order. Additionally, as the mortgage debt owed by Talbot Enterprises Limited to our Bank was satisfied, upon completion of your sale of the property to Kelly's Freeport Limited, the purchaser became entitled to take custody and possession of the documents of title. Commonwealth Bank Limited currently has no claim to the documents of title.

We are obligated to provide a Satisfaction of Mortgage and we are in the process of having this prepared for execution and delivery to you in short order.

We trust that the preceding fully answers your query with regard to your documents of title.

Yours faithfully

Denise D Turnquest

...

August 15th, 2008

Ms Denise D Turnquest

...

Dear Madam:

Re: Your letter dated February 15th, 2008

We refer to the captioned regarding the PAID MORTGAGE loan of Talbot's Enterprises Limited and note that although in the paragraph before the final sentence you stated that your esteemed organization "are obligated to provide a satisfaction of mortgage" and that "we are in the process of having this (satisfaction of mortgage) prepared for execution and delivery to you in short order." [sic]

Interestingly, the best of this response to the captioned is exactly Six Months later and the satisfaction of mortgage has still not yet been received; but it is so very noticeable that without any written instructions from myself MY DOCUMENTS "were sent to Mrs Tiffany Dennison in escrow on May 9th, 2006" by yourselves, "to facilitate the completion of a sale of my company's property to Kelly's Freeport Limited."

We note also that you further state in your communication that Mrs Dennison was acting for both my company and Kelly Freeport Limited in that purported transaction, and that "we confirm that there is an agreement for sale on our file duly executed by you."

I presume that Mrs Dennison has produced for the satisfaction of yourselves, documents duly executed by myself and therefore legally representing my company in a legitimate transaction.

We appreciate the cordial services given by yourselves in the past and look forward to receiving whatever documents that is due to me within the next 14 clear days.

We close with our thanks.

Yours respectfully,

Almond Talbot

...

September 8th 2008

Ms Denise D Turnquest

...

Dear Ms Turnquest

Re: Talbot Enterprises Limited Mortgage Loan

The captioned was retired on August 15th 2006, as per paragraph four of your letter dated February 15th 2008, to Mr Almondo Talbot, in regard to the status of the original documents for the mortgaged properties, the loan over which properties having been repaid 'in full' by a Manager's cheque drawn on the Bank of Nova Scotia by order of the undersigned Cyril Minnis.

According to your letter of February 15th 2008 those "original documents were sent to Ms Tiffany Dennison in escrow on May 9th 2006 to facilitate completion of a sale of the property to Kelly's Freeport Limited".

When I paid off the loan on August 15th 2006 there was no sale of those properties in effect between Talbot Enterprises Limited and Kelly's Freeport Limited to my knowledge, and if your institution was aware of any such transaction, then the acceptance of my cheque on August 15th 2006, was a fraudulent transaction in which I became a victim.

I note very carefully that I was not copied on this February 12th 2008 communication, although it is apparent from your files that the loan for those properties were [sic] paid by myself, and for all intents and purposes, I would stand in the stead of your institution by the acceptance of my payment of the indebtedness, and as such should have been copied.

It is also noted that you are aware of the obligation of your institution "to provide a Satisfaction of Mortgage" in this transaction, and it is my hope that your institution is aware that a "Satisfaction of Mortgage" by definition, must include a return of the documents of conveyance involved in the Mortgage Agreement, and although it is more than two years since this loan was "paid in full", the creation of a legal obligation owed by your institution to satisfy and honour the retirement of the debt by presenting to the mortgagor the relevant documents, remains outstanding.

In closing I wish to advise that this matter has been left hanging for too long. The purported contract for sale of the property is prima facie, null and void and if there is no satisfactory conclusion of this unusual situation within fourteen days I would be forced to take any legal step necessary to realize my rights.

I look forward to a prompt response to this communication, and remain;

Yours faithfully

Cyril Minnis

...

30. Under cross-examination Ms Turnquest agreed with Mr Shurland that at the time the aforesaid mortgage was paid off Mr Talbot was entitled to receive whatever security he had left with the Bank; that the bank owed Mr Talbot a duty to provide him with the security documents and a satisfaction of mortgage.

31. The parties also relied on several pieces of correspondence and other documentary evidence contained in the agreed bundle of documents.

32. The issues that arise for consideration, from the plaintiff's perspective, are as follows:

- 1) Whether or not there was a contract between the plaintiff and the defendant to keep the mortgage of Mr Talbot alive for the plaintiff once the debt is paid?
- 2) Whether or not the plaintiff had the right of a first mortgagee and was entitled to possession of the security for the mortgage?
- 3) Whether or not the plaintiff is entitled to be subrogated to the first charge to the extent that the plaintiff's money was used to discharge the mortgage debt of Mr Talbot?
- 4) If answered in the affirmative, what remedy is due to the plaintiff because of his subrogated rights?

33. Those identified by the defendant, are as follows:

- 1) Whether the plaintiff and 1st defendant made a legally enforceable agreement whereby the 1st defendant agreed to transfer their mortgage over the property to the plaintiff in exchange for the plaintiff satisfying the mortgage debt owed by TEL to the 1st defendant?
- 2) Whether the 1st defendant is legally obligated to deliver to the plaintiff the original title documents relating to the property?
- 3) As the 1st defendant has not delivered to the plaintiff the original title documents relating to the property, is the 1st defendant liable to pay damages to the plaintiff?

