

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2019/CLE/gen/000256**

BETWEEN:

IN THE MATTER OF the real property compromised in an Issue of Indenture and Legal Mortgage dated the 12th March, A.D., 2007 and Made between Ara Investments Ltd. (as Mortgagor) and David Johnstone (as Mortgagee), and Andre Arpad Pascal Busson as Assignee

AND IN THE MATTER OF THE Conveyancing and Law of Property Act, Chapter 115

ANDREA ARPAD PASCAL BUSSON

Plaintiff

AND

ARA INVESTMENTS LTD.

First Defendant

AND

DARRELL E. ROLLE

Second Defendant

Before: The Honourable Mr. Justice Keith Thompson

**Appearances: Ms. Chizelle Cargill
Mr. Darrell Rolle**

**Hearing Dates: 4th April, 2019
27th June, 2019**

- [1] This is an application on behalf of the Plaintiff by way of an Originating Summons filed on 1st March, A.D., 2019 and supported by his affidavit also filed on 1st March, 2019.
- [2] The Plaintiff seeks an order pursuant to Order 77, or in the alternative Order 73 of the Rules of the Supreme Court in the following terms.
- i. A Declaration that the Plaintiff is entitled to possession of **ALL THAT** piece parcel or lot of land comprised in the Indenture of Mortgage dated the 2th day of March A.D., 2007, and made between Ara Investments Ltd. of the one part and David Johnstone of the other part, and assigned by David Johnstone to Andre Arpod Pascal Busson, the Plaintiff herein, and now of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 9987 at pages 574 to 558 (“the Mortgage”), known as Lot Number Nineteen (19) , Block Number Forty-four (44) situate in Skyline Villas Subdivision in the Western District of the said Island of New Providence and having such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to an Indenture

dated the 18th day of November, A.D., 1968 between the said Dudley Hugh Aloysius Wright of the one part and Colonial Management Limited of the other part and now of record in the said Registry of Records in Volume 1356 at pages 93 to 100 and thereon coloured Pink ("the Property").

- ii. An order directing the Defendants to deliver to the Plaintiff vacant possession of the Property comprised in the Mortgage.
- iii. A Declaration that the Defendants are in breach of the terms of the Promissory Note dated 12th March, A.D., 2007 and the Mortgage, and that the power of sale conferred upon the Plaintiff under the Mortgage has arisen and is exercisable.
- iv. Payment of all sums due to the Plaintiff by the Second Defendant under the Promissory Note dated 12th March, 2007 and the Mortgage, together with interest thereon.
- v. Costs.
- vi. Interest on any judgment amount in accordance with the applicable rate as set out in the Promissory Note and/or the Mortgage and pursuant to the Civil Procedure (Award of Interest) Act, 1992.

[3] The Plaintiff relies on;

- a) Plaintiff's Originating Summons filed 1 March, 2019.
- b) Affidavit of Andre Busson filed 1 March, 2019.
- c) Affidavit of Service of Patrick Wright filed 7 March, 2019.

- d) Affidavit of Cordero Smith filed 22 March, 2019.
- e) Affidavit of Search of Cordero Smith filed 22 March, 2019.
- f) Certificate of Urgency filed 22 March, 2019.

HISTORY/BACKGROUND:

[4] The history of the instant matter is set out in the Affidavit of Andre Busson filed on 1 March, 2019. The relevant paragraphs are paragraphs 5 to 27, which we set out below;

5. **“That on or about 12 March 2007, the Second Defendant entered into a loan agreement with Mr. David R. Johnstone (“Mr. Johnstone”) to borrow the total sum of \$327,456.2. This sum was secured by a Promissory Note, also dated 12 March 2007, and executed by the Second Defendant and Mr. Johnstone (“the Promissory Note”). The terms of the Promissory Note are as follows;**

i. **The Second Defendant as borrower promised to pay to Mr. Johnstone as lender the sum of \$327,456.12 (the Principal Sum”);**

- ii. **The Second Defendant acknowledged that consideration or the Promissory Note had been received by him;**
 - iii. **Interest on the principal sum provided in the Promissory Note accrued at a rate of 8% per annum.**
 - iv. **The Principal Sum with accrued and unpaid interest was due and payable immediately on December 31st, 2007;**
6. **The Promissory Note is set out at page 19 of Exhibit APB-1.**
7. **As further security for repayment under the Promissory Note, the First Defendant, by its representative the Second Defendant, who is a director and shareholder of the First Defendant, entered into the Mortgage, whereby the First Defendant mortgaged the Property to Mr. Johnstone.**
8. **The said Mortgage contains the following provisions which are material to these proceedings;**

Clause 1. In consideration of the premises the Mortgagor as beneficial owner hereby grants conveys unto the Mortgagee all the hereditaments together with the appurtenances thereunto belonging to hold the same unto and to the use of the Mortgage and its assigns in fee simple for the purposes of securing the obligations due under the Promissory Note subject to the restrictions and encumbrances noted in Item Four (4) of the Schedule hereto hereinafter referred to as “the said

restrictions”) subject to the proviso for redemption hereinafter contained.

