

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/01004

B E T W E E N

COLINA MORTGAGE CORPORATION

Plaintiff

AND

MILLER ENTERPRISES LTD

First Defendant

AND

EARL MILLER

Second Defendant

Before: The Honorable Madam Justice Carla Card-Stubbs

Appearances: Mr. Darzhon Rolle of Counsel for the Plaintiff
Ms. Tai Pinder of Counsel for the Defendant

Hearing date: November 17, 2023; (Further affidavit and written submissions
December 15 2023)

Mortgage Suit by assignee – Whether the assignee is the proper Plaintiff – Whether transfer and assignment were valid and effective – Whether choice of initiating action by originating summons was procedurally incorrect

The First Defendant executed a mortgage and further charge with one company. The Second Defendant executed a guarantee for the loan, with the same company. That company underwent a name change and subsequently transferred and assigned the mortgage, guarantee and further charge to the Plaintiff. The Plaintiff alleged that the First Defendant

defaulted on the mortgage agreement (and further charge). The Plaintiff sued the First Defendant as well as the Second Defendant in his capacity as guarantor.

The Defendants resisted the claim primarily on the basis that the Plaintiff did not have standing to sue and had no cause of action against the Defendants. The Defendants also argued that there had been no notice of the Transfer and Assignment, that the transfer instrument was not shown to have been duly stamped or exempted from stamp duty and that the proceedings were improperly commenced by way of originating summons.

HELD: The Court found that the Transfer and Assignment was effective to pass to the Plaintiff the benefit of the mortgage, further charge, and guarantee and that the Plaintiff could maintain the proceedings against the First and Second Defendants. The Court found that the Plaintiff had dealt with the Defendants as mortgagor/lender and that the Defendants' course of dealings had amounted to an acknowledgement of that status of the Plaintiff. The Court held that the originating process used was procedurally proper. The Court found that none of the objections raised by the Defendants displaced the underlying claim and that the Defendants had not contested the defaults alleged by the Plaintiff or the updated statement of account. The Court granted an order in favour of the Plaintiffs.

RULING

INTRODUCTION

[1.] The case of the Plaintiff, Colina Mortgage Corporation Limited, is that the First Defendant, Miller Enterprises, executed a mortgage with Colina Imperial Insurance Ltd. securing approximately BSD \$880,000 over the property that is the subject of these proceedings. A further charge was later granted in the approximate sum of BSD \$270,000. The Second Defendant, Mr. Miller, executed a guarantee in support of the indebtedness of the First Defendant. The Plaintiff's case is that the benefit of the mortgage, the further charge, and the associated debt was transferred or assigned to it, and that it thereafter administered the account and dealt with the Defendants as creditor.

[2.] Colina Mortgage Corporation Limited seeks foreclosure or sale of the mortgaged property and payment of all sums due and owing by the Defendants under the mortgage and further charge, plus any other relief the court deems fit, as well as costs.

[3.] The Defendants, Miller Enterprises and Earl Miller, resist the claim principally on the basis that Colina Mortgage Corporation has not sufficiently established its standing to sue; that there was no notice of the transfer/assignment; that there are inconsistencies in the documentary references to the relevant Colina entities; that the transfer instrument was not

shown to have been duly stamped or exempted from stamp duty; and that relief against Mr. Miller, as guarantor, is procedurally improper in these proceedings.

BACKGROUND

[4.] On the 29th day of August 2018 the Plaintiff brought an action against the Defendants by filing an Originating Summons under Order 77, Rule 1 of the Rules of the Supreme Court.

[5.] By the Originating Summons, the Plaintiff alleges that the Defendants are:

... the Borrower and Guarantor under the Mortgage dated the 31st day of March, A.D. 2006 made between the First Defendant of the one part and Colina Imperial Insurance Ltd. of the other part and recorded at the Registry of Records of the Commonwealth of The Bahamas in Volume 9624 at pages 574 to 591 and a Further Charge made between the First Defendant of the one part and Colina Imperial Insurance Ltd. of the other part and recorded at the Registry of Records of the said Commonwealth in Volume 9801 at pages 452 to 457.