34. The plaintiff, at paragraphs 6 through 12 of his statement of claim, pleads as follows:

- 6) That by an Offer in writing dated 15th August 2006 from Mr Hal O Tynes, Esq, Counsel and Attorney-at-Law to the Manager, Commonwealth Bank Limited, Freeport, Mr Tynes as representing the plaintiff herein, Cyril Livingstone Minnis, informed the 1st defendant's Freeport Branch Management, that the plaintiff had "agreed" with the 2nd defendant "to pay off the debt owed by the 2nd defendant's company, Talbot's Enterprises Limited, to the 1st defendant" in exchange for Talbot's Enterprises Limited Mortgaging the captioned property to him."
- 7) The caption of Mr Tynes said letter was as follows Re: Mortgage by Talbot's Enterprises Limited of Lots 10, 11 and 12, Civic Industrial Park, Freeport, Grand Bahama to Commonwealth Bank Limited.
- 8) The "OFFER" having been accepted by the 1st defendant, the plaintiff paid the 1st defendant on the same date as the said letter in the form of a manager's cheque drawn on the Bank of Nova Scotia, "the sum of One

Hundred and Three thousand Two Hundred and Fifty Eight Dollars and Sixty Nine Cents (\$103,258.69) in satisfaction of the debt due to Commonwealth Bank Limited" the said 1st defendant.

- 9) The plaintiff delivered the said "manager's cheque" to the 1st defendant's premises on the Mall, Freeport, Grand Bahama, in person accompanied by the said Mr Tynes and the said 2nd defendant.
- 10) In the letter of 15th August 2006, Mr Tynes stated inter alia: "I should be grateful, therefore, if you would forward the Title documents reference the captioned property to my firm together with the name of the individual authorized to execute a Deed of Transfer of Mortgage from Commonwealth Bank Limited to Mr Minnis. I will then prepare and forward the same to your bank for execution."
- 11) Having not received any documents regarding this transaction and also having been given a copy of a letter dated February 15th, 2008, with the caption "Re: Talbot Enterprises Limited Mortgage Loan" with the 1st defendant's letterhead, to the 2nd defendant, which letter was signed by one "Denise D Turnquest, Vice President, Mortgage and Commercial Lending," informing the 2nd defendant inter alia that: "the documents were sent to Ms Tiffany Dennison in escrow on May 9th, 2006 to facilitate completion of a sale of the property to Kelly's Freeport.
- 12) As a result of the breach of contract by the 1st and 2nd defendants and the illegal possession of documents rightfully belonging to the plaintiff by the 3rd defendant, the plaintiff has suffered loss and damages.

35. The contents of Mr Tynes' 15 August 2006 letter upon which the plaintiff relies to prove his claim are set out hereunder:

"I represent Mr Cyril Minnis who has agreed to liquidate Talbot's Enterprises Limited's debt to Commonwealth Bank Limited in exchange for Talbot's Enterprises Limited mortgaging the captioned property to him. In the circumstances, I am enclosing herewith a manager's cheque in the sum of One Hundred and Three Thousand Two Hundred and Fifty-eight dollars and Sixty-nine Cents (\$103,258.69) in satisfaction of the debt due to Commonwealth Bank Limited. I should be grateful, therefore, if you would forward the title documents referenced the captioned property to my firm together with the name of the individual authorized to execute a deed of transfer of mortgage from Commonwealth Bank to Mr Minnis. I will then prepare and forward the same to your bank for execution.

I thank you in advance for your cooperation and look forward to hearing from you in the very near future"

36. There is no evidence of any written response to Mr Tynes' said letter having been provided by or on behalf of the 1st defendant, although the plaintiff under cross-examination asserted that by accepting his cheque, Mr Davis, on behalf of the Bank, agreed to the terms of Mr Tynes' said letter.

37. The evidence is that on or about 15 August 2006, the plaintiff along with his lawyer, Mr Hal Tynes, now deceased, the plaintiff's daughter, and Mr Talbot, went to the Bank where they met with Mr Lyndon Davis, the Bank's Senior Assistant Manager, to whom they presented the aforesaid letter and a cheque in the sum of \$103,258.69,

being the sum Mr Davis had previously advised was necessary to discharge TEL's indebtedness to the Bank. Mr Davis accepted the cheque on behalf of the 1st defendant.

38. Counsel for the plaintiff submits that a contract, binding upon the defendant, was created between the plaintiff and the defendant when Mr Davis agreed to accept the plaintiff's money to discharge Mr Talbot's aforesaid mortgage debt; and that the express term of that contract was that the defendant would release the security for the mortgage and the satisfaction of mortgage to the plaintiff upon payment of the aforesaid sum to the 1st defendant. Further, that in breach of that contract, the 1st defendant has refused to forward the said satisfaction of mortgage and security documents to the plaintiff.

39. On the other hand, counsel for the 1st defendant argues that there was and is no agreement between the 1st defendant and the plaintiff that created an obligation on the part of the 1st defendant to deliver to the plaintiff the aforesaid documents of title. Therefore, counsel argues, the 1st defendant was under no obligation to provide the plaintiff the documents of title as alleged. Further, counsel submits, the plaintiff has produced no evidence to show that he had any legal right to the said documents or a right to assert a claim for the same.

