IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00568

B E T W E E N

FIRST CARIBBEAN INTERNATIONAL (BANK) BAHAMAS LIMITED

Plaintiff

AND

EMILCO LTD.

First Defendant

AND

EMILY T. FERGUSON

Second Defendant

Before: The Honourable Mr Justice Neil Brathwaite

Appearances: Mr. Darzhon Rolle for the Plaintiff

Mrs. Margaret Gonsalves - Sabola for the First and Second Defendants

DECISION

INTRODUCTION & BACKGROUND

[1.] The Plaintiff commenced this action against the First and Second Defendant by way of Originating Summons filed 26 May 2021. In the Originating Summons, the Plaintiff claims pursuant to Order 77 Rule 1 of the Rules of the Supreme Court ("RSC") delivery of possession of Lot Number C-1 situated in Claridge Heights, Carmichael Road, New Providence. Further, the payment of all sums due and owing by the Defendants with interest thereon in respect of two mortgage loans.

THE PLAINTIFF'S CASE

[2.] The Originating Summons was supported by an Affidavit of Linda Bandelier filed on even date. In the affidavit, Ms. Bandelier avers that the First Defendant conveyed the Lot C-1 to the Plaintiff under an Indenture of Mortgage (No. 201682872) dated 14 March 2006 to secure advances in the amount of $259,000.00. The Mortgage was also secured by way of a Guarantee and Postponement of Claim signed by the Second Defendant on 1 September 2006. The deponent avers that as at 30 March 2021, the Defendants made payments in the amount of $92,322.39 toward the principal sum. Further, it is averred that the principal sum of $166,385.61 and interest in the amount of $20,629.42 is due and owing by the Defendants to the Plaintiff under the mortgage agreement.

[3.] The deponent averred that the Plaintiff and its attorneys have made demands to the Defendants for the payment of the total sums due and owing with interest. However, the Defendants have failed or refused to pay off the commercial mortgage in full. Although the Defendants paid off the arrears portion of the mortgage, the Plaintiff downgraded the account to non-performing status due to the Defendants' failure to adequately service the account, resulting in a breach of the Credit Agreement dated 26 August 2016 by which the Plaintiff had restructured the credit facilities which had been granted to the Defendants. This agreement stipulates that on the occurrence of a default, the balance of the account will be repayable immediately and without notice, and further that any sums waived as a consequence of the agreement would be reversed. The Plaintiff claimed that it has attempted to assist the Defendants by having the non-performing debt restructured as the subject commercial mortgage. The deponent averred that the Plaintiff has no level of comfort that the history of delinquency by the Defendants would not be repeated in the future, as there has been a past demand loan (No. 200649426) with an outstanding balance of $72,790.67 which the Plaintiff has had to write off due to the Defendants non-payment.

[4.] The Plaintiff filed the First and Second Affidavits of John Burrows on 16 December 2022 and 8 February 2023 respectively updating the amount of the principal and interest balances under both loans. The principal and interest amounts as of 8 February 2023 on Loan No. 201682872 were $114,678.06 and $34,770.94 respectively. Interest accrued daily at a rate of $17.28025 per diem.

The principal and interest amounts as of 8 February 2023 on Loan No. 200649426 were $49,070.79 and $26,499.55 respectively.

[5.] The Plaintiff also filed the Second Affidavit of Linda Bandolier on 10th March 2023, which again sought to update the figures due and owing, and in which it was averred that as of 9th March 2023 the principal and interest amounts due and owing on loan No. 201682872 were $114,678.06 and $35,272.07 respectively, with interest continuing to accrue at a daily rate of $17.28025. According to the account statement exhibited to that affidavit, the interest rate on the loan is 6.75%. With respect to loan No. 200649426 the principal and interest due as of the same date $49,070.79 and $26,782.21 respectively, with a rate of interest of 10.25%.

The Plaintiff's submissions

[6.] The Plaintiff submits that as a mortgagee it is entitled to possession of the mortgaged property given the Defendants' default and the Court has no jurisdiction to decline its right to possession. The Plaintiff relies on the authority of **Birmingham Citizens Permanent Building Society v Caunt and Another [1962] 1 All ER 163**, in which Russell J stated that the court would not interfere to prevent a mortgagee from lawfully exercising his right to enter into possession. Particularly, in an instance where there is an installment mortgage and by reason of default, the whole money becomes payable. Additionally, **Citibank, N. A v Major [2001] BHS J. No. 6** in which Ganpatsingh JA stated that the position is where under a legal mortgage (installment 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 Learned Justice stated that it is clear that there could be no power in the Court to vary contractual rights or to deny one party the benefit of the remedies which flow from the default of the mortgagor. The mortgagee in such an event is entitled not only to possession, but the mortgage money also which becomes presently payable as a lump sum and no longer by installments. Ultimately, the Plaintiff submits that the Court should order the Defendants to deliver to the Plaintiff possession of the mortgaged property, to pay all sums due and owing together with interest, and to pay the costs of this action.

