

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**IN THE MATTER** of an indenture of First Demand Legal Mortgage dated the 7<sup>th</sup> day of January, A. D., 2010 and made between Julian F. Pedican (as Borrower) of the one part and Commonwealth Bank Limited ( as Lender) of the other part to secure advances to the said Julian F. Pedican by the said Commonwealth Bank Limited

**AND**

**IN THE MATTER** of an Indenture of First Demand Legal Mortgage dated the 14<sup>th</sup> day of September, A.D., 2016 made between Julian F. Pedican (as Borrower) of the one part and Commonwealth Bank Limited (as Lender) of the other part to secure advances to the said Julian F. Pedican by the said Commonwealth Bank Limited

**AND**

**IN THE MATTER** of all THAT piece or parcel or lot of land being Lot A containing measurement 7,725 square feet situate on the Western side of Millar Road in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas

**AND**

**IN THE MATTER** of all THAT piece or parcel or tract of land containing Forty- three Thousand Five Hundred and Sixty (43,560 square feet or One (1) acre being a part of a larger tract of land containing Three and Two Hundred and Nine Thousands (3,209) acres and comprising the Northwestern portion of Lot Number Twenty – three (23) of the Gladestone Road Crown Land Allotments situate in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas

**AND**

**IN THE MATTER** of Rules of the Supreme Court Order 77

**BETWEEN**

**COMMONWEALTH BANK LIMITED**

**Plaintiff**

**AND**

**JULIAN FERKARIES PEDICAN**

**Defendant**

Before: The Honourable Madam Justice Camille Darville Gomez  
Appearances: Mr. Jamal Davis the Plaintiff  
Miss Myra Russell for the Defendant  
Hearing Dates: 23<sup>rd</sup> November, 2021; 7<sup>th</sup> December, 2021;

## **DECISION**

### **Darville Gomez, J**

1. This action was commenced by the Plaintiff by way of Originating Summons filed on the 14<sup>th</sup> April, 2021 pursuant to Order 77 of the Rules of the Supreme Court for the following Orders:
  - (1) *Payment of the sum of \$286,545.81 under Loan Account Number 3113376157 ("**Mortgage 1**") being \$237,376.88 as to the principal sum outstanding, \$17,688.49 as to add-on charges ( inclusive of Insurance fees of \$16,260.67, Appraisal fees of \$450.00, Legal fees of \$220.50, Value Added Tax of \$55.32 and Service charges of \$702.50) \$29,127.43 as to the interest sum outstanding up to the 11<sup>th</sup> March, 2021, calculated at the rate of 8.50% per annum and continuing thereon at the said rate of 8.50% per annum of \$24.97 per diem down to the date or dates of payment, late fees of \$2,357.33 and less an escrow balance of \$4.32;*
  - (2) *Payment of the sum of \$131,851.46 under Loan Account number 1113375789 ("**Mortgage 2**"), being \$106,821.96 as to the principal sum outstanding , \$392 add- on charges ( inclusive of Appraisal fees of \$392.00) \$ 14, 065. 49 as to the interest sum outstanding up to the 11<sup>th</sup> March, 2021, calculated at the rate of 8.50% per annum and continuing thereon at the said rate of 8.50% per annum of \$24.97 per diem down to the date or dates of payment, late fees of \$621.60 and less a escrow balance of \$49.59;*
  - (3) *Delivery by the Defendant to the Plaintiff of possession of ALL THAT piece parcel of tract of land designated as Lot A and being a portion of a larger tract of land containing 32,728 square feet and situate on the Western side of Millar Road in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas as charged by the Defendant to the Plaintiff by the First Demand Legal Mortgage dated the 7<sup>th</sup> day of January, A. D., 2010 to secure the monies*

*therein mentioned (hereinafter referred to as the “Millar Road” property);*

**(4)** *Delivery by the Defendant to the Plaintiff of possession of ALL THAT piece parcel or tract of land containing Forty- three Thousand Five Hundred and Sixty (43,560) square feet or One (1) acre being a part of a larger tract of land containing Three and Two Hundred and Nine Thousand (3,209) acres and comprising the Northwestern portion of Lot Number Twenty- three (23) of the Gladstone Road Crown Land Allotments situate in the Western District of the Island of New Providence as charged by the Defendant to the Plaintiff by a First Demand Legal Mortgage dated the 14<sup>th</sup> day of September, A. D., 2016 to secure the monies therein mentioned (hereinafter referred to as the “Fire Trail Road” property);*

2. The Defendant filed a Summons and Affidavit on the 29<sup>th</sup> April, 2021 pursuant to section 4, 5, and 6 of the Homeowners Protection Act, 2017 and or under the inherent jurisdiction of the Court for the following Order:

*(1) That the commencement of proceedings in this action be stayed and/or struck out for lack of jurisdiction.*

*(2) That the costs of this application and the costs of and occasioned by the commencement of these proceedings be borne by the Plaintiff.*

### **Issues**

3. Before the Court can determine whether to grant judgment to the Plaintiff for the sums claimed under both of the mortgages and possession of the properties, it must consider the following issues raised by the Defendant in the said Summons and set out in his submissions:

- (i) Whether the Plaintiff has complied with Order 83, rule 3 of the Rules of the Supreme Court, 1976;
- (ii) Whether the Plaintiff commenced this action in contravention of section 4(1) of the Homeowners Protection Act, 2017
- (iii) Whether the action should be struck out pursuant to Section 4(1) of the Homeowners Protection Act, 2017, pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1976 and/or under the inherent jurisdiction of the Court;



- (iv) Whether the Defendant has submitted to the jurisdiction of the Court regardless of whether the Plaintiff has contravened section 4(1) of the Homeowners Protection Act, 2017.

**Issue 1: Whether the Plaintiff has complied with Order 83, rule 3 of the Rules of the Supreme Court, 1976 (“RSC”)?**

4. Counsel for the Defendant submitted that it was patently clear on the face of the Originating Summons and the Affidavit in support that it was deficient and lacked the particulars required by Order 83, rule 3 of the RSC.
5. The Plaintiff’s Counsel in response submitted that the English RSC Order 83 or its local equivalent does not apply to the instant action. He noted that the local equivalent is Order 73 which does not apply in the instant action because it is a mortgage action and therefore comes under Order 77 of the RSC.
6. Further, the Plaintiff’s Counsel submitted that even if the Defendant was correct, that he had waived that irregularity by the entry of an unconditional appearance to the Plaintiff’s Originating Summons and by his conduct in defending the action on its merits. He relied upon the case of **Saunders Trucking Co. v Cain Services Corp. [1992] BHS J. No. 43**
7. He referred to the dicta of Madam Justice Mrs Joan Sawyer (as she then was) in the above case:

***“In my view, the entry of an unconditional appearance constitutes a waiver of the irregularity in the issue of the writ especially when joined with the filing of the affidavits by or on behalf of the defendant which seek to deal with the substance of the plaintiff’s case”***

8. Firstly, I believe that this action was initiated properly under Order 77 of the RSC. I set out a portion of the said Order beginning with the heading as follows:

***“Order 77***

***Mortgage Actions***

***This order applies to any action (whether begun by writ or originating summons) by a mortgagee 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;***

9. I am fortified in my view by the case of **Scotiabank (Bahamas) Limited v The Personal Representative of Freddie John Archer, deceased and another [2016] 2 BHS J. No. 212** where the Defendant in an action commenced by way of an Originating Summons pursuant to Order 77 submitted that mortgage actions must also comply with the mandatory provisions of Order 73 of the RSC, that is, money lending actions. The Honourable Acting Justice Gregory Hilton (as he then was) did not accept the same and noted that money lending actions are normally commenced by Writ of Summons and further, that Order 73 rule 2 specified the particulars that ought to be included in the Statement of Claim. He therefore concluded that there was no merit in the submission that mortgage actions begun by Originating Summons must comply with Order 73(2).
10. For these reasons, I find that Order 83 of the RSC is not applicable to the instant action at all, therefore, the Plaintiff did not need to comply with it.

**Issue 2: Should the Court strike the action due to the non-compliance by the Plaintiff with the Homeowners Protection Act?**

11. The Defendant argued that the Plaintiff's non-compliance with section 4 of the HOPA means that the commencement of this action is ineffective because the purported formal notices of demand failed to provide what was required by statute. For this reason, Counsel for the Defendant invited me to strike out the action.
12. The Defendant in their submissions cited the case of **Scotiabank (Bahamas) Limited v Clarence Elias Rolle and Lenor Yvunka Rolle [2018]** where the Court expressed the need of a Mortgagee to give proper notice prior to instituting proceedings pursuant to Order 77 of the RSC. He also relied on **RBC Royal Bank (Bahamas) Limited v Lawson H. Hall and Rhonda E. Hall 2020/CLE/gen/00236** where Winder J noted the importance of strictly complying with the Homeowners Protection Act before instituting proceedings relative to Order 77.
13. The Plaintiff in response averred that there has been compliance with section 4 of the Homeowners Protection Act ("HOPA") prior to the commencement of this action.
14. In support of this submission, the Plaintiff in its Affidavit filed on the 15<sup>th</sup> April, 2021 exhibited the formal notices of demand dated the 6<sup>th</sup> day of October, A. D.,



2020 and the 7<sup>th</sup> day of July, A. D., 2020; for the payment of the sums due and owing under Mortgage 1 and Mortgage 2 and invited the Plaintiff to enter into reasonable arrangements for the repayment and satisfaction of the mortgages.