Clause 6(a) The Obligations shall forthwith become due and payable and all mortgagee’s power of sale, foreclosure action, possession and of appointing a Receiver (and other powers and remedies of a mortgage) shall forthwith be or become available to the Mortgagee in enforcing its security hereunder in any of the following events (each of which shall constitute an act of Default);

- (i) The Borrower shall default under the terms of the Promissory Note.**

Default:

- 9. The Second Defendant is in default of his obligations under the Promissory Note as he has failed to pay the sums owed under the Promissory Note which became due as of 31st December, 2007.**
- 10. On 29 January 2013, Lennox Paton, on behalf of Mr. Johnstone, wrote to the Second Defendant describing the defaults under the Promissory Note and the Mortgage and demanding repayment in full of all amounts due and owing within 30 days of the date of the aforementioned letter. The Second Defendant was also informed that in the absence of payment, Mr. Johnstone would take steps to enforce the security under the Mortgage and seek an order for possession and**

sale of the Property. The aforesaid letter sets out the amounts that were due and owing to Mr. Johnstone, pursuant to the Promissory Note and Mortgage, as at 29 January 2013. At that date the amount due and owing was \$481,630.48. A copy of this letter is set out at page 21 of Exhibit APB-1.

- 11. Notwithstanding this demand however, the Second Defendant failed and/or neglected and continues to fail and neglect to pay all or any of the sums owing under the Promissory Note and Mortgage.**

Demand for vacant possession

- 12. On 23 January 2014 Mr. Johnstone again wrote to the Second Defendant and informed him that he had failed to satisfy the amount owing on the loan secured by the Mortgage. At this time Mr. Johnstone informed the Second Defendant that he intended to exercise his power of sale, to sell the Property immediately. A copy of this letter is set out at page 24 of Exhibit APB-1.**
- 13. On 9 June 2017, Mr. Johnstone wrote to the Second Defendant informing him that he remained in default under the terms of the Promissory Note and the Mortgage. The Second Defendant was advised that as a result of his failure to pay the outstanding indebtedness, Mr. Johnstone had elected to exercise his right to sell the Property and that HG Christie Ltd and Better Homes & Gardens**

Realty had been engaged to market the Property. A copy of this letter is set out at page 25 of Exhibit APB-1.

- 14. On 4 October 2018, in the exercise of his power of sale, Mr. Johnstone entered into an Agreement for Sale, whereby he agreed to sell the Property to Camelot International Diplomatic Services Limited who agreed to purchase the same at the purchase price of \$800,000 (“Agreement for Sale”). The completion date for the sale of the Property was set for 60 days from the date of signing the Agreement for Sale, or ten days after vacant possession of the Property was secured. A copy of the said Agreement of Sale is set out at page 26 of Exhibit APB-1.**
- 15. On 1 November 2018, Mr. Johnstone wrote to the Second Defendant informing him that he had entered into an Agreement for Sale to sell the Property, pursuant to his power of sale, and that the completion date was set for 60 days from 4th October 2018, being 4th December 2018. Mr. Johnstone therefore requested that the Second Defendant vacate the Property on or before the 60 day completion date. A copy of the Agreement for Sale was provided to the Second Defendant on 19 November 2018, under cover letter. The aforesaid letters are set out at pages 35 to 36 of Exhibit APB-1.**
- 16. Notwithstanding the demands, the Second Defendant has refused to deliver vacant possession of the Property and the completion of the sale is being hindered as a result of this.**