THE DEFENDANTS' CASE

[7.] On 14 July 2021, the Defendants filed a Defence claiming that the matter should have not been filed as the substantive loan is not delinquent. The Defendants claim that the Plaintiff's letters dated 27 February 2020 requesting repayment of the entire outstanding amount of mortgage loans No. 200649426 and 201682872, were not received. The Defendants claim that they were under duress and undue influence and should have been advised to seek legal advice before signing the Guarantee and Postponement Agreement. The Defendants further claimed that the amounts postponed under the loan subject to the agreement, were to be added to the loan, however, the amount postponed was treated by the Plaintiff as a separate loan. The Defendants contend that the treatment of this transaction requires further clarity. The Defendants ask the Court to allow additional time to remedy amounts outstanding on the "other loan" and a suspension or postponement subject to the Defendants remedying any default as the Court thinks fit.

[8.] The Second Defendant as the President of the First Defendant filed an Affidavit on 14 July 2021. It is averred that in October 2018, the First Defendant's loan account with the Plaintiff would be transferred to regular banking at the Plaintiff's Shirley Street branch and no longer needed to be held at the delinquent centre located at Airport Industrial Park. The Second Defendant averred that to her understanding, this was done because the account was regularized and no longer needed to be at the delinquent centre. On 24 February 2019, the Second Defendant was advised by an agent of the Plaintiff, Mr. Kevin Fernander that the loan account (No. 201682872) was in arrears of $4,122.31, which represented the part payment made for 30 December 2018 and full payment for 30 January 2019.

[9.] The Second Defendant further avers that over a series of emails from Mr. Fernander, she was further advised on 29 March 2019 that the account would be transferred to the debt recovery unit of the company if a deposit was not made on that date. The Second Defendant posits that she did not understand why the loan would be transferred to this unit as there was not a significant amount of arrears, nor was the account 90-plus days in arrears. The Second Defendant avers that on 17 July 2019, she received communication from Ms. Linda Bandelier advising that the account was transferred to the special loans division. Additionally, she was informed that as of 16 July 2019, she was in arrears of $5,441.57, and that the $70,502.24 which was conditionally waived would be added to the loan. The Second Defendant avers that she understood this to mean that the

amounts waived were to be added to the existing loan (No. 201682872) and not forming a new loan.

[10.] On 2 August 2019, the Second Defendant stated that she indicated to the Plaintiff's agents Mr. Fernander and Ms. Bandelier that she would bring the loan account current by 15 September 2019. Nonetheless, the Second Defendant admits that she did not meet this date as her plan to do so did not materialize until February 2020. The Second Defendant avers that she has made every effort to keep loan No. 201682872 current and to make payments on loan No. 200649426, notwithstanding not being advised of the terms of this loan.

[11.] The Second Defendant filed a second Affidavit on 22 September 2022 seeking a suspension of the Plaintiff's action under the doctrine of contra proferentem and estoppel. The Second Defendant expressed that there is ambiguity with the terms of the Restructure Agreement and the letter dated 16 July 2019 by Ms. Bandelier in that the agreement specifies a waiver of the principal and interest of Loan No. 200649429, however, the letter implies that the principal and interest would be added to the existing loan which the Defendant claimed is a deferment of payment rather than a waiver. The Second Defendant avers that unfair accounting has occurred to the detriment of the Defendants. These claims were not substantiated by any evidence. Further, the Second Defendant averred that she was advised by Ms. Bandelier to secure a buyer for the property within 60 days, failing which, the Plaintiff would commence legal proceedings. However, the Second Defendant averred that it was not realistic to secure a buyer within that time frame, but a buyer was secured and a Sales Agreement was executed on 13 March 2020. The Second Defendant averred that she has offered to pay the balance of loan No. 200649426, and to continue paying loan No. 2016828272.

[12.] In the Third Affidavit of Emily Ferguson filed 16 January 2023, it was averred that the Plaintiff and the First Defendant entered into a mortgage agreement on 14 March 2006 in the amount of $259,000.00 (Loan No. 200649426). The Second Defendant on behalf of the company averred that she was unable to pay the full monthly amount due consistently, as a result of ill health. The Second Defendant further averred that she was unaware of the judgment made against the First Defendant for vacant possession of the premises by Isaacs, J (as he then was) dated 11 June 2012. The Second

Defendant was contacted and informed that the property was being advertised in the Nassau Guardian newspaper, which she retrieved and found the same to be true. It was then the Second Defendant contacted the Plaintiff and was later informed in a meeting that the company's registered office was served with the documents. However, the Second Defendant was abroad receiving medical attention and was unaware that the registered office attempted to contact her.