40. It is unclear from the plaintiff's testimony the precise nature of his agreement with Mr Talbot, that is: whether he was to have purchased the Property from TEL or simply advance funds to Mr Talbot to enable TEL to pay off its then existing mortgage with the 1st defendant in exchange for which TEL would give the plaintiff a mortgage over the Property.

41. However, it appears from Mr Tynes' said letter, that as between the plaintiff and the 1st defendant, the proposal was that in exchange for the plaintiff paying to the 1st defendant the funds necessary to discharge TEL's indebtedness to the 1st defendant, the 1st defendant would:

- 1) Forward to the plaintiff or his attorney the title deeds held by the 1st defendant as security for the aforesaid loan to TEL; and
- 2) Execute a transfer of mortgage in favour of the plaintiff, which document was to be prepared by Mr Tynes upon receipt by him of the name of the person authorised to execute such documents on behalf of the 1st defendant.

42. Further, Mr Tynes' evidence (paragraph 6 of his witness statement) is that at the aforesaid meeting, he expressly told Mr Davis that the plaintiff was paying off the debt with the understanding that the Bank would transfer and/or assign the mortgage to the plaintiff along with the original title documents and a satisfaction of mortgage; that, Mr Davis informed him, and he, Mr Tynes, believed Mr Davis, that the Bank would provide a satisfaction of mortgage in short order.

43. The law is clear. To constitute a valid agreement there must be a simple acceptance of the terms proposed. *Holland v Eyre* (2 Sim. & St. 194). Further, where an offer has been made but the terms are not accepted and there is a counteroffer, the counteroffer puts an end to the original offer. See *Hyde v Wrench* [1840] 49 ER 132.

44. So, while it may be gleaned from Mr Tynes' 15 August 2006 letter that an "offer" was being made on behalf of the plaintiff to extinguish TEL's debt to the Bank, in exchange for the Bank executing a deed of transfer of mortgage in favour of the plaintiff,

in addition to forwarding the title deeds for the Property to Mr Tynes, there is no evidence that that “offer” was accepted. Instead it appears that Mr Davis, on behalf of the Bank, “counter-offered” to “provide a satisfaction of mortgage in short order”.

45. I note here that although Mr Tynes’ evidence is that he expressly mentioned the satisfaction of mortgage when he spoke to Mr Davis, no mention of a satisfaction of mortgage was made in his 15 August 2006; and, in my view, understandably so, since a satisfaction of mortgage would, in my view, have been inconsistent with Mr Tynes’ proposal that the Bank assign its mortgage to the plaintiff.

46. Nevertheless, it seems to me that when Mr Davis “counter-offered” to “provide a satisfaction of mortgage in short order”, Mr Tynes and/or the plaintiff, both of whom were present at the meeting, should have pointed out to Mr Davis that the plaintiff was not asking the Bank to provide him with a satisfaction of mortgage, but rather he was proposing that the Bank transfer its mortgage to him in exchange for him paying off TEL’s aforesaid indebtedness.

47. However, there is no evidence that either Mr Tynes or the plaintiff, or for that matter, Mr Talbot who was also present at the meeting, said anything to Mr Davis to indicate that they were of the view that he had misunderstood the plaintiff’s proposal or to clarify for him what the plaintiff was proposing in exchange for his payment of TEL’s debt. Nor is there any evidence that Mr Davis was asked to return the cheque as it was not being accepted on the conditions with which it had been tendered.

48. Instead, the cheque was left with Mr Davis and the plaintiff and his lawyer departed the Bank, apparently in agreement with Mr Davis’ “counter-offer” on behalf of the Bank to provide a satisfaction of mortgage in short order.

49. I note here the plaintiff’s assertion under cross-examination that by accepting his cheque the Bank agreed to provide a deed transfer of mortgage. However, in my judgment, there is no evidence that Mr Davis, on behalf of the Bank, or any other officer of the Bank, agreed to transfer the Bank’s said mortgage to the plaintiff.

50. When it was put to him by counsel for the 1st defendant that Mr Davis at the time did not say to anyone in the meeting that the Bank would provide a deed of transfer of the mortgage, the plaintiff said: “Yes, he did. If he read and asked for the cheque that means, yes”.

51. However, as counsel for the 1st defendant points out, that evidence by the plaintiff under cross-examination is inconsistent with what he stated on several occasions in his evidence-in-chief, specifically at paragraphs 3, 5, 6 and 13 of his witness statement, which, in a nutshell is that the Bank was to send to him or his attorney a satisfaction of mortgage and the title documents. Indeed, nowhere in his evidence-in-chief did the plaintiff refer to a deed of transfer or an assignment of mortgage.

52. Furthermore, when the plaintiff wrote to the Bank on 8 September 2008, more than two years after the aforesaid 15 August 2006 letter, although he referred to the satisfaction of mortgage and the title documents, he made no mention of a deed of transfer or assignment of mortgage.

53. Additionally, while in his witness statement Mr Tynes' said that Mr Davis at no time made them aware that there was "a pending sale or any other encumbrances against the loan and/or the Bank's ability to provide them with the documentation", no mention was made by Mr Tynes of any agreement having been made between the Bank and himself, as attorney for the plaintiff, pertaining to a transfer or assignment of mortgage.