[6.] The Plaintiff seeks the following relief:

1. Foreclosure or sale of the property comprised in the Mortgage and Further Charge namely **ALL THOSE** pieces parcels or lots of land being Lots "A", "B" and "C" totaling 2.46 acres situate at the Southwestern Junction of Harrold Road and Knowles Drive in the Western District of the island of New Providence one of the Islands of the Commonwealth of The Bahamas.
2. Payment of all sums due and owing by the Defendants to the Plaintiff together with all interest thereon under the Mortgage and Further Charge.
3. Further or other relief.
4. Costs.

THE HEARING

[7.] At the hearing of the Originating Summons, the Defendants did not dispute the allegations of the mortgage and further charge or that there was a default or that there were sums owing. However, the Defendants raised several points in answer to the claim. The matters raised may be summarized as the right of the Plaintiff to bring the action and whether Colina Mortgage is the proper party to the action, the validity of the assignment of the mortgage and whether the Defendants were notified of same, the issue of stamp duty

compliance and the proper procedure for the action. I note, for the record, that the Defendant filed a summons on February 13, 2019, which sought to treat with some of these responses to the Claim brought.

[8.] Prior to the hearing, the Defendants filed a summons on the 13th day of February 2019 which sought:

An Order Striking Out the Originating Summons filed 28th Day of May 2018, pursuant to Order 18 of the Rules of The Supreme Court Rule 19 (1) (a), No cause of action (c) it may prejudice, embarrass or delay the fair trial of the action, and (d) an abuse of the Courts process.

Alternatively, that the Originating Summons be converted to a Writ of Summons and for leave to be granted to the Defendants for an Order pursuant to Order 1 b Rule 1 of the RSC to add COLINA INSURANCE LIMITED as a necessary party.

[9.] The Defendants did not pursue the summons and, instead, the Court treated with the matters raised by the summons in the course of hearing the substantive application on the Originating Summons.

[10.] **ISSUES**

The issues raised are:

- 1 Whether Colina Mortgage Corporation Limited is a proper party:
 - (i) Whether the Plaintiff is entitled to bring this action against the First and Second Defendants,
 - (ii) Whether the Defendants were notified of the Transfer and Assignment,
 - (iii) Whether the transfer of mortgage and assignment may be admitted into evidence in the absence of evidence of stamp duty compliance.
 - (iv) What is the nature and effect of the Transfer and Assignment - whether there was a valid assignment of the mortgage, further charge and guarantee and
- 2 Whether the proceedings ought to have been commenced by Writ of summons and not by Originating Summons.

3 Whether the Plaintiff is entitled to the relief sought.

ISSUE 1

PROPER PARTY

[11.] The Defendant raises the issue of whether Colina Mortgage Corporation Ltd is the proper party to enforce the mortgage.

Submissions of the Defendants

[12.] The Defendants submit that Colina Mortgage Corporation Limited is not the proper party to bring the action since the Defendants had no contractual relationship with the Plaintiff and no notice of any assignment. The Defendants argue that their relationship was with ColinaImperial Insurance Limited, the original mortgagee. The Defendants submit that the action should be dismissed because no cause of action is made out and that the action is misconceived and constitutes an abuse of the Courts process.

[13.] The Defendants contend that although the security documents executed by the Defendants were transferred to the Plaintiff, the actual debts in relation to those documents were never transferred. The Defendants submit that the debts were never transferred and could not have been lawfully transferred as there is no indication on the document to show that Stamp duty was paid, making any partial assignment legally defective.

[14.] The Defendants argue:

1. Neither Mr. Miller nor Miller Enterprises has been a customer of the Plaintiff company.
2. Miller Enterprises was a customer of ColinaImperial Insurance Limited. The Defendants were never advised of any transfer or assignment of the Miller Enterprise's mortgage nor have they ever had any dealings with the Colina Mortgage Corp.