[13.] Nevertheless, the Second Defendant averred that she was informed by the Plaintiff that Loan No. 200649426 would be restructured by a 2013 mortgage agreement to be serviced by way of salary deduction. The Second Defendant was unable to maintain the full monthly payments under the 2013 mortgage agreement and in August 2016, was extended a Credit Agreement by the Plaintiff. The Second Defendant claims that the Credit Agreement was a restructuring of the 2013 Mortgage and not the original mortgage under Loan No. 200649426. The Second Defendant further averred that she nor the First Defendant received the demand letters dated 27 February 2022 for the repayment of all sums due and owing together with interest. The Second Defendant further averred that as of 26 May 2021, no outstanding amounts were due. Also, she has continued to make monthly payments to the Plaintiff under the 2016 commercial loan, which she says is current, and has been making periodic payments on Loan No. 200649426 since becoming aware of these proceedings and the Plaintiff's claim in that regard.

The Defendants' submissions

[14.] The Defendants submit that the Plaintiff's action pursuant to Order 77 of the RSC is materially deficient as the Bandelier and Burrows affidavits sworn in support do not comply with the provisions of Order 77. The Defendants assert that the affidavits do not comply with Order 77 Rule 4 (2), (3), (4), (6) and (7) as they do not exhibit the original mortgage deed, and failed to state the amount advanced to the First Defendant under the 2006 mortgage or under the 2016 Commercial Mortgage. The Defendants claim that no evidence is tendered by the Plaintiff as to the amount of repayments made by the Defendants between March 2006 and the date of 26 May 2021, when the Originating Summons was issued. Further, the Defendants submits that the Plaintiff has adduced no evidence as to any interest in arrears at the date of issue of the Originating Summons or the date of the Bandelier or Burrows affidavit. The Defendants highlight that in the Bandelier affidavit, it

was stated in paragraphs 7 and 8 that at the date of issue of the Originating Summons, no arrears were outstanding. It is the Defendants' evidence that throughout the proceedings, payments were continuing and were accepted by the Plaintiff.

[15.] In any event, the Defendants assert that by the 2006 mortgage deed, the First Defendant as the mortgagor covenanted to pay on demand made to it by the Plaintiff. However, the Defendants contend that the two purported demand letters exhibited by the Plaintiff were never received by the Second Defendant, and there is no evidence to substantiate that they were ever delivered to the addressees. Therefore, in the absence of a properly served demand, the Plaintiff is not entitled to seek possession of the mortgaged property or make any claim for repayment of sums due under the mortgage deed. The Defendants submit that the Plaintiff's claims are premature as their rights under a power of sale do not crystalize until there is a valid demand and a failure to pay in response to the demand, and rely on clauses 6.2 and 14 of the mortgage deed and clause 10 of the Guarantee and Postponement of Claim document.

[16.] As it relates to the Commercial Mortgage, the Defendants submit that the Originating Summons does not refer to the Commercial Mortgage nor does it refer to the Guarantee and Postponement of Claim. Moreover, the Plaintiff has not advanced a claim against the Second Defendant in the Originating Summons. In this vein, the Defendants submit that there is no credible evidence upon which the Court can make a determination as to the quantum of any amounts allegedly due to the Plaintiff, and that the affidavits do not prove that any amount was due and owing by either Defendant at the date of issue of the Originating Summons.

[17.] Moreover, the Defendants submit that the Plaintiff has knowledge that the lower floor of the mortgaged property has been occupied by a commercial tenant since 2012, yet denies this fact in the Bandelier and Burrows affidavits contrary to Rule 4 (4). The Defendants rely on **Morley v Family Guardian Insurance Co. Ltd [2014] 1 BHS J. No. 105** to assert that an affidavit was considered to be deficient where it did not state whether to the Plaintiff's knowledge, any person was in possession of the mortgaged property, and did not state the interest amount. However, the Court of Appeal upheld the trial judge's acceptance of the affidavit as the affidavit was not so deficient as to render the court unable to consider the application of equitable principles to the

claim. Nevertheless, the Defendants submit that the Plaintiff's failure to comply with Rule 4 should not be viewed simply as a procedural irregularity but rather as fatal defects that go to the very root of the facts and matters which the Plaintiff must prove. Thus, the action should be dismissed.

LAW

[18.] Mortgage actions are governed by Order 77 of the Rules of the Supreme Court, which provides in part as follows:

> "1. (1) 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;
> ....
> (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;
> ..."

[19.] In an action for possession or payment, or both, Rule 4 outlines fundamental requirements for the affidavit in support of the originating summons with which the Plaintiff must comply. It provides:

> 4. (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 to 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 repayments;

(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.

...

(6) Where the plaintiff claims payment of moneys secured by the mortgage, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest."