54. And, while counsel for the plaintiff put several questions regarding the provision of a satisfaction of mortgage by the Bank to Ms Turnquest, he put no questions to her regarding a purported deed of transfer or assignment of mortgage.

55. Additionally, in her 15 February 2008 letter to Mr Talbot, Ms Turnquest, after setting out the sequence of events in relation to the issues before the Court, acknowledged that the Bank was obligated to provide a satisfaction of mortgage and advised that the Bank was in the process of having the same prepared and executed for delivery to him. No mention was made by Ms Turnquest of a transfer or assignment of mortgage.

56. I agree with counsel for the defendant that the inference to be drawn from the plaintiff's reliance on Ms Turnquest's 15 February 2008 letter in support of his claim that the Bank was obligated to provide a satisfaction of mortgage, is that he admits that the provision of a satisfaction, together with the usual return of the original title documents, was the Bank's only obligation upon payment of the moneys due under the mortgage.

57. Moreover, I note that neither Mr Talbot nor the plaintiff made any mention of a transfer of mortgage in their respective responses to Ms Turnquest's aforesaid letter.

58. Indeed, in his 8 September 2008 response, the plaintiff wrote, inter alia:

"It is also noted that you are aware of the obligation of your institution "to provide a Satisfaction of Mortgage" in this transaction..."

59. In my judgment, then, the plaintiff has failed to prove that there was an agreement between himself and the 1st defendant whereby the 1st defendant would transfer its mortgage over the Property to him in exchange for him satisfying the mortgage debt owed by TEL to the 1st defendant.

60. Furthermore, while there is no dispute that the Bank upon payment of the funds necessary to satisfy its mortgage, was obliged to release the security documents, there is no evidence of any agreement on behalf of the Bank to release those documents to the plaintiff or his attorney.

61. It is unfortunate for the plaintiff that, having presented Mr Davis with the aforesaid cheque for \$103,258.69, he and his attorney left the Bank without anything in writing from Mr Davis, on behalf of the Bank, confirming the terms upon which the aforesaid payment had been made or accepted.

62. Furthermore, although Mr Talbot was also present when the cheque was presented to Mr Davis, there is no evidence that he, at the time, or subsequently, gave any directions to the Bank with regard to how the Bank should deal with the security documents and/or the satisfaction of mortgage.

63. In the circumstances, I accept the submission of counsel for the 1st defendant that the fact that the plaintiff nor his attorney requested the return of the cheque upon Mr Davis confirming that the Bank would provide a satisfaction of mortgage in short order, but instead leaving the cheque with Mr Davis, is cogent and conclusive evidence that the plaintiff and his then attorney accepted the terms under which the Bank accepted the cheque: namely, that in exchange for the plaintiff paying to the Bank the aforesaid sum of \$103,258.69 to liquidate TEL's debt to the Bank, the Bank would prepare and provide a satisfaction of mortgage "in short order".

64. The question arises as to whom was the 1st defendant obligated to provide the said satisfaction of mortgage?

65. There is no dispute that upon payment of a loan secured by a mortgage over real property, the borrower is entitled to the return of all documents held by the lender as security for the loan, along with a duly executed satisfaction of mortgage or re-conveyance of the property in his favour, unless the borrower directs otherwise.

66. In that regard, clause 3 of the said mortgage states:

"Provided always and it is hereby expressly agreed and declared that if the borrower shall repay to the Bank all principal moneys with interest thereon on demand or otherwise without any deduction then in such case the bank shall at the request and expense of the borrower execute and do all such acts deeds and things as may be necessary for re-conveying the said hereditaments unto and to the use of the Borrower or as he may direct or re-assign the said chattels to the borrower or as he may direct."

67. Further, section 32 of the Conveyancing and Law of Property Act provides, inter alia, that upon payment of the funds necessary to discharge the mortgage debt, the estate of and in the Property shall vest "in the person for the time being entitled to the equity of redemption without a re-conveyance."

68. In the ordinary course of events, therefore, upon payment of the aforesaid mortgage debt, TEL would have been entitled to the equity of redemption in the mortgaged property, unless, of course, the same had earlier been disposed thereof.

69. In that regard, clause 6(6) of the said mortgage provided that TEL could not dispose of its equity of redemption in the Property without the previous consent in writing of the Bank and there is no evidence that any such consent had been given or requested with respect to the plaintiff.

70. Consequently, I find that upon payment of the aforesaid mortgage the Bank was obligated to provide TEL with a re-conveyance or satisfaction of mortgage and to return to TEL the documents of title held by the Bank as security for the aforesaid debt, unless, of course, TEL directed otherwise.

71. There is no evidence that TEL, at the time the plaintiff paid the Bank, or subsequently, ever direct the Bank to provide a satisfaction of mortgage and or deliver the title documents to the Property to the plaintiff. Indeed, Mr Talbot, two years after the aforesaid payment, by letter dated 15 August 2008, was still asking the Bank to forward the documents to him; and the plaintiff has adduced no evidence to show that he had

acquired the equity of redemption from TEL, with or without the written consent of the 1st defendant, that would have entitled him to those documents.