Assignment

- 17. By an Assignment Agreement dated 28 December, 2018, Mr. Johnstone assigned the outstanding loan amount, as at that date, secured by the Mortgage, as well as the benefit of the Mortgage, to me for the purchase price of three hundred and sixty five thousand dollars (B\$360,000.00) (“the Assignment Agreement”).**
- 18. By clause 2 of the Assignment Agreement Mr. Johnstone granted and conveyed to me the Property, as security for the outstanding loan amount to hold in fee simple, with all such powers rights and remedies, but subject to the prior mortgages and the Mortgagor’s right of equity of redemption. A copy of the Permit issued by The Bahamas Investments Board allowing me to hold the Property as security, and a copy of the Assignment Agreement are set out at pages 37 to 41 of Exhibit APB-1.**
- 19. On 15 February, 2019, I instructed Lennox Paton to write to the Defendants, notifying them of the Assignment. The Defendants were informed that, given their default, I intended to exercise the owner of sale remedy granted to me in the Mortgage and Assignment, and to proceed with the Agreement for Sale. The Defendants were therefore asked to deliver vacant possession of the Property by 22 February, 2019. The Defendants have not complied with this request. Copies of the letters to the Defendants are set out at pages 42 to 49 of Exhibit APB-1.**

Prior Mortgages

20. I am aware that there were two prior mortgages over the Property which rank in priority to the Mortgage. The two mortgages are as follows:

1. Mortgage from the First Defendant to Finance Corporation of The Bahamas dated 10th June 1980 recorded in Volume 3314 pages 247-252 (collectively with numbers 2 and 3 below, “FINCO Mortgage”);

a. Further Charge from ARA Investments Ltd. to Finance Corporation of Bahamas Ltd. dated 14 January 1986 in Volume 4405 at pages 215 to 218.

b. Deed of Variation and Further Charge ARA Investments Ltd. to Finance Corporation of Bahamas Ltd. dated 31 October 1994 recorded in Volume 6318 at pages 67 to 71.

2. Second Mortgage from the First Defendant to Royal Bank of Canada dated 18th May 2005 recorded in Volume 9247 pages 311-322 (“RBC Mortgage”).

21. In a letter dated 28 January, 2019, Lennox Paton wrote to RBC FINCO giving them notice of the impending sale of the Property and the impending action for possession and further giving an undertaking to

pay the balance of the loans owing to RBC Finco from the proceeds of sale.

22. I am advised that there are no outstanding loans held by the First Defendant with Royal Bank of Canada secured by the RBC Mortgage.

Particulars pursuant to Order 73 and/or Order 77 of the RSC

23. The Defendants' obligations are as follows:

- (a) the terms of the loan were agreed between the Second Defendant and Mr. Johnstone on or about 12 March 2007;
- (b) the amount to be repaid by the Second Defendant was \$327,456.12;
- (c) the rate of interest charged is 8% per annum;
- (d) the Promissory Note whereby the Second Defendant promised to repay the loan was made on or about 12 March 2007 and was signed by the Second Defendant;
- (e) the Mortgage was made and signed by the First Defendant, by its duly authorized representative being the Second Defendant, securing payment under the Promissory Note on 12 March 2007;
- (f) the amount repaid is Nil;
- (g) the principal amount due but unpaid is \$327,456.12 as of 12 February 2019;

- (h) the sum under the Promissory Note became due as of 31 December 2007;**
- (i) the amount of interest accrued due and unpaid as of 12 February 2019 is \$312, 617, 34; and**
- (j) the total amount due but unpaid as of 12 February 2019 is \$640,073.46.**

24. As far as I am aware, that the Second Defendant occupies the Property as a dwelling home, together with at least one of his children.

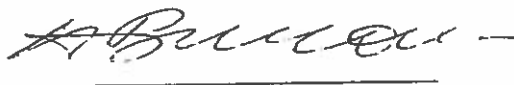
Conclusion

25. As far as I am aware, the Second Defendant was at all material times in possession of the Property and remains in possession of the Property.

26. As assignee of the Mortgage, I am desirous of exercising my power of sale under the Mortgage Deed and the said power has arisen by reason of the Second Defendant's default under the Promissory Note and by him being in arrears to the extent as set out herein-before.

27. I make this affidavit in full support of the Originating Summons filed herein, wherein I seek from this Honourable Court an Order for delivery up of possession of the said Property and for Judgment in the terms appearing in the originating summons.

SWORN to this ¹⁴ day)
of February 2019)
at Nassau, N.P., Bahamas.)



Before me,



NOTARY PUBLIC

**RESPONSE TO THE FILING AND SERVICE OF THE ORIGINATING SUMMONS AND
AFFIDAVIT IN SUPPORT.**

[5] The First and Second Defendants filed a Memorandum of Appearance on 4th April, 2019 with the Originating Summons having been filed on March 01st, 2019. The Memorandum of Appearance was filed by ROLLE, NEWTON & CO., Mr. Damian Gomez Q.C. appeared in court on April 04th, 2019 for the First and Second Defendants but never put himself on record officially.