[20.] In **Simeon Peter Cooper v Bank of The Bahamas Limited [2021] 1 BHS J. No. 158**, Crane-Scott JA had occasion to explain the importance of pleadings and the formal requirements of Rule 4. The Learned Judge stated at paragraphs 34- 38:

"34 In our system of civil proceedings it is trite law that a claimant must when pleading, clearly identify the case which is to be made out against the defendant. Where there are two or more defendants, the case against each defendant must be clearly set out. This point was succinctly made in McPhilemy v. Times Newspapers Ltd [1999] 3 All ER 775 where Lord Woolf MR observed:

"Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties."

35 It goes without saying that if a defendant is sued in a mortgage action in his capacity as the guarantor for monies secured under a mortgage loan taken out by a co-defendant (as mortgagor) then the Bank's pleadings and more particularly, the supporting affidavit filed in support of the Originating Summons accordance with rule 4, should clearly establish how and under what security the mortgagee and the guarantor respectively, are obligated to pay the monies claimed to be due and owing to the mortgagee.

36 In mortgage actions begun by Originating Summons under O. 77 seeking relief in the form of an order for payment of moneys secured by the mortgage or an order for delivery of possession, rule 4 expressly sets out what must be contained in the affidavit which is filed in support of the mortgagee's claim.

37 The formal requirements of rule 4 have been put in place to ensure that the mortgagee can establish to the satisfaction of a judge of the Supreme Court, the contractual basis on which the mortgage action is instituted vis-a-vis each defendant and to ensure that the defendant (whether the mortgagor or the guarantor) is not taken by surprise or ambushed by a claim for delivery of possession or for payment of monies secured by the mortgage as the case may be, without the prescribed particulars being given (and produced).

38 The rule also expressly requires the mortgagee to exhibit with the supporting affidavit, a true copy of the relevant mortgage security; and to produce the original security at the hearing of the summons."

[21.] Generally, in mortgage actions, the mortgagee has a right to vacant possession of the mortgaged property following a breach of the mortgage obligations by the mortgagor. This condition is an imperative facet of mortgage contracts. In **Citibank, N.A v Major [2001] BHS J. No. 6** Ganpatsingh J.A stated at paragraphs 10 and 11:

"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...

11 It is pellucidly clear therefore that there could be no power in the Court to vary contractual rights or to deny one party the benefit of the remedies which flow from the default of the mortgagor. The mortgagee in such an event is entitled not only to possession, but as well the mortgage moneys which become presently payable as a lump sum and no longer by installments. The mortgagor in order to get relief must necessarily raise an action on the mortgage transaction itself."

ANALYSIS

Claim against the Second Defendant

[22.] The Plaintiff's Originating Summons is addressed to the First and Second Defendants. It requires the First Defendant, solely, as the mortgagor under the mortgage dated 14 March 2006 to enter an appearance in the matter. The Plaintiff then claimed under Order 77 Rule 1 for delivery of possession of Lot No. C-1 Claridge Heights, Carmichael Road by the Defendants, the payment of all sums due and owing by the Defendants together with interest, and further relief and costs. The Defendants assert that no claims were made against the Second Defendant in the Originating Summons. On the face of it, the Originating Summons is against both the First and Second-named Defendants. Whilst I appreciate that the Originating Summons by form only required the First Defendant under the 2006 mortgage to enter an appearance and not the Second Defendant under the Guarantee and Postponement of Claim agreement, there is no doubt to my mind that the omission of the Second Defendant and reference to the 2016 Agreement was an irregularity. The

Bandelier Affidavit in support of the Originating Summons laid out the nature of the relationship between the parties, the nature of the mortgage agreement of 2006 and the 2016 Guarantee and Postponement of Claim agreement. It made various averments against the First and Second Defendants consistent with the relief claimed by the Plaintiff in the Originating Summons. In any event, both Defendants in their defence responded to the claims against the Second Defendant manifested in the Bandelier Affidavit and even asserted duress and undue influence. The Defendant's challenge to this matter is in form and not substance. To my mind, this procedural irregularity has no detrimental impact on the determination of the issues at hand and can be cured pursuant to Order 2 Rule 2 of the Rules. Order 2 Rule 2 provides:

> "1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

[23.] Despite the irregularities contained in the Originating Summons, the claims therein ought to be continued against the First and Second Defendants.

Compliance with Order 77 Rule 4

[24.] The Defendants further challenge the Bandelier and Burrows affidavits, and the Plaintiff's compliance with Order 77 Rule 4 (2), (3), (4), (6), and (7). I now consider the Affidavits' contents

in light of Order 77 Rule 4. A fully executed and recorded copy of the original 2006 mortgage between the First Defendant and the Plaintiff is attached to the Bandelier Affidavit and marked as exhibit "LB.1" and also to the Burrows Affidavit marked "JB.1". I find the Plaintiff to be compliant with Rule 4 (2). The Plaintiff was then required by Rule 4(3) to state the amount of the advance, the amount of the repayments, the amount of any interest or installments in arrears at the date of issue of the originating summons and affidavit and the amount remaining due under the mortgage. In paragraph 4 of the Bandelier Affidavit, the Plaintiff stated that $259,000.00 was advanced to the First Defendant after Lot C-1 Claridge Heights was conveyed by way of mortgage to the Plaintiff.