Submissions of the Plaintiff

[15.] The Plaintiff's case is that the mortgage and associated rights were transferred to it under the Deed of Transfer and Assignment of Mortgages ('Transfer and Assignment'), and that it can therefore sue for foreclosure or sale as mortgagee or assignee. The Plaintiff's evidence is that ColinaImperial Insurance Ltd. with whom the Defendants contracted, had a change of name to Colina Insurance Limited. Subsequently there was a Transfer and Assignment of Mortgages and Other Documents from Colina Insurance Limited to Colina Mortgage Corporation Ltd.

[16.] Colina Mortgage Corporation also argues that the Indenture of Mortgage allowed for an assignment of the mortgage without notification to the Defendants and that the Defendants had notice of the assignment during their communication with Colina Mortgage Corporation.

[17.] The Plaintiff, Colina Mortgage Corporation, also relies on the case of **AIB Mortgage Bank v. Nadine Thompson** ([2017] IEHC 515, [2018] 3 IR 172) for the issue of notice. It is the submission of Counsel for the Plaintiff that even where formal notice was required and not given, the lack of notice did not invalidate the assignment of the mortgage and that the assignment is to be treated as a "transfer in equity".

ISSUE 1(I) WHETHER PLAINTIFF ENTITLED TO BRING ACTION

MORTGAGE, FURTHER CHARGE AND GUARANTEE

[18.] The Defendants do not dispute the facts that gave rise to the obligation of debt. Those facts are set out in the affidavit of Beverley Ferguson which is in support of the Plaintiff's Originating Summons. Beverley Ferguson is described as the Manager of Credit and Collections at Colina Mortgage Corporation Ltd. Her evidence is that on or about 31st

March, 2006, the sum of \$880,000.00 was advanced to the First Defendant by way of a mortgage loan. Thereafter there was a guarantee and further charge. By affidavit filed August 29, 2018, she avers, in part, at paragraph 6 that the sum was secured:

- i. by an Indenture of Mortgage dated 31st day of March A.D. 2006 made between the First Defendant of the one part and Colina Imperial Insurance Ltd. of the other part and recorded at the Registry of Records of the Commonwealth of The Bahamas in Volume 9624 at pages 574 to 591 wherein the First Defendant granted and conveyed ALL THOSE pieces parcels or lots of land being Lots "A", "B" and "C" totaling 2.46 acres situate at the Southwestern Junction of Harrold Road and Knowles Drive in the Western District of the island of New Providence. A copy of the Mortgage is exhibited hereto and marked '**BF.1**';
- ii. a Guarantee dated 31st day of March A.D., 2006 made between the Second Defendant of the one part and Colina Imperial Insurance Ltd. of the other part and recorded at the Registry of Records of the Commonwealth aforesaid in Volume 9625 at pages 1 to 6. A copy of the Guarantee is exhibited hereto and marked '**BF.2**';
- iii. a loan facility letter dated 22nd September A.D., 2006. A copy of the letter is exhibited hereto and marked '**BF.3**'; and
- iv. Further Charge dated 26th day of September A.D., 2006 made between the First Defendant of the one part and Colina Imperial Insurance Ltd. of the other part and recorded at the Registry of Records of the Commonwealth of The Bahamas in Volume 9801 at pages 452 to 457. A copy of the Further Charge is exhibited hereto and marked '**BF.4**'.

[19.] Therefore the evidence is that the loan obligation arose between Miller Enterprises Limited and Colina Imperial Insurance Ltd. and was secured by the property described in the Indenture of Mortgage dated 31st day of March A.D. 2006. The sum loaned Was also secured by a guarantee dated 31st day of March A.D., 2006 made between Earl Miller and Colina Imperial Insurance Ltd.

