IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/00339

IN THE MATTER of property comprised in Mortgage dated the 4th day of November 2002, between LARONE RECCERO FAWKES BANK OF THE BAHAMAS LIMITED (of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 10452 at pages 223 to 233.

AND IN THE MATTER of a Mortgage Action pursuant to Order 77 of the Rules of the Supreme Court 1978.

BETWEEN:

BANK OF THE BAHAMAS LIMITED

Plaintiff

AND

LARONE RECCERO FAWKES

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Alecia Bowe for the Plaintiff

Attorney Edwin Knowles for the Defendant

DECISION

FACTUAL SUMMARY

[1.] As security for the advance of the sum of $17,600.00, the Defendant, by an Indenture of Mortgage dated 1st November 2002, and recorded in the Registry of Records in Volume

10452 at pages 223 to 233, conveyed to the Plaintiff Lot Number 7, Block Number 7, in the Subdivision called and known as Chesapeake, situate in the island of Grand Bahama. The advanced sums were to have been repaid within seven years with monthly payments of $321.00 to commence on 27th October 2007.

[2.] The Plaintiff alleges that the Defendant defaulted on 28th April 2008, but that some payments were made thereafter, with the last payment made on 27th October 2015. A demand letter dated 10th November 2020 was accordingly sent to the Defendant, demanding repayment of the total sum of $123,720.86, with the sum of $111,030.52 marked as past due. The Defendant having failed to satisfy that demand, the Plaintiff commenced the instant action by Originating Summons filed 1st April 2021, seeking payment of $32,251.16 principal, $40,189.52 interest, $54,952.21 late fees and penalties, delivery of the mortgaged property, and costs.

THE PLAINTIFF'S CASE

[3.] In addition to the initial affidavit of Paulette Butterfield filed 21st April 2021, the Plaintiff filed two further affidavits of Paulette Butterfield on 25th October 2022 and 12th January 2023. In the first, the affiant exhibits a letter outlining the terms of the loan and giving the postal address of the Defendant as F-60270 Fortune Point, Freeport Grand Bahama. That letter also gives the amount borrowed as $17,600.00, and states the rate of interest as "3% over Bank of the Bahamas Prime Rate, currently 10.00% p.a. for an effective rate of 13% p.a. presently."

[4.] In the second supplemental affidavit, in material parts the affiant states the following:

> 6. That further to paragraph 5 above, on the said date I personally conducted a check of our Securities Department and discovered the Promissory Note dated the 7th day of November 2002, and signed by the Defendant acknowledging and agreeing to an Interest rate of 13%., which I am advised by Mrs. Bowe and verily believe to be material in this Action. Additionally, I also discovered a copy of the Deed of Re-Conveyance dated the 4th day of August 2015, from The Grand Bahama Development Company Ltd, (hereinafter referred to as "G.B."), to the Defendant, which said Re-Conveyance was lodged for recording on the 15th day of September, 2015, by the Defendant's present Counsel and is recorded iii Volume 12429 at pages 481 to 502. Now produced and shown to me in a bundle marked for identification as Exhibit "l" is a true copy of the said Promissory Note, and Re-Conveyance.

7. That further to paragraph 6, and at my requests, Mr. Blanton Kemp of our Grand Bahama branch forwarded the following documents to my attention on today's date evidencing the Plaintiff's payments of the outstanding Service Charges due and payable to G.B, as covenanted firstly in the Conveyance exhibited to his said Affidavit at pages 1 to 9 and secondly the Mortgage Deed exhibited to my Principal Affidavit, namely:

(1) A letter dated the 25th day of June, 2014, wherein the Plaintiff acknowledged receipt of correspondence from G.B. which said letter acknowledged G.B.s demand for payment for outstanding service charges for the said hereditaments, and requesting an updated Statement for settlement. Now produced and Shown to me marked for identification as Exhibit "2" is a true copy of the said letter;

(2) A letter dated the 8th day of July, 2014, wherein GB acknowledged receipt of the Plaintiffs letter aforesaid and confirmed that the subject property was repossessed by way of an Affidavit dated the 7th day of May, 2014, verifying repossession and forfeiture of the estate. The said Affidavit of Repossession is exhibited to the Defendant's said Affidavit at pages 21 to 28. Further, that GB also advised in the said letter of its decision to reconvey the said hereditaments to the Defendant upon payment of the outstanding sums. Now produced and shown to me marked for identification as Exhibit "3" is a true copy of the said letter;