[25.] In paragraph 5, the Plaintiff stated that as at 30 March 2021, the Defendants made repayments of $92,322.39 towards the principal sum and that the principal sum of $166,385.61 was still owing, together with interest in the amount of $20,629.42 on Loan No.201682872. In paragraph 7, the Plaintiff stated that from 30 March 2021, interest accrues at a daily rate of $25.07. These amounts were set out in the Defendants loan ledger which was exhibited to the Affidavit and marked "LB.3", and "LB 5", which also indicate that the rate of interest on loan 201682872 is 6.75%, and 10.25% on loan No 200649426.

[26.] There is no indication in the Bandelier Affidavit that at the time of filing the Originating Summons and the Affidavit, the Defendants were in arrears. In fact, in paragraph 8, it states *"notwithstanding the payment of the arrears by the Defendants, the Plaintiff had already downgraded the said account to Non-Performing status on account of the failure by the First Defendant to adequately service the account and the breach by the Defendants on the covenants of the Credit Agreement dated 26 August 2016. The Credit Agreement stipulates that upon the occurrence of an event of default, the balance of the account will be repayable immediately and without notice."* Therefore, as per the 2016 Credit Agreement, the remaining balance of the principal sum of $166,385.61 and interest of $20,629.42 became due and owing by the Defendants with interest accruing at a rate of $25.07 daily as provided. The Bandelier Affidavit states at paragraph 10 that the balance under Loan 200649426 was $72,790.67 but averred that it was written off due to nonpayment. The Plaintiff further updated the balances due and owing in the Burrows Affidavits on Loans No. 201682872 and 200649429. In the Second Burrows Affidavit filed 8 February 2023 supplemental

to the Bandelier Affidavit, the amount of principal and interest due and unpaid under Loan 200649429 was $49,070.79 and $26,499.55 respectively. Under Loan No. 201682872 the amount of principal and interest due and unpaid was $114,678.06 and $34,770.94 respectively. I find that the information the Plaintiff has alluded to in the Bandelier and Burrows affidavits is sufficient to show the circumstances under which the right to possession arises and has complied with Rule 4 (3) in this regard.

[27.] The Defendants assert that the lower floor of the mortgaged premises has been occupied by a commercial tenant, Paradise Games Ltd. since 2013. The Plaintiff has not supplied this information in accordance with Rule 4 (4) but rather states at paragraph 19 of the First Burrows Affidavit that "to my knowledge and information there are no persons other than the Defendants in possession of the mortgaged property." There was no explanation ever afforded as to why the Plaintiff had no knowledge of the commercial tenant's lease. The Defendants further mentioned an existing 5-year lease with the company which expires in 2027, but no evidence was provided of the same. In any event, the Plaintiff's omission of this information, especially if they had knowledge of the possession by the commercial tenant is contrary to Rule 4 (4). However, this does not have the effect of undermining any claims made by the Plaintiff as I give some weight to the Defendants' evidence in this regard, and contemplate the effect the delivery of possession would have on the commercial tenants. In **Morley v Family Guardian Insurance Co. Ltd [2014] 1 BHS J. No 105**, the court faced with a similar challenge to the contents of the Affidavit in support stated:

> "In light of the above, we fail to understand and cannot agree with the appellant's assertion that the affidavit did not comply, at all, with the requirements of Order 77 r. 4. While it is noted that the affidavit does not describe, as required by sub rule 4, every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property; and while it is also true that the affidavit does not state the amount of a day's interest. It is by no means possible to say or to infer that the affidavit is so deficient that the court is unable to consider the application of equitable principles to the claim, as alluded to by Lyons J, in Citibank N.A v Hutchinson [2004] BHSJ. No. 442."

[28.] The Court went on to consider the provisions of Order 2 Rule 2 and equated this to an irregularity. Allen P stated:

> "It was well within the jurisdiction of the trial judge to continue these proceedings despite an irregularity in the pleadings. In the present case the learned trial judge must have considered the information provided in the affidavit as sufficient.
>
> 13 In the premises, although the affidavit filed on behalf of the respondent failed to comply with the provisions of Order 77 of the Rules of the Supreme Court in that it did not include every particular prescribed by the Order; we nevertheless find that the affidavit complies in all material particulars. As such ground 2 of the appeal must fail."