NAME CHANGE AND TRANSFER AND ASSIGNMENT

[20.] By her affidavit, Ms. Ferguson, on behalf of the Plaintiff, gives evidence of the status of Colina Mortgage Corporation Ltd. this way:

7. By a Certificate of Change of Name and Incorporation issued by the Registrar General of the said Commonwealth on the 4th December, 2009, it was certified that the name of Colina Imperial Insurance Ltd. was changed to Colina Insurance

Limited. A copy of the Certificate of Change of Name and Incorporation is exhibited hereto and marked '**BF.5**'.

8. By a Transfer and Assignment of Mortgages and Other Documents dated 16th March, 2010 and made between Colina Insurance Limited of the one part and Colina Mortgage Corporation Ltd. of the other part and recorded at the Registry of Records in Volume 11173 at pages 124 to 1.82, Colina Mortgage Corporation became seised in fee simple of the subject property. The relevant pages of the Transfer and Assignment of Mortgages and Other Documents are exhibited hereto as '**BF.6**'.

[21.] The Plaintiff's evidence is that Colina Imperial Insurance Ltd. with whom the Defendants contracted, had a change of name to Colina Insurance Limited. Subsequently there was a Transfer and Assignment of Mortgages and Other Documents dated 16th March, 2010 between Colina Insurance Limited and Colina Mortgage Corporation Ltd. The recorded Transfer and Assignment of Mortgages and Other Documents includes the mortgage, the guarantee and the further charge which form the subject of this action.

[22.] The Indenture of Mortgage between Colina Imperial Insurance Ltd. and Miller Enterprises is exhibited to the affidavit of Beverley Ferguson. That deed makes provision for the transfer of the benefit of the mortgage. It is silent on the question of notification to the Defendant. In that regard, Clause 7(22) of the Indenture of Mortgage provides:

7. IT IS FURTHER AGREED AND DECLARED as follows: -

(22) The Lender may at any time transfer the benefit of this Mortgage to anyone and in such case the transferee shall have the benefit of all covenants by the Borrower and the provisions herein contained and may at any time thereafter exercise all rights and remedies of the Lender for securing the moneys and other liabilities due hereunder.

[23.] Notably, Clause 7(22) of the Indenture of Mortgage does not provide that the lender/mortgagee must notify the borrower/mortgagor of such a transfer or that a transfer is effective only after notification. However, notification is important so that the mortgagor may properly meet its obligation and know where that assignment lies. Otherwise a mortgagor is at risk of making payments to an original lender/mortgagee while being bound to an assignee.

COURSE OF DEALINGS

[24.] The Defendants' evidence is that they are not familiar with Mrs. Ferguson and ought to have had notice about the name change. Counsel for the Defendant argued that the Defendants were left in a situation where they did not know who the true mortgagee was. The Defendants rely on the affidavit evidence of Earl Miller. By affidavit filed on filed on February 13, 2019, Earl Miller avers, in part:

I, EARL MILLER of the Western District of the Island of New Providence make OATH and say as follows, THAT:-

- [1.] I am President and Director of the Miller Enterprises Limited and I am duly authorized to swear this affidavit on the company's behalf. I am also named personally herein as Guarantor to a Mortgage made March 31, 2006.
- [2.] I have perused the affidavit of Beverley Ferguson filed August 29th 2018, who I am not personally familiar with and I have no knowledge of her involvement in my banking affairs.
- [3.] In my capacity as Director I have never authorized any loan facility, credit facility or account with the Plaintiff.
- [4.] My personal and confidential banking relationship was with Colina Imperial Insurance Ltd.
- [5.] In paragraph "z" of the Ferguson Affidavit the affiant stated that the information contained therein is based on her personal knowledge. Never has she stated or implied that she was ever employed by Colina Imperial Insurance Ltd.
- [6.] I have received no notice of any assignment of any account and based upon the evidence presented to the court it would appear that Colina Insurance Ltd should be a necessary party to this action.
- [7.] I further swear this affidavit in support of a summons filed contemporaneously with this affidavit seeking to stance out this Originating Summons your full cooperation as we seek to save valuable judicial time and cost to our client.