(3) By letter dated the 31st day of October, 2014, the Plaintiff enclosed cheque number 021426, in the amount of $2,057.97, representing payment of the outstanding annual Charges for the said hereditaments and which ought to have been paid by the Defendant as covenanted in the said Conveyance from GB. Now produced and shown to me marked for identification as Exhibit "4" is a true copy of the said letter.

[5.] The Plaintiff submits that the governing document in this matter is the Mortgage Deed, which is clear in its meaning and requires no reference to any external source, and which entitles the Mortgagee to pursue all remedies to enforce its security. With respect to the contention that the Plaintiff was under a duty to pay the service charges, the Plaintiff submits that there was no privity of contract between the Grand Bahama Development Company and the Plaintiff, and the Plaintiff was therefore under no obligation to the pay those charges. The Plaintiff further notes that, pursuant to the Mortgage Deed, the Defendant covenanted to pay all taxes, rates and assessments, which they say would include the service charges. They therefore submit that the property was repossessed by the Development Company due to the negligence of the Defendant, and not the Plaintiff. They further note that the service charges were eventually paid by the Plaintiff, and not the Defendant, and that the property was re-conveyed to the Defendant by the

Development Company. The Plaintiff contends that this does not constitute a fresh title so as to destroy any claim on the part of the Plaintiff. Furthermore, the Plaintiff submits that as the holder of the legal title, and having paid the service charges, the Defendant should be called upon to cure any defects in the title of the Plaintiff, which would include delivering up the original Deed of Re-Conveyance, so as to protect the interests of the Plaintiff by preventing the Defendant from dealing further with the property.

[6.] With respect to the limitation point, the Plaintiff relies on the evidence of Paulette Butterfield that the last payment was made on 27th October 2015, resulting in the limitation period running from that date. They rely on section 38 (1) b of the Limitation Act, and submit that a fresh period commences where there is an acknowledgement of the debt at any point by part payment thereof, and therefore submit that the action is not barred by statute.

[7.] In addressing complaints of the Defendant with regard to the rate of interest, the Plaintiff submits that the rate of interest is evidenced in the promissory note signed by the Defendant, who was represented at the time by present counsel, and who made no complaints or objections to that rate of interest. They therefore submit that the complaints of the Defendant are baseless, and that the Defendant is now estopped from objecting to the rate of interest.

THE DEFENDANT'S CASE

[8.] In seeking to oppose the Originating Summons, the Defendant filed the affidavit of Larone Fawkes on 31st October 2022. In that affidavit, the Defendant states the following:

4. That in October 2002, I agreed to purchase from Jerome L. Deveaux a vacant lot known as Lot Number 7, in Block Number 7, in the Chesapeake Subdivision lying to the East of Freeport on the Island of Grand Bahama (hereinafter referred to as "the property").

5. That Mr. Deveaux title to the property was derived from (i) a Deed of Conveyance dated 21 September 1979 ("the 1979 Conveyance") from Grand Bahama Development Company Ltd ("Devco") to John A. Scaglione and Catherine M. Scaglione; and (ii) a Deed of Conveyance dated 19 January 2000 from John A. Scaglione to Mr. Deveaux ("the 2000 Conveyance"}.

6. That the 1979 Conveyance is recorded in the Registry of Records at Nassau, Volume 3247, at pages 440 to 447. A true copy of this 1979 Conveyance is Exhibited at Pages 29-36 of Exhibit-'LRF-1'. By that instrument, Devco conveyed the property in fee

simple for the consideration of the purchase price therein specified and for the further consideration, inter alia, of the payment of a yearly service charge for a term of ninety-nine (99) years upon the uses therein declared for the purpose of providing Devco with powers and remedies for enforcing payment of the said yearly service charge and for determination of the fee simple interest conveyed in the event of non-payment of the said yearly service charge.