[29.] I accept and apply the decision of the court in the aforementioned case. In relation to Rule 4 (7), as explored earlier, the Bandelier Affidavit mentioned the amount of a day's interest, and in the account documents exhibited to that affidavit the rates of interest are mentioned consistent with Rule 4 (7). Further, the Second Burrows Affidavit provided an updated continuing rate of the day's interest as of 8 February 2023 at $17.28025 per diem on Loan No. 201682872. As for Loan No. 200649429, the Burrows Affidavit did not mention the day's interest amount. However in the exhibit marked "JB.9", there is a zero interest rate per diem on the account, indicating that the account does not attract a daily interest charge. I find the Affidavits to be materially compliant with Rule 4 (7). For the reasons given, I reject the Defendant's submission that the Plaintiff failed to comply with Rule 4, that the defects are fatal and the action ought to be dismissed.

Claim for possession

[30.] The Plaintiff claims delivery up of possession of the mortgaged property. In **Fourmaids v Dudley Marshall (Properties) Ltd. [1957] 2 All ER at p 36**, Harman J stated:

> "... I said in that case [i.e., Hughes v. Waite], and I repeat, that the right of the mortgagee to possession in the absence of some specific contract has nothing to do

with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right. He has the right because he has a legal term of years in the property. If there is an attornment clause, he must give notice. If there is a provision expressed or to be implied that, so long as certain payments are made he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course."

[31.] In this present matter, the Commercial Mortgage Agreement dated 26 August 2016 signed by the First and Second Defendant provided at page 4:

"**Credit Management**

1. Any delinquency or default of payment arising under this commitment in excess of 30 days within the first three years from the date of the restructure (being the date hereof) shall constitute a breach of this agreement and the Bank, at its sole discretion and without notice to the Borrower, may reverse the interest waived (the sum of $10,791.45) principal ($59,710.79) waived on the original facilities, rending the customer liable for the full balance including principal, interest earned and outstanding on the facility (including the previously waived portion of the interest in the said sum of $70,502.24) and fees. Additionally, the Bank will immediately exercise all of its powers as mortgagee and will commence vacant possession proceedings against you to seek delivery up of possession of the mortgaged property and will exercise its power of sale arising from the said default and delinquency."

[32.] In **Birmingham Citizens Permanent Building Society v Caunt and another [1962] 1 All ER 163,** Russell J stated at page 182:

"Accordingly, in my judgment, where, as here, the legal mortgagee under an instalment mortgage under which, by reason of default, the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline to make the order or to adjourn the hearing, whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. The sole exception to this is that the application may be adjourned for a

> short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth. The practice direction on which the district registrar, very understandably, relied does not assume such a jurisdiction, and if it had it would have been an erroneous assumption.
>
> In the present case on the facts the sole exception to which I have referred is clearly not applicable and the order for possession in the usual form within twenty-eight days after service of the order must be made."

[33.] As mortgages are contractual in nature, the Court for the most part is bound by the provisions of the mortgage document and/or any subsequent agreements between the parties. I accept the Plaintiff's evidence that the 2016 Credit Agreement restructured the 2006 mortgage, provided a conditional waiver of $70,502.24 and extended further facilities comprising a commercial mortgage to the Defendants. The Second Defendant contends that there was a 2013 Agreement that restructured the 2006 loan, but no evidence of this agreement was provided nor was it ever mentioned by the Plaintiff. The terms of the Agreement at page 4 aforementioned are clear and unambiguous. If the Defendants defaulted on the mortgage payments in excess of 30 days within the first 3 years of the agreement, that is August 2016-2019, the Plaintiff in its discretion and without notice to the Defendants would reverse the fees waived under the 2006 mortgage, and the principal and interest under the 2016 Agreement along with fees would become due. Moreover, the Plaintiff stated that it would immediately exercise all powers and seek delivery up of possession and exercise its power of sale.

[34.] It is the evidence of the Plaintiff that the Defendants under the 2016 Credit Agreement refused and or failed to make the required payments as stipulated, resulting in the Plaintiff reversing the initial waivers granted. The Plaintiff has not indicated exactly when and for how many months the Defendants were in default of the mortgage loan. The Second Defendant in her First Affidavit filed 14 July 2021 exhibited email correspondence between herself and one Kevin Ferguson marked as

exhibits "EF 1" and "EF 2". In the correspondence, Mr. Ferguson informed the Second Defendant on 25 February 2019 that Loan No. 201682872 was in arrears by $4,122.31 which represented part payment for 30 December 2018 and the full payment for 30 January 2019. The email further urged the Second Defendant to make a deposit of $4,122.31 on or before 27 February 2019 to fully update the loan as another payment was due 28 February 2019. On 8 March 2019, Mr. Ferguson informed the Second Defendant that the loan was one partial payment and two full payments in arrears. This is indicative of the fact that the Defendants were in arrears in excess of 30 days contrary to the 2016 Credit Agreement.