72. I also note that on 29 September 2006, Attorney Fayne Thompson, purportedly acting on behalf of TEL, wrote to the Bank and asked that the Bank return “all of the title deeds and documents which [the Bank] may have for Mr Talbot.”

73. Moreover, it appears from his cross-examination of Ms Turnquest that counsel for the plaintiff also accepted that, as between TEL and the plaintiff, it was TEL and not the plaintiff to whom the 1st defendant was obligated to provide a satisfaction of mortgage.

74. The following excerpts from Mr Shurland’s (Q) cross-examination Ms Turnquest (A) are instructive:

Q: “...Mr Talbot – at the time this mortgage was paid off, he was entitled to receive whatever security he had left with the Bank. Is that correct?”

A: Yes sir.

Q: Did the Bank owe Mr Talbot a duty as a loyal customer to provide him with the security and a satisfaction of mortgage that they took that was pledged for the loan? Did they owe him that duty to provide that and return that to him?

A: Yes sir.

Q: And that didn’t happen, did it?

A: It did not.

75. On another occasion:

Q: You know why he [meaning Mr Adams] is holding on to Mr Talbot’s satisfaction?

76. Counsel for the plaintiff then told Ms Turnquest that she should “give Mr Talbot his satisfaction of mortgage” and “let him do what he wants to do with it.”

77. I, therefore, find that there was no express agreement between the plaintiff and the 1st defendant for the 1st defendant to release the aforesaid security documents and satisfaction of mortgage with respect to its said mortgage with TEL to the plaintiff upon payment by the plaintiff of the sum of \$103,258.69 to the 1st defendant.

78. In the circumstances, in the absence of directions from TEL, or an express agreement between the plaintiff and the 1st defendant to do so, the 1st defendant was, in my judgment, under no legal obligation to forward to the plaintiff a satisfaction of mortgage or the documents of title to the Property held by the Bank as security for its loan to TEL, notwithstanding it was the plaintiff’s funds with which the said loan was satisfied.

79. Moreover, the evidence is that at the time the Bank received the aforesaid funds from the plaintiff, the title documents were no longer in the Bank’s possession, the same having been previously forwarded to Dennison & Co. to be held in escrow pending

completion of a sale by TEL to Kelly's, pursuant to an agreement for sale signed by Mr Talbot.

80. In that regard, the evidence, which I accept, is that on or about 9 February 2006, TEL, by its principal, Mr Talbot, signed a letter of intent for the sale of the Property to Kelly's. On 1 March 2006, Mrs Dennison wrote to the Bank, advised that she represented Mr Talbot in connection with the sale of the Property and requested "copies of the original documentation" held by the Bank in order to conduct a title search on the Property. Although, at the time, Dennison & Co also represented the purchaser, Kelly's, that information was not disclosed in their said 2006 letter.

81. By letter dated 20 March 2006, the Bank forwarded "copies of the backing sheet of the original documents" to Dennison & Co., and by letter dated 9 May 2006, the original documents of title relating to the Property were delivered by the Bank to Dennison & Co. "in escrow pending Mr Talbot's indebtedness" to the Bank.

82. Approximately two weeks after receipt of the aforesaid cheque from the plaintiff, the Bank, by letter dated 28 August 2006, requested the return of the original title documents from Dennison & Co.

83. However, instead of returning the said documents, Dennison & Co., on 31 August 2006, informed the Bank that the sale to Kelly's had been completed; that they were "unable to release the documents at this time"; and that the documents would "remain held in escrow until determination of the issues herein, now the subject of Supreme Court litigation."

84. Several more requests for the return of the said documents were apparently made of Dennison & Co., who not only did not honour the escrow terms and return the documents to the Bank, but who also, by letter dated 16 March 2007 to Graham, Thompson & Co., advised that they no longer held the original documents of title as they had been sent to The Royal Bank of Canada, "per their mortgage terms with Kelly's".

85. Additionally, by letter dated 19 January 2007, Dennison & Co. provided the 1st defendant with a copy of an Order by Justice Norris Carroll (Acting) in which the learned Judge effectively ordered specific performance of the aforesaid agreement for sale between TEL and Kelly's.

86. While it appears from the copy Order adduced in evidence that the same was filed on 18 January 2007, there is no indication on the face of that copy of the date when the Order was, in fact, granted. However, a perusal of the judge's notes revealed that the Order was granted at a hearing before Carroll J (Acting) on 30 November 2006, several months after the Bank's first request of Dennison & Co. for the return of the title deeds.

87. It also appears, on the face of the copy Order that the application there for was made by Dennison & Co. on behalf of Kelly's via summons filed 4 August 2006, prior to the date of the aforesaid payment by the plaintiff, but a day after Mrs Dennison's 3 August 2006 letter to the Bank in which she stated that she had been advised by Mr Talbot that TEL's obligations with the Bank had been satisfied.

88. According to the aforesaid summons, the same was for an “application by [Kelly’s] to set aside the Order of Justice Carroll dated August 3rd, 2006, and for further declarations and Orders pertaining the property situate at Lots 10, 11 and 12 Block K Civic Industrial Area...”

89. The 3 August 2006 Order to which the above-mentioned summons referred was an order granted ex parte by Carroll, J (Acting) to, Mr Talbot and TEL, the plaintiffs in that action who, at the time, were presented by Fayne Thompson, whereby the learned judge restrained Kelly’s from trespassing on the Property.