7. That, under the provisions of the said uses as specified in clause 1 sub-clause (4) of the 1979 Conveyance, Devco was empowered to re-enter and repossess the property (referred to the in the 1979 Conveyance as "said hereditaments") if the said yearly service charge any part thereof should at any time or times be 3 years in arrears.

8. That I am advised and I therefore believe that the effect of the 1979 Conveyance was not to convey a "fee simple absolute" but to create a "fee simple conditional", which was liable to forfeiture if the service charge was left unpaid for 3 years or more.

11. That, two days after my purchase of the land from Mr. Deveaux, on 1 November 2002, at the request of the Bank, I executed a Deed of Mortgage prepared by the Bank, which deed is recorded in the Registry of Records at Nassau, Volume 10452, at Pages 223 to 233. A true copy of the same extracted from the said Registry is Exhibited at Pages 10 to 20 of Exhibit-'LRF- 1'.

12. That I am advised and therefore I believe that the Deed of Mortgage was not a statutory mortgage under the (Bahamas) Conveyancing and Law of Property Act. Instead, under the terms of the Deed of Mortgage, I conveyed the land to the Bank absolutely but upon terms that I was entitled to request the land to be reconveyed to me if all the monies which I covenanted to pay to the Bank were repaid. In the circumstances, as the successor in title to the original purchasers under the 1979 Conveyance, the Bank was bound by the obligation to pay the service charges payable to Devco.

13. That, in 2003, I was made redundant, losing my employment and my income. Accordingly, I approached the Bank after my redundancy and I invited them to retake possession of the mortgage security, that is to say, the property. The purpose of the voluntarily repossession was to prevent the loan running and prevent the interest from accumulating, thereby prevent me getting into unknown or unspecified debt on the basis that the security was returned. In my professional experience as a bank officer, that would be normal practice. The Bank at the time agreed to take possession of the property. I recall that it was advertised for sale by the Bank in the Freeport News. One of the Bank's officers, Mr. Nelson Vilburn, even approached me to purchase the property but, in the end, he did not purchase it.

14. That, even though the Bank was in possession of the property, the Bank failed or refused to pay the service charge which, as the legal owner, it was liable to pay under the

terms of the 1979 Conveyance. As a result of this, on 30 April 2014, Devco exercised its entitlement to forfeit the property. By an Affidavit dated 7 May 2014, and recorded in the Registry of Records at Nassau, Volume 12153, at Pages 254 to 261, Devco verified its repossession and forfeiture of estate. A true copy of the same extracted from the said Registry is Exhibited at Pages 21 to 28 of Exhibit-LRF-1.

15. That I am advised that the effect of the said forfeiture was to extinguish both the fee simple conditional then vested in the Bank and, with it, my right of redemption under the Mortgage because the destruction of the bank's interest meant it no longer held a fee simple to re-convey to me. I treat that as a repudiation by the Bank of the Mortgage and I hold it responsible for my loss.

16. That I became employed in Bimini in or about May 2014. At that time, I informed the Bank of my new address and also that I wished to regularize the loan because I did not wish for unpaid arrears to show up on any background checks in my new role as a Compliance Officer/Anti money Laundering Officer. The Bank asked me to give them an offer to re-negotiate the loan. I then made an offer that I would repay the sum of $23,000.00, being the amount outstanding under the original loan together with rolled up arrears, over a new term of years together with interest. However, the Bank rejected my offer. That was over 8 years ago.

[9.] The Defendant goes on to deny signing any loan agreement for $31,311.07 or borrowing any such sum, and to state his inability to check or verify the amounts claimed by the bank. The Defendant further denied receiving the demand letter on 10th November 2020 addressed to "Fortune Point, P.O. Box F-60270, Freeport, Grand Bahama", stating that he had not maintained that address for 19 years.

THE DEFENDANT'S SUBMISSION

[10.] The Defendant contends that the Originating Summons is defective and should be struck out or the application dismissed, as the Defendant never entered into a mortgage dated 4th November 2022 as alleged by the Plaintiff. They further suggest that the Defendant never entered into a Mortgage for the principal sum of $32,952.21 as again alleged by the Plaintiff, and that the Plaintiff has acted with willful neglect by miss-stating the amount borrowed, giving differing figures of $17,600.00, $31,311.07,and $32,952.21, and by charging an incorrect and exorbitant rate of interest of 13%.