[35.] On 16 July 2019, Linda Bandelier wrote to the Defendants explaining that the amount of arrears on the account was $5,441.57 as of that date and that the loan was relegated to non-performing status. The letter further states that the outstanding balance on the account was $225,386.78 which comprised of the principal, interest and late fees at an interest rate of 5.50%. Therefore, the $70,502.24 conditionally waived was to be added to the outstanding balance. The Second Defendant in her first affidavit at paragraph 13 admitted that subsequently she met with and informed agents of the Plaintiff that she would bring the loan account current by 15 September 2019 but did not meet this date as the action which she took to meet the obligation did not materialize until February 2020. The Defendants unequivocally acknowledge being in default of the 2016 Credit Agreement, although the arrears were subsequently paid off and the account brought current.

[36.] The Plaintiff by its attorneys Alexiou Knowles & Co. sent two demand letters dated 27 February 2020 addressed to the Defendants stating that the First Defendant was indebted to the Plaintiff under the 2006 loan and the 2016 agreement and demanded the whole amount outstanding. The letter states that the outstanding amount was to be paid within 14 days otherwise the Plaintiff would exercise its remedies under the Mortgage document. The Second Defendant claims that she never received this letter and that it was not served on the registered office of the First Defendant. I accept the Defendants' submission that there was no evidence presented by the Plaintiff to prove that service of this demand letter was effected.

[37.] Under the provision of section 4 of the Home Owners Protection Act 2017, the mortgagee is obligated to give notice to the mortgagor prior to instituting court proceedings either personally or by registered post. In **RBC Royal Bank (Bahamas) Limited v Lawson H Hall and another [2020] 1 BHS J No. 118** Winder J (as he was) had the occasion to remark on the provisions of section 4 of the Act in an instance where the mortgagor claims to have not been served with a demand letter. At paragraph 8, the Learned Judge stated:

> "8 The purpose of the HPA legislation was to provide meaningful protection to homeowners by ensuring a true and proper discourse between the Mortgagor and the Mortgagee prior to taking the significant and ultimate step of recovering the security through litigation. Its provisions ought to be strictly complied with otherwise mortgagees would be precluded from instituting proceedings."

[38.] The demand letter indicates that the letter was to be delivered by hand to the address #184 Corner of Carmichael Road and Faith Avenue Suite A and to the Proprietress of Carmichael Rent A Car Ltd. The Second Defendant in her Third Affidavit stated that the address aforementioned is the location of the registered office of the First Defendant. There is competing evidence between the parties with various possibilities. It could very well be that the Plaintiff delivered the demand letter to the address but the Second Defendant never received it for whatever reason which to my mind is the most plausible scenario. However, I note, as indicated by the learned Winder J, that the purpose of this requirement is to enable meaningful discourse between the parties, and to provide a measure of protection to a homeowner. It cannot be said in all the circumstances of this case that there has not been opportunity for meaningful dialogue, or opportunities for the issues to be resolved.

[39.] I further note that in the Credit Agreement of 2016, under the rubric "Credit Management", the following was stated:

> "1. In the event of defaulted payments First Caribbean International Bank (Bahamas) Limited will take such action as may be deemed necessary to effect repayment without further notice to you. All cost will be duly added to the Mortgage and included in your total liability to the Bank."

2. Any delinquency or default payment arising under this commitment in excess of 30 days within the first three years from the date of the restructure (being the date hereof) shall constitute a breach of this agreement and the bank, at its sole discretion and without notice to the Borrower, may reverse the interest waived (the sum of $10,791.45) principal ($59,710.79) waived on the original facilities, rendering the customer liable for the full balance including principal, interest earned and outstanding on the facility (including the previously waived interest in the said sum of $70,502.24) and fees. Additionally, the Bank will immediately exercise all of its powers as mortgagee and will commence vacant possession proceedings against you to seek delivery up of possession of the mortgaged property and will exercise its power of sale arising from the said default and delinquency"

[40.] These clauses, which were initialed by the Borrower, form a part of the agreement between the Plaintiff and the Defendants, and obviated the need for strict compliance with notice requirements. Therefore, in my view this is not an appropriate matter to have the action struck out for failure to prove service of a demand letter.

[41.] Following the decision of the Court in **Birmingham Citizens Permanent Building Society**, the Defendants agreed to the provisions of the 2016 Credit Agreement to repay on a monthly basis. Both the Plaintiff and Defendants aver that there was a default in the payment of the mortgage in 2019. The earliest evidence provided of the default as contained in the First Affidavit of Emily Ferguson was 24 February 2019. The Defendants contend that at the time the Originating Summons was filed, there were no arrears on the 2016 Commercial mortgage as they were making payments on the account. Therefore, there is no claim against them. However, it ought to be noted that in 2019 or thereabout, the Defendants were in breach of the Credit Agreement and the Plaintiff had the discretion under the Agreement to seek delivery up of possession and demand full repayment of the mortgage funds. Full payment of the arrears and subsequent repayments in installments do not regularize a mortgage. Until the full amount is paid, a debt stands due to the Plaintiff and they can accept payments on the same which is what occurred in this instance. In this regard, this a proper instance to not interfere with the Plaintiff's right to delivery up of possession of the mortgaged property.