- [6] The parties were to appear again on the 27th June, 2019. At this hearing, the Second Defendant appeared on behalf of the First and Second Defendant. However, at the time and to date, no response has been filed to the Plaintiffs' Originating Summons and Affidavit in support thereof. We hasten to add that at the April 4th, 2019 fixture, Mr. Gomez had agreed that the Second Defendant would have filed an affidavit in response within ten (10) days of the April 4th, 2019 hearing. It was further agreed and put to the court that the filing of the affidavit would have taken place no later than 18th April, 2019.
- [7] On 29th April, 2019, Counsel for the Plaintiff wrote to Mr. Gomez reminding him of the undertaking to file the affidavit on behalf of the Second Defendant no later than 18 April, 2019. Counsel for the Plaintiff extended an additional five (5) days from 29th April, 2019 for the filing of the affidavit by counsel of the Second Defendant. To date no affidavit in response has been filed.
- [8] On the 27th day of June, 2019, Mr. Rolle appeared and accepted that there was in fact a lack of response. Mr. Rolle was not able to offer any reasonable explanation as to why there was non-compliance with the filing of the affidavit.

THE LAW:

- [9] The Plaintiff is seeking an order for vacant possession of the mortgaged property subject to the terms set out in the mortgage deed dated 12 March, 2007 or in the alternative, payment of the sums due and owing pursuant to the Loan Agreement and Promissory Note also dated 12 March, 2007.

[10] The application is pursuant to Order 77 of the Rules of the Supreme Court. In particular Order 77 Rule 1 and Order 77 Rule 4, (1)-(4). In the alternative, the Application is pursuant to Order 73 Rules 1 and 2 of the Rules of the Supreme Court. (“RSC”).

(“RSC”) Order 77 Rule 1 provides:

1. ***“(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgage or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely – (a) payment of moneys secured by mortgage; (b) sale of the mortgaged property; (c) foreclosure; (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property; (e) redemption; (f) re-conveyance of the property or its release from the security; (g) delivery of possession by the mortgagee. (2). In this Order “mortgage” includes legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly. (3) An action to which this Order applies in referred to in this Order as a mortgage action.”***

19. Order 77 Rule 4 (1)-(4) further provides:

- (1) “The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule. This rule applies to a mortgage action begun by originating summons in which the plaintiff is the mortgagee and claims delivery of possession or payment of moneys secured by the mortgage or both.**
- (2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.**
- (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right of possession arises, and except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of – (a) the amount of the advance; (b) the amount of the re payments; (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and (d) the amount remaining due under the mortgage.**
- (4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the**

plaintiff's knowledge is in possession of the mortgaged property."

[11] As it relates to the above, we say that the Plaintiff has complied.

[12] In the alternative the Plaintiff relies on Order 73 Rules 1 and 2, which provides as follows;

ORDER 73 Rules 1 and 2:

1. ***(1) "These Rules apply to a money-lending action subject to the following rules of this Order.***

(2) In these Rules – "the Act" means the Money Lending Act; and "money-lending action" means any action for the recovery of money lent or for the enforcement of any agreement or security relating to money so lent, being an action brought by the lender or an assignee, and includes any action to which section 3 of that Act applies. 2.
2. ***Every statement of claim in a money-lender's action (whether indorsed on the writ or not) must state – (a) the date on which the loan was made; (b) the amount actually lent to the borrower; (c) the rate per cent, per annum of interest charged; (d) the date when the contract for repayment was made; (e) the fact that a note or memorandum of the contract was made and was signed by the borrower; (f) the date when a copy of the note or memorandum was delivered or sent to the borrower; (g) the amount repaid; (h) the amount due but unpaid; (i) the***

date upon which such unpaid sum or sums became due; and (j) the amount of interest accrued due and unpaid on every such sum.”

[13] Again as it relates to Order 73 Rules 1 and 2, we say that the Plaintiff has complied.

[14] Mr. Johnstone and the Plaintiff entered into an Assignment of Mortgage dated 28th December, 2018. Paragraph 1 of the said Assignment of Mortgage states;

“In pursuance of the said agreement and in consideration of the purchase Price paid by the Transferee to the Transferor (the receipt whereof the Transferor hereby acknowledges) the Transferor AS MORTGAGEE hereby assigns unto the Transferee ALL THAT the Outstanding Loan Amount secured by the Legal Mortgage and all interest due or henceforth to become due thereon and the full benefit of all powers rights remedies and securities in the Legal Mortgage contained and thereby expressly or impliedly conferred on mortgagees TO HOLD the same unto the Transferee and its assigns absolutely.”