[11.] The Defendant relies on clause 1(4) of the 1979 conveyance from Grand Bahama Development Company (DEVCO) to John Scaglione from which the Defendant's root of title derived, to support the suggestion that what was created was a fee simple

conditional as opposed to a fee simple absolute, as they say that continued ownership of the property was conditional upon the payment of the service charges. The Defendant further relies on the Mortgage Deed by which the property was conveyed by him to the Plaintiff, with a right of redemption once the sums advanced were repaid. The suggestion is therefore that by that clause, the Plaintiff was actually the owner of the property, and bound to ensure that the service charges were paid. The Defendant also insists that in 2003 the Plaintiff agreed to retake possession of the property, and in fact advertised the same for sale, and were therefore doubly responsible for the payment of the service charges. Once those charges were not paid, with the result that the right of forfeiture exercised by DEVCO in May 2014, ownership of the property passed from the Plaintiff to the Development Company. The Defendant further suggests that, by failing to ensure that the service charges were paid, the Plaintiff failed in their duty to protect the property from forfeiture, and destroyed the security for the loan, and are therefore themselves at fault.

[12.] In support of these submissions, the Defendant cites the case of **Den Norske Bank ASA v Acemex Management Co Ltd (2003) 2 All ER (Comm) 318**, in which the court said that

"If a mortgagee enters into possession he is liable to account for rent on the basis of willful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor."
The Defendant also cites **Yorkshire Bank plc v Hall and Others, Hall and Others v Yorkshire Bank plc (1999) 1 All ER 879.**

[13.] Further, the Defendant cites the seminal text of **Megarry & Wade: The Law of Real Property (8th edn.) at paragraph 3-056** in support of the contention that the title to the property was a fee simple conditional, as opposed to a fee simple absolute. The position of the Defendant is therefore that failure of the Plaintiff to ensure that the service charges were paid, which was the condition which could determine the fee simple title, resulted in the loss of the property, as a result of which the Plaintiff has no title to re-convey to the Defendant upon satisfaction of the mortgage. The Defendant submits that this amounts to a repudiation of the mortgage itself and that, as a result, this action should be dismissed.

[14.] The Defendant accepts that even if it is found that the Plaintiff failed in its duty to protect the Defendant's interest in the property and thereby repudiated the mortgage, this would not have the effect of extinguishing the money debt. However, the Defendant submits that the money claim must also fail for a number of reasons.

[15.] The Defendant submits that while the Plaintiff has exhibited the mortgage document, they have failed to exhibit the actual loan agreement, in the absence of which the court could not be satisfied as to the terms of the loan. They further submit that the demand letter was never properly served, as the address of the Defendant had changed, a fact which they say must have been known to the Plaintiff. The Defendant also takes issue with the rate of interest, suggesting that the rate was variable, but that no information was provided with respect to whether that rate varied during the course of the loan, which they say is fatal to any claim for interest, as the court could not be certain what rate should be applied. They further suggest that the affidavit relied upon by the Plaintiff fails to comply with the **Rules of the Supreme Court Order 77 rule 3(3), 4(3) and 4(6),** in that there was no endorsement on the fold of the notice informing the Defendant that the Plaintiff intended to seek possession, the affidavit fails to show the circumstances under which the right to possession arises and that the money is due and payable.

[16.] Finally, the Defendant claims that the action is barred by operation of the limitation period, and rely on section 5 of the **Limitation Act Chapter 83** which provides a six year period within which such actions must be brought. The Defendant submits that the cause of action accrued either on 28th April 2008, which is more than 12 years before the action was filed on 1st April 2021.

DISCUSSION

[17.] A major contention of the Defendant is that as the property was conveyed to the Plaintiff during the mortgage process, the Plaintiff as the owner of the property had a responsibility to ensure that the service charges were paid. The premise continues that the Plaintiff failed in that duty, and caused the loss of the property which was thereafter repossessed by the Grand Bahama Development Company. The Defendant suggests that the re-conveyance of the property to the Defendant by DEVCO constitutes a separate title over which the Plaintiff has no claim. The Defendant also suggests that when he fell into difficulties, the property was turned over to the Plaintiff, as was evidenced by the Plaintiff's attempt to sell the same, thereby relieving the Defendant of any further responsibility.