[25.] In this case, the Defendant's argument is that the position is confusing and that they do not know who the proper mortgagee is. The Plaintiff relies on surrounding conduct, including account statements, demand letters, the continued use of the same loan number, and payments allegedly made to Colina Mortgage Corporation, to show that the Defendants knew that Colina Mortgage Corporation, the Plaintiff, was the entity entitled to receive payment.

[26.] Colina Mortgage Corporation relies on the affidavit evidence of D'Andra Johnson filed on September 29, 2023. Ms. Johnson is described as legal counsel at Colina Mortgage Corporation. She seeks to rebut the Second Defendant's evidence that he was unaware of Ms. Ferguson and unaware of the status of the Plaintiff. Her evidence is that:

7. At paragraph 2 of the Second Defendant's Affidavit dated 13th February 2019, he further stated that he was not personally familiar with Beverly Ferguson ('Miss Ferguson') nor has any knowledge of her involvement relative to his banking affairs. However, there are correspondences from as early as May 2010 addressed to the Second Defendant from Beverly Ferguson on behalf of CMC indicating that the Commercial Mortgage Loan No. 1074COM was and is still currently in default which disputes this. A copy of the communications between Miss Ferguson and the Second Defendant Counsel is exhibited hereto and marked 'DJ.1.'

8. There was also a letter dated 5th May 2015 from Mrs. Donna Harding-lee addressed to Miss Ferguson whereby she acknowledged that CMC is holding the mortgaged property as security. A copy of the letter is exhibited hereto and marked 'DJ.2.'

9. Furthermore, since March 2010, the Second Defendant has made several payments to the Plaintiff and has effectively acknowledged the debt. A copy of the payment receipt is exhibited and marked 'DJ.3.'

[27.] The exhibited documents at DJ1 are presented as exchanges between the Defendants and actors for the Plaintiff. I will refer to some here. Exhibited is a letter dated May 17, 2010, addressed to Mr. Earl Miller and Miller Enterprises, over the signature of 2 persons, including Beverley Ferguson described as Manager, Credit and Collections. It refers to mortgage Loan #1074COM. There is no letter head. However, the attached statement (not referred to in the letter) shows a heading "ColinaImperial Mortgage Corporation Ltd. – Payments Due" and it makes a reference to Loan #1074COM" with "Customer ID Millers Enterprises". There are other such letters and statements where the letters are issued over the signature of Beverley Ferguson.

[28.] There is also a letter dated October 8, 2010 and addressed to the Bank of The Bahamas re "Mr. Earl Miller, Miller Enterprises, Re Loan #1074COM". That letters serves to advise "that Mr. Miller has been a client of Colina Mortgage Corporation Ltd. since

November 1, 2006” and that “Mr. Miller maintains a mortgage facility”. The letter is over the signature of 2 persons, including Beverley Ferguson described as Manager, Credit and Collections. There is a letter dated December 5, 2011 addressed to Miller Enterprises “re: Loan#1074 COM” which advises that the loss payee on the insurance policy for the property subject to the mortgage should be “Colina Mortgage Corporation”. There is also a letter headed “final notice” which is on a letter head of “Colina” with the sender’s detail and address shown as “Colina Insurance Limited”. It is a letter dated January 23, 2013, addressed to “Miller’s Enterprises Limited c/o Mr. Earl Miller”, over the signature of 2 persons, including Beverley Ferguson described as Manager, Mortgage and Collections. It refers to mortgage Loan #1074COM and demands payment of the “full balance of \$1,007,842.07”. The attached statement (not referred to in the letter) shows a heading “Colina Mortgage Corporation, makes a reference to Loan #1074COM”, shows a demand date of January 23, 2013 and a total amount due of \$1,007,842.07.