90. On the face of the said copy Order, the hearing before Carroll, J (Acting) was attended only by Mrs Dennison apparently in her capacity as counsel for the applicant, Kelly’s, but who, as I said, had previously represented both parties in the sale and purchase of the Property. There is no indication on the said copy Order that the plaintiffs named therein, namely, Mr Talbot and TEL, or their attorney, had participated or were invited to participate in the hearing.

91. As pointed out by counsel for the 1st defendant, that Order has not been set aside.

92. The Order reflects that the learned judge treated the application as having been made under section 4 of the Conveyancing and Law of Property Act, chapter 138, Statute Laws of The Bahamas, which provides as follows:

“4(1) A vendor or purchaser of land in The Bahamas, or his representatives respectively, may at any time or times and from time to time apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract) and the court shall make such order upon the application as to it shall appear just, and shall order how and by whom all or any of the costs of, and incidental to, the application shall be borne and paid.”

93. Also included amongst the documentary evidence are two copies of a conveyance from Talbots Enterprises Limited to Kelly’s Freeport Limited: one copy, executed but unstamped and unrecorded, is dated 17 May 2006; the other is dated 19 June 2006 and has been duly stamped and recorded in the Registry of Records in Book 9859 at pages 309 to 316. It is obvious from an inspection of that latter document that the date was altered. I note further that that document was lodged for record by Higgs & Kelly on 11 December 2006.

94. While there is no evidence that either the plaintiff or the 1st defendant was, at the date of the aforesaid payment, that is, 15 August 2006, aware of the existence of the executed conveyance, it is clear that at that date, TEL had already conveyed its interest in the Property to Kelly’s. A fact which must certainly have been known to Mr Talbot.

95. In light of the aforesaid Order by Carroll J (Acting), counsel for the 1st defendant invited the Court firstly, to take judicial notice of the fact that Kelly’s and not the plaintiff was entitled to the documents of title relating to the Property; and secondly, to find consequently that the plaintiff is not entitled to the documents of title as he asserts and claims.

96. In the case of *Hackett v Inverugie Investments Ltd* [1989-90] 1 LRB 484, 490, Chief Justice Gonsalves-Sabola, as he then was, cited with approval the decision of the Privy Council in the case of *Isaacs v Robertson* [1984] 3 All ER 140; [1985] AC 97, where the Court opined that: “an order made by a court of unlimited jurisdiction (the Supreme Court being such a court) has to be obeyed by the person against whom it was made and this was so even though the order was liable to be set aside by the court on application made to that end.”

97. I note here, that although the said Order was not made against or directed to the 1st defendant, it was made against and directed to Mr Talbot and TEL who were, in my judgment, obliged to obey the same, which, in this case, meant completing the sale to Kelly's.

98. As I have found, the Bank was obligated by the mortgage and the provisions of the Conveyancing and Law of Property Act aforesaid to provide TEL with a satisfaction of mortgage or re-conveyance and to release the security documents thereto.

99. Pursuant to the aforesaid Order of Carroll, J (Acting), upon completion of the sale of the Property to Kelly's, Kelly's was entitled to the title documents with respect thereto, unless, of course, Kelly's directed otherwise.

100. In that regard, the evidence is that Kelly's completed the purchase of the Property with the assistance of a loan from The Royal Bank of Canada secured by a mortgage on the Property and consequently, Dennison & Co. forwarded the said title documents to that bank to be held as security for their loan to Kelly's.

101. In the circumstances, I am constrained to agree with counsel for the 1st defendant that in light of the aforesaid Order of Carroll, J (Acting), notwithstanding that the loan to TEL was discharged from moneys advanced by him, the plaintiff is not entitled to the documents of title as he asserts and claims.

102. So, having found that there was no express agreement between the plaintiff and the Bank for the Bank to deliver the title documents to the Property to the plaintiff; and that there was no legal obligation on the part of the Bank to forward a satisfaction of mortgage and or the title documents to the Property to the plaintiff, and having found that pursuant to the aforesaid Order of Carroll, J (Acting) that Kelly's, as purchaser of the Property from TEL, is entitled to possession of the documents, the plaintiff's claim for damages with respect to the Bank's failure to deliver a satisfaction of mortgage and the title documents to the Property to him must fail, and I so find.

Keeping the mortgage alive

103. In addition to his submission that there was an express term in the alleged agreement between the plaintiff and the 1st defendant that the 1st defendant would release the satisfaction of mortgage and the said title documents to the plaintiff, counsel for the plaintiff also argued that “it is clear from Mr Tynes' said letter, that it was an implied term of the alleged agreement that the 1st defendant would keep the mortgage alive for the plaintiff's benefit.”

104. In counsel for the plaintiff's submission, “keeping the mortgage alive” meant that the Bank had a responsibility of holding the mortgage security in escrow for the plaintiff's benefit.

105. According to Lord Jenkins in the Privy Council case of *Ghana Commercial Bank v Chandaran* [1960] 2 All ER 865, on appeal from the Court of Appeal of Ghana: "it is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit": see *Butler v. Rice* [1901] 2 Ch 277.