15. The demand notices set out the balance owing on each mortgage account and provided the following: (i) principal outstanding; (ii) interest outstanding; (iii) late fees outstanding; (iv) the deduction for the escrow balance; (v) the arrears; (vi) the rate of interest and the per diem.
16. Despite service of the demand notices by prepaid registered post and by hand on the Defendant, he took objection to the commencement of the action because the Plaintiff did not include in the demand notices, the amount of any administrative or other costs including any real property tax and insurance costs. This is a requirement under section 4(c) of the HOPA.
17. The Plaintiff conceded that these figures were not set out in the formal demand notices. Section 4(c) did not apply to the Fire Trail Road property which is vacant land; therefore this argument was moot in relation to Mortgage 2. However, it was submitted that they were reflected in the principal and balance amounts for Mortgage 1 that is, for the Millar Road property which has a building and is therefore, subject to the payment of real property taxes and insurance.
18. Despite this submission, the evidence of the bank in the Supplemental Affidavit of Kayla Callender confirmed that the amount of the insurance was included in the principal sum set out in the demand notice and notice of the outstanding real property tax was provided to the Defendant in a separate letter dated June 29, 2020.
19. Therefore, the Defendant was given notice of the insurance and real property tax but, in two separate letters. I set out the relevant paragraphs in the Kayla Callender Affidavit as follows:

*“iii. Exhibit “JP-2 of the Defendant’s said Affidavit refers to a notice given to the Defendant by the Plaintiff of the outstanding Real Property taxes in relation to the Millar Road Property more than thirty (30) days before the present action was lodged by the Plaintiff;*

*iv. The costs of insurances and incurred by the Defendant and paid by the Plaintiff was included in the principal sum outstanding under Mortgage Loan Account 1 and outlined in the Plaintiff’s demand letter to the Defendant dated the 6<sup>th</sup> day of July, A.D., 2020.”*

20. I have considered the authorities of the Defendant in relation to this issue and note that both of these cases are unhelpful. The dicta in the case of **Scotiabank (Bahamas) Limited v Clarence Elias Rolle and Lenor Yvunka Rolle supra** expressed the need of a Mortgagee to give proper notice prior to instituting proceedings pursuant to Order 77 of the RSC. That is not the position in the instant case. The Plaintiff has clearly complied with the giving of proper notice to the Defendant. The submission of the Defendant's Counsel is whether the formal demand notice was compliant with the HOPA and NOT that none was given ***[my emphasis added]***.
21. Similarly, **RBC Royal Bank (Bahamas) Limited v Lawson H. Hall and Rhonda E. Hall supra** is not applicable to the instant case. The Honourable Justice Winder noted the importance of strictly complying with the Homeowners Protection Act before instituting proceedings relative to Order 77. However, the circumstances differed significantly from the instant case. RBC Royal Bank (Bahamas) Limited sent the formal demand notice to the Defendants via general delivery mail which they never received. Therefore, when proceedings were initiated and the homeowners personally served with the court documents, they had not had the benefit of the notice under the HOPA at all.
22. Clearly, that is not the position in the instant case in relation to Mortgage 1.
23. The Defendant had the benefit of a demand notice sent via prepaid registered post and by hand, as well as, the letter setting out the sum due for real property tax. Both of these letters pre-dated the commencement of the action by more than five months. These facts have not been disputed at all by the Defendant.
24. Accordingly, it is unclear what prejudice has been suffered by the Defendant as a result of the said deficiencies in the demand notice in light of what actually transpired. The demand notice and the letter setting out the real property tax figure when viewed together, have in my view, satisfied both the spirit and intent of the HOPA. I refer to the submissions of the Defendant's counsel where she quoted as follows:
- “The purpose of the Homeowners Protection Act legislation was to provide meaningful protection to homeowners by ensuring a true and proper disclosure between the mortgagor and mortgagee prior to taking the significant and ultimate step of recovering the security through litigation.”***
25. For the above reasons, I refuse to strike out the action of the Plaintiff due to the non-compliance with the HOPA.



**Issue 3: Whether the action should be struck out pursuant to Section 4(1) of the Homeowners Protection Act, 2017, pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1976 and/or under the inherent jurisdiction of the Court.**

26. Notwithstanding that the Plaintiff did not fully comply with section 4 (c) of the HOPA, for the reasons mentioned above, the Defendant was well aware of his debt to the Plaintiff more than thirty (30) days in advance of the commencement of the instant action, therefore, I refuse to strike out this action pursuant to section 4(1) of the HOPA.
27. Further and additionally, I find that there are no other reasons for the strike out of the action, either under Order 18 rule 19, or, under the Court's inherent jurisdiction.