[18.] It can readily be seen that the success of this logic depends on the correctness of the proposition that the Plaintiff had a duty to ensure that the service charges were paid. The first point to be considered is the suggestion that the property was turned over to the Plaintiff. The Defendant in his affidavit claims that in 2003 he invited the Plaintiff to retake possession of the mortgage security. The difficulty with this premise is that

such a retaking of possession does not relieve the Defendant of his obligations under the mortgage, as there is no provision in the mortgage deed, which governs the relationship between the parties, which enables the termination of the agreement by a voluntary surrender of the security. I therefore do not accept that any such voluntary surrender would have the effect of shifting responsibility for payment of the service charges to the Plaintiff, or relieve the Defendant of the obligation to satisfy the mortgage.

[19.] The second part of this submission is based on the conveyance of the property to the Plaintiff during the mortgage process, which the Defendant relies upon to state that the Plaintiff was responsible thereafter for ensuring that the service charges were paid. This premise ignores the provisions of clause 4(3) of the Mortgage Deed which reads as follows:

4. The Mortgagor hereby covenants with the Bank as follows:
(3) That during the continuance hereof the Mortgagor will regularly and punctually pay all taxes rates assessments outgoings and impositions whatsoever now or during the continuance of this security to become payable in respect of the said hereditaments and will on demand produce and deliver to the Bank all receipts and vouchers in proff of such payments AND that if the Mortgagor shall make default in any of the above matters the Bank may at its discretion pay all or any such taxes rates assessments outgoings and impositions whatsoever and that its expenses of so doing shall be a debt for the Mortgagor in the same manner as other moneys due from the Mortgagor to the Bank hereunder.

[20.] In my view the service charges certainly fall within "rates assessments outgoings and impositions" which the Defendant as Mortgagor covenanted to pay. That obligation was not erased by the conveyance of the security to the Bank. The Defendant was therefore himself in breach of his mortgage obligations by failing to ensure that the service charges were paid, while the Plaintiff was under no obligation to pay the same, but could do so in their discretion, and sums paid then became a further debt of the Defendant. I therefore do not find that the Plaintiff had a duty to pay the service charges and failed in that duty, causing the repossession of the property and the nullification of the mortgage.

[21.] The Defendant also submits that the re-conveyance to him following the payment of the service charges by the Plaintiff constitutes a new title over which the Plaintiff has no claim. To my mind this is a novel proposition, as it would mean that the Defendant through his own default, which was then made good by the Plaintiff, would have an unencumbered title without having paid the service charges or the mortgage. I have also reviewed the Mortgage Deed, which refers only to a description of the property,

and not to the manner in which title was obtained. I have already concluded that the mortgage was not nullified as suggested by the Defendant, and further conclude that unless the mortgage is satisfied and the property re-conveyed by the Plaintiff to the Defendant in accordance with the Mortgage Deed, the property still constitutes security for the loan, and any title to that specific property held by the Mortgagor is still subject to the obligations freely entered into by him in agreeing to the mortgage.

[22.] The Defendant contends that the action is barred by operation of the limitation period. The **Limitation Act Chapter section 38(1)** provides as follows:

38. (1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and — (a) the person in possession of the land or personal property, acknowledges the title of the person to whom the right of action has accrued; or (b) in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or any person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment.

[23.] The supplemental affidavit of Paulette Butterfield states that the most recent payment on the debt was in 2015. Counsel for the Defendant denied that payment. However, there is no evidence of such a denial in the affidavit of the Defendant, and the submissions of counsel do not constitute evidence. The result is that there is nothing before the court to contradict the evidence of the Plaintiff on this point. Pursuant to section 38(1) of the Limitation Act as cited above, the right to bring an action accrues on the date of the last payment. I therefore find that the limitation period in this case runs from the date of the last payment on 21st October 2015, and the action is not barred by statute.