106. Lord Hoffman in the case of *Banque Financière de la Cité v Parc (Battersea) Ltd and others* [1998] 1 All ER 737, said that when judges say that the charge is 'kept alive' for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the charge had been assigned to him. It does not by any means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched. Per.

107. It seems to me that Mr Tynes' letter proposing that the Bank execute a transfer, rather than a satisfaction, of mortgage may be presumed to have been an intention on the part of the plaintiff that the mortgage be kept alive for his benefit, at least until he was able to obtain a valid mortgage from TEL as indicated in Mr Tynes said letter.

108. In my judgment, however, that presumption has been rebutted by the subsequent behaviour of the parties.

109. As indicated, when presented with Mr Tynes' aforesaid letter and the plaintiff's aforesaid cheque, Mr Davis promised to provide a satisfaction of mortgage in short order. No follow-up request was made for a transfer of mortgage nor is there any evidence of the plaintiff, his counsel, or anyone else for that matter, telling the Bank not to prepare a satisfaction of mortgage before the plaintiff had obtained a valid mortgage from TEL. Indeed, the plaintiff's action against the 1st defendant is for its alleged breach in failing to deliver the satisfaction of mortgage and title deeds to the plaintiff, for which several requests had been made.

110. In my judgment then, the plaintiff's acceptance of the Bank's offer to provide a satisfaction of mortgage in exchange for his payment of TEL's debt to the Bank, rebutted any presumption on his part that he intended that the mortgage be kept alive for his benefit.

111. Further, as opined by Lord Hoffman, in a case in which the whole of the secured debt is repaid, the charge is not kept alive at all. It is discharged and ceases to exist. See *Banque Financière de la Cité v Parc (Battersea) Ltd and others* [1998] 1 All ER 737 at 749.

112. In any event, the evidence is that the 1st defendant has executed a satisfaction of mortgage and has delivered the same to its attorneys, who are awaiting a determination in these proceedings as to whom the same should be delivered.

113. In the circumstances, I find that the 1st defendant having agreed to provide, and having in fact executed, a satisfaction of mortgage in exchange for the plaintiff having paid off TEL's indebtedness to the Bank, there was no agreement, express or implied, between the Bank and the plaintiff that the 1st defendant/Bank would keep its mortgage alive for the benefit of the plaintiff once TEL's debt to the Bank had been paid.

Subrogation

114. As indicated, one of the issues identified by counsel for the plaintiff is whether or not the plaintiff is entitled to be subrogated to the first charge to the extent that the plaintiff's money was used to discharge the mortgage debt of Mr Talbot.

115. In that regard, the plaintiff alleges in his statement of claim that he is "the subrogee in place of the 2nd defendant" and he includes the following "particulars of loss":

- 1) Deprivation of peace, enjoyment and financial benefits of property due to 1st and 3rd defendants' withhold[ing] of possession of properties' documents referencing the LEGAL SUBROGATION transaction of 15th August 2006 between the plaintiff and 1st and 2nd defendants.
- 2) As regarding [the 3rd defendant] the plaintiff states that the 3rd defendant having obtained the properties' documents only to hold in escrow by herself is in breach of a Fiduciary duty to transfer those documents to the plaintiff who for all intents and purposes is the legal and beneficial ownership [sic] flowing to himself by the CONVENTIONAL SUBROGATION transaction of 15th August 2006 between the plaintiff and the 1st and 2nd defendants.

116. As indicated, by the time this trial concluded, the 2nd and 3rd defendants were no longer parties to these proceedings.

117. Counsel for the plaintiff makes the following assertion at paragraph 2 of his written closing submissions:

"...the plaintiff is relying on the scope of the equitable remedy of subrogation for the court to enforce his rights and order the [1st] defendant to turn over possession of the documents relating to the Property, a satisfaction of mortgage, damages, interest and costs."

118. Counsel for the plaintiff then argues that, having paid off the mortgage with the 1st defendant, the plaintiff became subrogated to the "rights of Mr Talbot in accordance with the law" and that the equitable remedy of subrogation is available against the 1st defendant, "which is the only party which would be unjustly enriched". In his submission, in the absence of subrogation, the 1st defendant would be enriched at the plaintiff's expense and, that *prima facie* such enrichment would be unjust.

119. In support of those arguments, counsel for the plaintiff cited a number of authorities, including *Orakpo v Manson Investments Ltd* [1978] AC 85; *Chetwynd v Allen* [1988] 1 Ch 353; *Butler v Rice* [1910] 2 Ch 277; *Ghana Commercial Bank v Chandiram*— [1960] AC 732; *Boscawen v Bajwa*[1996] 1 WLR 328; *Paul v Speirway Ltd* [1976] Ch 220[1976] Ch 220; *Boodle Hatfield & Co v British Films Ltd* [1986] PCC 176; and *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643.

120. While counsel for the 1st defendant does not dispute the law on the doctrine of subrogation, he disagrees with counsel for the plaintiff's application thereof to the facts of this case.

121. In counsel for the 1st defendant's submission, there can be no claim in law or in equity for subrogation or restitution as against the 1st defendant, a secured creditor

whose debt has been satisfied. Rather, counsel submits, the remedy is available against the person or entity enjoying the benefit of a secured debt being discharged by another. In this case, counsel for the Bank argues, that would be TEL, as it is TEL whose debt has been discharged and it is TEL who did not itself contribute to the repayment of that debt. Therefore, counsel for the 1st defendant submits, it is TEL and not the 1st defendant who has been unjustly enriched at the plaintiff's expense.