**Issue 4: Whether the Defendant has submitted to the jurisdiction of the Court regardless of whether the Plaintiff has contravened section 4(1) of the Homeowners Protection Act, 2017.**

28. The Defendant did not file a Conditional Appearance pursuant to Order 12, rule 6 of the RSC.
29. The Defendant filed an Unconditional Appearance, a Defence and Counterclaim and two Affidavits which all evidenced an intention to dispute jurisdiction on the one hand and to defend the action on the other.
30. The Defence and Counterclaim was irregular because the action was commenced by Originating Summons and not Writ of Summons. Therefore, I do not intend to address the issues raised in this pleading. However, some of the issues raised were referred in the Defendant's Affidavits.
31. However, notwithstanding the irregularity of the Defence and Counterclaim, the Plaintiff submitted that there was no obligation on their part to further finance the Defendant in whatever business venture he was in the course of pursuing. Also, that any claim brought by the Defendant against the Plaintiff does not disentitle the Plaintiff to Judgment and Delivery of possession of the subject properties. In essence, the Defendant is still indebted to the Plaintiff. The Plaintiff relied on the case of ***British American Bank (1993) Limited v Ellis [2004] BHS J. No. 431*** on this point.
32. I have found against the Defendant in relation to the HOPA issue and find that the Defendant has submitted to the jurisdiction of the court by having filed an



unconditional appearance. **Saunders Trucking Co. v Cain Services Corp. [1992] supra.**

33. Further, and in any event, I have considered the evidence of the Defendant where he sought to demonstrate that he has a defence to the claim for the sums due and owing to the Plaintiff. He claimed inter alia:

- (1) that the Bank had given him some assurance that they would continue to finance his future projects;
- (2) the tort of interference with trade;

34. All of the claims made by the Defendant were either unsubstantiated or were unmeritorious. However and in any event, it was clear that the Defendant acknowledged the debt to the Plaintiff under Mortgage 1 and 2 and further, that they went into arrears.

35. Accordingly, I grant the following orders:

(1) The Defendant's Summons filed on 29<sup>th</sup> April, 2021 is hereby dismissed.

(2) The Plaintiff is granted judgment as follows:

(a) the sum of \$286,545.81 under Loan Account Number 3113376157 being \$237,376.88 as to the principal sum outstanding, \$17,688.49 as to add-on charges ( inclusive of Insurance fees of \$16,260.67, Appraisal fees of \$450.00, Legal fees of \$220.50, Value Added Tax of \$55.32 and Service charges of \$702.50) \$29,127.43 as to the interest sum outstanding up to the 11<sup>th</sup> March, 2021, calculated at the rate of 8.50% per annum and continuing thereon at the said rate of 8.50% per annum of \$24.97 per diem down to the date or dates of payment, late fees of \$2,357.33 and less an escrow balance of \$4.32;

(b) the sum of \$131,851.46 under Loan Account number 1113375789 being \$106,821.96 as to the principal sum outstanding , \$392 add- on charges ( inclusive of Appraisal fees of \$392.00) \$ 14, 065. 49 as to the interest sum outstanding up to the 11<sup>th</sup> March, 2021, calculated at the rate of 8.50% per annum and continuing thereon at the said rate of 8.50% per annum of \$24.97 per diem down to the date or dates of payment, late fees of \$621.60 and less the escrow balance of \$49.59;

(c) possession of ALL THAT piece parcel of tract of land designated as Lot A and being a portion of a larger tract of land containing 32,728 square feet and situate on the Western side of Millar Road in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas as charged by the Defendant to the Plaintiff by the First Demand Legal Mortgage dated the 7<sup>th</sup> day of January, A. D., 2010 to secure the monies therein mentioned; suspended until November 2, 2022;

(c) possession of ALL THAT piece parcel or tract of land containing Forty- three Thousand Five Hundred and Sixty (43,560) square feet or One (1) acre being a part of a larger tract of land containing Three and Two Hundred and Nine Thousand (3,209) acres and comprising the Northwestern portion of Lot Number Twenty- three (23) of the Gladstone Road Crown Land Allotments situate in the Western District of the Island of New Providence as charged by the Defendant to the Plaintiff by a First Demand Legal Mortgage dated the 14<sup>th</sup> day of September, A. D., 2016 to secure the monies therein mentioned; suspended until November 2, 2022;

(d) Interest on the judgment sums at (a) and (b) from today's date at the statutory rate of interest pursuant to the Civil Procedure (Award of Interest) Act.

(e) Costs to the Plaintiff to be paid by the Defendant to be taxed in default of agreement.

**Dated this 2<sup>nd</sup> day of August, A. D., 2022**



**Camille Darville Gomez**  
**Justice**