[24.] The Defendant complains of a number of deficiencies in the Originating Summons, and submits that the same should be struck out. Complaint is made that the Originating Summons refers to a mortgage dated 2nd November 2002, which does not exist, and that the amount referred to in the document is incorrect, as the loan was not for that amount. The third complaint is with respect to there not being an endorsement on the fold of the documents indicating the intention to seek possession. The Defendant also complains that the interest rate is exorbitant, and does not take into account any fluctuations in the prime rate.

[25.] The mortgage document itself states that it was made on 1st November 2002. The date in the Originating Summons is therefore incorrect. The loan agreement gives the

amount of the loan as $17,600.00, whereas the Originating Summons gives the principal amount as $32,251.16, and the affidavit of Paulette Butterfield gives the outstanding principal amount as $31,311.07.

[26.] Mortgage actions are governed by Order 77 of the Rules of the Supreme Court. 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."

[27.] 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."

[28.] In **Morley v Family Guardian Insurance Co. Ltd [2014] 1 BHS J. No 105**, the court considered a challenge to the contents of the Affidavit in support and 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."

[29.] The Court went on to consider the provisions of Order 2 Rule 2 and equated any deficiencies in the affidavit 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."

[30.] While I accept that the Originating Summons states the wrong date for the mortgage, and that there are different figures given for the outstanding principal amount, I do not consider any of the complaints of the Defendant to be a sufficient basis to strike out these proceedings. The actual mortgage document is exhibited to the affidavit in support of Paulette Butterfield. The Defendant could therefore not have been in any doubt about which mortgage was the subject of the action. The Defendant's complaint that there is no notice of the intention to seek possession endorsed on the fold of the affidavit ignores the fact that the Originating Summons itself states that the Plaintiff seeks "Delivery by the Defendant to the Plaintiff of Possession of the mortgaged property. Any failure to endorse such a notice on the affidavit could therefore in my

view only amount to an irregularity which could be cured pursuant to Order 2 Rule 2 of the Rules of the Supreme Court. I also note the case of **Colina Insurance Limited v. Miller [2014] 1 BHS J. No. 20** in which a similar complaint was rejected by the learned Evans J (as he then was) on the basis that any such irregularity was waived by the Defendant in entering an unconditional appearance. In the instant case an unconditional appearance was entered by the Defendant on 23rd June 2021, so that the same reasoning would apply.

[31.] The Defendant also complains of improper service of the demand letter, stating that he no longer resides at the address to which the correspondence was sent, a fact which he claims was known to the Plaintiff.

[32.] Clause 7 of the Mortgage Deed states the following:
"A demand for payment or any other demand under this security may be made by any Manager or Officer of the Bank by letter delivered by hand to the Mortgagor or sent by post addressed to the Mortgagor at the Mortgagor's address as given in this security or to such other address as the Mortgagor may from time to time notify the Bank in writing. A letter delivered to the Mortgagor shall be deemed to be given at the time when it is so delivered. A letter sent by post shall be deemed to be given three (3) days after the same was posted."

[33.] While there is no address given in the Mortgage Deed, the actual loan agreement is addressed to the Defendant at P.O Box F-60270, Fortune Point, Freeport, Grand Bahama, the same address to which the demand letter was sent. The Defendant claims that his address had changed, and that this fact was known to the Plaintiff, as he claims that he had communicated in writing with the Bank on several occasions over the years, and that the Bank also had an email address on file. The Defendant does not indicate whether the correspondence was by email or by post, nor does he indicate that he ever formally notified the Bank in writing of a change of address, as is required by the Mortgage Document. In the absence of evidence of a proper notification I am unable to conclude that the demand letter was not served in accordance with the Mortgage Deed. I also note again that the Defendant entered an unconditional appearance to this action, which would usually have the effect of waiving any objection to proper service.

[34.] With respect to the complaint related to the interest rate, the Supplemental Affidavit of Paulette Butterfield exhibits the loan agreement, signed by the Defendant, which indicates that the rate of interest will be **"3% over Bank of the Bahamas Prime Rate, currently at 10%, for an effective rate of 13% per annum presently."** That agreement goes on to say the following:

"The above rate is subject to change from time to time in line with the current level of interest rate structure in the Bahamas."