122. The general principle (as is evident from the above-mentioned authorities), is that a person who advances money which is used to discharge a security will normally be subrogated to the rights under that security against a borrower or subsequent incumbrancer, even though there has been no actual transfer of the security.

123. Lord Hoffman in the case of *Banque Financiere de la Cité v Parc (Battersea) Ltd supra* opined that "subrogation" may be a "contractual arrangement for the transfer of rights against third parties" but that "the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment". He described the former as being part of the law of contract and the latter as part of the law of restitution.

124. In the case of the law of contract, Lord Hoffman said that the doctrine of subrogation rests upon the common intention of the parties, as in the case of insurance claims, and gives effect to the principle of indemnity embodied in the contract. A typical case of such subrogation, he noted, is when an insurance company pays its insured client for injuries and losses caused by another, then sues that other party which the injured person contends caused the damages to him to recover the sum paid.

125. That branch of the law is sometimes referred to as "conventional subrogation". However, in my view, this is not such a case.

126. In the case of the law of restitution, which, in my view, is the branch upon which the plaintiff now seeks to rely, Lord Hoffman opined that the equitable remedy of subrogation is not based upon any agreement or common intention of the party enriched or the party deprived (although questions of intention may be relevant to the question of whether the enrichment has been unjust). Further, that in order for the enrichment to be unjust, it is not necessary that there should have been any misrepresentation or sharp practice on the part of the recipient of the enrichment.

127. Consequently, it is accepted that "subrogation" is not a right nor is it a cause of action, but rather, it is an equitable remedy against a party who would otherwise be unjustly enriched. (Millet LJ in *Boscawen v Bahwa* [1995] 4 All ER 769 at 777, [1996] 1 WLR 328 at 335); or, as opined by Lord Hoffman in the *Banque Financiere de la Cité v Parc Ltd* case *supra*, "it is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment" [p.749].

128. There is no dispute that TEL's outstanding debt to the 1st defendant secured by the aforesaid mortgage was repaid by the plaintiff. Indeed, as I have said, the 1st defendant has since executed a satisfaction of mortgage in connection therewith.

129. It is, therefore, in my judgment, clear from the facts in this case that, contrary to the submissions of counsel for the plaintiff, it is the debtor, TEL, and not the creditor, the

1st defendant, who has benefited from the aforesaid payment by the plaintiff; that is, it is TEL who has been enriched at the plaintiff's expense.

130. The 1st defendant received what it was entitled to, albeit from a source other than its borrower. On the other hand, TEL had its indebtedness to the 1st defendant discharged without the burden of paying off the debt himself, thereby benefitting.

131. Additionally, because of the aforesaid payment by the plaintiff, TEL was placed in a position to, and did, sell the Property free from such mortgage.

132. In that regard, the evidence is that prior to the aforesaid payment by the plaintiff, Mr Talbot had, on behalf of TEL, entered into an agreement with Kelly's to sell the Property to Kelly's. However, notwithstanding the date of the recorded conveyance to Kelly's being 19 June 2006, the evidence also is that that transaction was completed pursuant to an order for specific performance embodied in the aforesaid Order of Carroll, J (Acting) which was made after the date of the aforesaid payment by the plaintiff to the 1st defendant, whereby the 1st defendant's mortgage on the Property was satisfied.

133. It is common ground that that Order remains in effect and the same having been made against TEL and Mr Talbot they were bound to obey it, even though it may have been liable to be set aside by the court on application made to that end. See *Hacket v Invergie Investments Limited supra*.

134. Consequently, at the commencement of this action on 1 October 2008, the Property was no longer owned by TEL. Indeed, it appears from the documentary evidence that at the date the plaintiff paid the aforesaid funds to the 1st defendant, that is 15 August 2006, the Property had already been conveyed by TEL to Kelly's, on 19 June 2006.

135. Furthermore, not only was the Property, at the date of trial, owned by Kelly's, but it may also have been mortgaged to The Royal Bank of Canada. I say that because there is evidence that the title documents to the Property had been forwarded by Dennison & Co. to The Royal Bank of Canada "per their mortgage terms with Kelly's".

136. As indicated, the general principle shown by the aforesaid authorities is that a person who advances money which is used to discharge a security will normally be subrogated to the rights under that security against a borrower or subsequent incumbrancer, even though there has been no actual transfer of the security.

137. So while it appears that, on the authority of the Privy Council case of *Ghana Commercial Bank v Chandiram*, and as intimated by counsel for the 1st defendant, the plaintiff may be entitled to subrogation under the security of the 1st defendant's mortgage as against TEL and or Kelly's and or its mortgagee, as subsequent encumbrancers, none of whom was added by the plaintiff as a party to this action, it is clear that he is not entitled to subrogation against the 1st defendant, and I so find.

Disposition

138. In the result, the plaintiff's claim against the Bank/1st defendant is dismissed in its entirety with costs to be paid by the plaintiff to the Bank/1st defendant, to be taxed if not agreed.

DELIVERED this 13th day of October A.D. 2017

Estelle G. Gray Evans
Justice