[42.] As this decision affects the lease agreement between the Defendants and Paradise Games Ltd. bringing the lease agreement to an end, I would allow the Defendants a three-month timeframe to deliver up possession and fairly provide the tenant with advanced notice of the termination of the lease.

The 2006 Demand Loan

[43.] The Second Defendant in her various affidavits expressed confusion regarding the 2006 Demand Loan. In the First Affidavit, the Second Defendant averred that she understood the amounts written off from the 2006 loan would be added to the new loan No. 201682872, not that there would be another loan. In the letter dated 16 July 2019, Ms. Bandelier stated that:

> "In a Credit Agreement dated August 26th, 2016 you were notified that a total of $70,502.24 ($59,710.79 principal and $10,791.45 interest) was being conditionally waived. It was also highlighted that any future default would result in this sum being added back to the loan. Delinquency persisted after the account was restructured and the debt has again relegated to Non-Performing status. Based on this the sum of **$BSD70,502.24** will be added to the aforementioned outstanding balance."

[44.] The Second Defendant claimed contra proferentem due to the variance of language in the Credit Agreement and the Bandelier letter on the $70,502.24. I understand the Second Defendant's ambiguous interpretation and confusion with both documents. However, it is my understanding based on the 2016 Credit Agreement that the amount under the demand loan was **conditionally waived**. Therefore, if the Defendants were in default of the 2016 Loan agreement, the amount conditionally waived would become due and payable. This does not mean that there was a deferment of the payment or that the funds formed a new loan. The 2006 mortgage existed already and was written off as bad debt for the most part, save for the $70,502.24 which was conditionally waived on the premise that the Defendants would keep the 2016 Loan current. I do not find that contra proferentem arises in this instance. Thus, there is no basis to suspend or estop the Plaintiff's claim. The Second Defendant stated in her Third Affidavit that no demand was made for the

repayment of the funds previously waived under the 2006 Loan. However, in the demand letter by Alexiou Knowles & Co. the Plaintiff claimed the amount due and owing under Loan No. 200649426 as of 22 January 2020 was $59,710.79 principal plus $14,860.62 interest at a rate of $11.86 per diem.

Duress and undue influence

[45.] In the Defence, the Second Defendant claimed duress and undue influence as she should have been advised to seek legal advice before signing the Guarantee and Postponement Agreement. The Defendants have not produced any evidence or legal arguments in support of these claims. The Guarantee and Postponement agreement between the Plaintiff and the Second Defendant was for the Second Defendant to become a guarantor of the First Defendant with its financial commitments to the Plaintiff, and to postpone any claim she may have against the First Defendant until the Plaintiff's claims are satisfied. This agreement gave additional security to the Plaintiff, but does not have a significant bearing on the Plaintiff's claims. The most vital document in relation to the Plaintiff's claims is the 2016 Credit Agreement. It is unfortunate that the Second Defendant felt as if she was under duress and unduly influenced when she signed the Guarantee and Postponement Agreement, but in my view there is no substance to the complaint. The Guarantee and Postponent Agreement were all part of an effort to sort out the affairs of the Defendant, who was already in serious financial difficulty, with orders having already been made by the courts and enforcement deferred, and to enable satisfactory progression between lender and client. Nothing has been advanced to show that the lender was in a superior position to the creditor, or that any duress or undue influence was applied within the legal meaning of those terms.

CONCLUSION

[46.] I am therefore satisfied on the evidence that the Plaintiff is entitled to the reliefs sought in this application. I hereby order as follows:

a) That the Defendants do deliver up to the Plaintiff possession of the mortgaged property, that is, ALL THAT piece parcel or lot of land being Lot Number C-1 in the Subdivision

called and known as "Claridge Heights" situate on the Northern side of Carmichael Road in the Western District of the Island of New Providence in the said Commonwealth, before the expiration of 90 days from the date of judgement.

b) That the Defendants do pay to the Plaintiff all sums due and owing under the 2006 Demand Loan (Loan No. 200649426), and all sums due and owing under the 2016 Commercial Mortgage (Loan No. 201682872) following an updated accounting to be provided by 27th September 2024, together with interest at the contractual rates to the date of judgment, and interest at the statutory rate thereafter.

c) That the Defendants do pay to the Plaintiff its costs of and occasioned by these proceedings, such costs to be assessed by this court if not agreed.

Dated this 29th day of August, A.D. 2024

Neil Brathwaite

Justice