[35.] The Defendant has placed before the court the Supplemental Affidavit of P. Olivia Ingraham, which indicates that the Central Bank reduced the prime rate from 6% to 5.5% effective February 15th 2005, from 5.5% to 4.75% effective June 8th 2011, and from 4.75% to 4.25% effective January 5th 2017. The Defendant refers to the Code of Conduct of the Clearing Banks Association, and the duty of member banks to deal fairly and reasonably with customers and complains that the Plaintiff has not been fair in its dealings, and has failed to adjust the interest rate as they were obligated to do.

[36.] Having considered the wording of the loan agreement, I agree that it was contemplated that the interest rate could vary in accordance with changes in the structure of interest rates in this country. The Defendant has placed before the court uncontroverted evidence that the Central Bank, which is responsible for monetary policy in this country, reduced the prime rate on several occasions over the life of this mortgage. There is no evidence that the rate of interest charged to the Defendant was varied accordingly.

[37.] In **Paragon Finance plc v Staunton; Paragon Finance plc v Nash [2002] 2 All ER 248** the Court of Appeal of England & Wales said the following:

(1) The power given to the claimant by the mortgage agreements to set interest rates from time to time was not completely unfettered. A construction to the contrary would mean that the claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level. Neither the existence of the regulatory powers of the Director General of Fair Trading nor the fact that borrowers could redeem their mortgages and seek loans from another source were good reasons for holding that the power to set rates of interest was completely unfettered. Furthermore, commercial considerations were not sufficient to exclude an implied term that the discretion to vary interest rates should not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily. It followed that it was necessary to give effect to the reasonable expectations of the parties that there be implied into both agreements a term that the rates of interest not be set dishonestly, for an improper purpose, capriciously or arbitrarily. Moreover, there was a implied term of both agreements that the claimant would not set rates of interest unreasonably in a Wednesbury sense, but that was not to imply a term that the lender would not set unreasonable rates (see [30], [32], [34], [35], [41], [42], [82], below); dicta of the Court of Appeal in Lombard Tricity Finance Ltd v Paton [1989] 1 All ER 918 at 923 disapproved.

[38.] I am therefore prepared to accept that the Plaintiff had an obligation to vary the interest rate, and to do so in a manner that was not capricious, arbitrary, or for an improper purpose. The Plaintiff has failed in that obligation. The question then becomes, what should be the result of that failure? The Defendant submits that the action should be dismissed.

[39.] In **Harrison Williams & Joann Buchanon v National Workers Cooperative Credit Union SCCivApp No. 141 of 2023** the learned Evans J, in following the case of James Morley v Family Guardian which has been cited above, said the following:

"Similarly, I am of the view that this failure to detail the interest charged, or the installments in arrears (see RSC Order 77 Rule (4) (3) (c)) and the amount of a day's interest (see RSC Order 77 Rule (4) (7)) do not vitiate the Originating Summons herein since there has been substantial compliance with Order 77 in spite of these failings." The learned judge went on to remit the matter to the Supreme Court for a proper accounting to be produced, again following the Morley decision.

[40.] In the oft cited case of **Citibank, N. A v Major [2001] BHS J. No. 6** the learned 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 concluded 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.

[41.] In the instant case, despite the various challenges raised by the Defendant, there is no doubt that the agreement has been breached, and that the Plaintiff is accordingly entitled to the relief sought. With respect to the interest rate, I do not find that the failure to vary the interest rate, or clarity with respect to the amounts due, should have the result that the action should be dismissed. Instead, in accordance with the reasoning in **Harrison Williams and Joann Buchanon** cited above, I am of the view that a proper accounting is required. I therefore make the following orders:

a. The Defendant is to deliver up to the Plaintiff the original re-Conveyance from the Grand Bahama Development Company to the Plaintiff.
b. Immediate Vacant Possession is granted to the Plaintiff.

c. The Plaintiff is to vary the interest rate applicable to the mortgage in accordance with the variations of the prime rate by the Central Bank during the duration of the mortgage, and to provide an updated accounting showing the amounts of principal, interest, and further charges due and owing by 18th July 2025, following which the parties will be heard with respect to that updated accounting and the issue of costs.

Dated this 18th day of June A.D., 2025

Neil Brathwaite

Justice