[15] The Defendant was duly notified of the Assignment on 15 February 2019. In this regard, there has been no response to the Notice of Assignment or otherwise. The Plaintiff asserts that firstly there was no objection raised with the Assignment of Mortgage. The Plaintiff further asserts that the Assignment is an absolute assignment and is in conformity with the statutory provisions as set out in Section 2 of the CHOSSES IN ACTION ACT, which provides;

“Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.”

[16] We point out the fact that, there are no provisions in the Assignment which prohibit the assigning of the Mortgage.

CLAIM FOR POSSESSION:

[17] Clauses 1 and 6 (a) of the Assignment state;

Clause 1. “In consideration of the premises the Mortgager as beneficial owner hereby grants conveys unto the Mortgagee all the hereditaments together with the appurtenances thereunto belonging to hold the same unto and to the use of the Mortgage and its assigns in fee simple for the purposes of securing the obligations due under the Promissory Note subject to the restrictions and encumbrances noted in Item Four (4) of the Schedule hereto

hereinafter referred to as “the said restrictions”) subject to the proviso for redemption hereinafter contained.

Clause 6 (a). The obligations shall forthwith become due and payable and all mortgagee’s power of sale, foreclosure action, possession and of appointing a Receiver (and other powers and remedies of a mortgagee) shall forthwith be or become available to the Mortgagee in enforcing its security hereunder in any of the following events (each of which shall constitute an act of Default);

(i) The Borrower shall default under the terms of the Promissory Note.

[18] The Mortgage is clear and unambiguous regarding the entitlement of the Plaintiff to possession of the subject property where the Second Defendant is in default of the terms of the Promissory Note.

[19] In the case of CITIBANK V MAJOR Appeal No. 28 of 1996 GANPATSINGH J.A. said at paragraph 10;

“The position at law is that where under a legal mortgage being an instalment mortgage, the whole mortgage money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the Court has no jurisdiction to refuse to make an order for possession or to adjourn the summons, either on terms or not on terms as to keeping up payments or paying arrears, if the mortgagee does not agree to that

course; but this does not exclude power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so.”

[20] Further, in the case of **CIBC BAHAMAS LTD. V. CITY LODGE LTD. Action No. 1315 of 2002 LYONS**; stated;

“.... But the fact remains that the first defendant is in default of the mortgage payments. What the first defendant fails to understand is that the mortgage is a contract (if I may put it in simple terms). The crucial part to be performed by the mortgagor is to meet the repayments. If not, then the contract is breached. As in any contract, once it is breached by one party, the other party has certain rights. In a mortgage, one of those rights is that the mortgagee can move into possession and sell the property in an effort to recover the amount outstanding.

19. The first defendant has “breached the contract”. The options are to remedy the breach (if the mortgagee agrees), to pay into court the full amount owing whilst arguing the points raised as a defence, or to move out and allow the mortgagee into possession.

20. The first defendant has no defence to the plaintiff’s action. It is in default.

21. I certainly have some sympathy for the third defendant. Mr. Ralph Curry. He, ably represented by Mr. Maynard of counsel, has fought a rearguard action trying to fend off the inevitable. After all it is his livelihood he is trying to preserve. But fortune is against him. He has desperately tried to delay the plaintiff whilst he hoped to get finance or a purchaser to get him out of his present dilemma. Unfortunately the recent unsettled state of global affairs has most likely finished off any hope he has.

22. Sadly sympathy does not remedy the situation. The mortgage and the debenture are in default. It does not appear to me that there is any serious issue to be tried as relates directly to the validity of the mortgage or the debenture.

23. In these circumstances the plaintiff is entitled to the orders for possession sought in prayers 1 (i) of the summons.”

[21] The authorities are clear as to what ought to be decided in the instant matter. The Plaintiff has complied with the relevant orders under which he has made application.

[22] Therefore, having reviewed the evidence and in all the circumstances, the Defendant has not provided the court with any evidence which persuades the court that it should not accede to the application of the Plaintiff for vacant possession of the Plaintiff's property.

[23] As a result, it is the order of this court that based on the legal and equitable principles as set out in the authorities herein, the Plaintiff is entitled to the orders as prayed and I so order.

Dated this 19th day of December A.D., 2019.


Keith Thompson
Justice