[29.] DJ2 is a letter dated May 5, 2015, from attorneys for Mr. Miller addressed to Colina Mortgage Corporation. It reads:

BY HAND

Colina Mortgage Corporation
#12 Village Road
Nassau, Bahamas

Attention: Ms. Beverly Ferguson

Dear Sirs:

Re: Earl Miller/Miller Enterprises

We represent Mr. Miller and the above-named company relative to a Lease of his premises situated on Harold Road, which we understand that you hold as security. Presently, we are awaiting final approval and are very optimistic that a Lease with the Government of the Bahamas will be signed shortly. Mr. Miller will then be in a position to satisfy and regularize all of his outstanding financial obligations with yourselves.

Please do not hesitate to contact us should you have any questions.

Yours faithfully,
Donna Harding-Lee (Mrs.)

[30.] DJ3 shows evidence of payment received from Mr. Miller as well as evidence of documents said to be executed by Mr. Miller. The Plaintiff’s documents show references to different company names, namely Colina Insurance Limited and ColinaImperial

Insurance Ltd. Significantly, there are copies of cheques and transfers made by Mr. Miller. A Royal Bank of Canada bank draft by purchaser Earl Miller and dated February 14, 2011 is made out to “Colina Mortgage”. There is another such draft dated May 30, 2012. Also exhibited is a CIBC/First Caribbean bank draft by purchaser Earl Miller and dated May 1, 2012 which is made out to “Colina Mortgage”.

[31.] The Defendants did not respond to or refute these documents in their response to the Second D’Andra Johnson Affidavit.

[32.] In this case, the Defendants do not dispute the existence of the contractual relationship resulting in the Indenture of mortgage, with a guarantor and the existence of a further charge. The Defendants do not dispute the existence of the underlying secured lending transaction. The evidence establishes the creation of the mortgage, the further charge, and the guarantee. It also establishes a continuing indebtedness acknowledged by the payments made by/on behalf of the First Defendant.

[33.] I find that the evidence shows the existence of a Transfer and Assignment instrument and an acknowledgement by the Defendants of a continuing secured lending relationship subsequent to that Transfer and Assignment.

[34.] I find that the Defendants’ conduct was consistent with recognition of the Plaintiff as the entity receiving payment and making demands in relation to the subject mortgage. The evidence also reveals that the documents relied upon by the Plaintiff, contain references to different Colina entities. That state of affairs leaves much to be desired. However, I do not find that it creates the sort of confusion that the Defendants contend for. I do not find that such discrepancies prevented the Defendant from knowing who the mortgagee was or that the discrepancies militated against the Plaintiff’s entitlement as the entity entitled to enforce the mortgage and the security. The documentary evidence demonstrates continuity in account administration and reliance on the same loan reference. Importantly, payments and communication *from* the Defendants were addressed to ‘Colina

Mortgage Corporation'. This is convincing evidence that the Defendants were well aware of the entity's status and that they owed an obligation to Colina Mortgage Corporation. It is apparent that the Defendants expected that payments made to "Colina Mortgage Corporation" were to be attributed to the loan first secured with Colina Imperial Insurance Ltd., i.e. Loan No. 1074COM. The First Defendant's own conduct, including continued dealings and payments, is consistent with recognition of the Plaintiff, Colina Mortgage Corporation, as the entity entitled to receive and enforce payment.

[35.] The evidence is that the payments of the First Defendant were advanced by the Second Defendant, Earl Miller. At the very least, Mr. Miller qua guarantor, had constructive notice of the Plaintiff claim and status as the entity entitled to receive and enforce payment.

[36.] In the premises, I am satisfied that the Plaintiff has standing to maintain these proceedings, is the proper Plaintiff and has a cause of action against both Defendants.

ISSUE 1(II) NOTICE OF TRANSFER AND ASSIGNMENT

[37.] The Defendants argued that no proper notice of assignment was served and that they could not safely know to whom the debt was owed, especially in light of inconsistent references to different Colina entities.

[38.] On the issue of notice to the Defendants, there is no evidence of formal notice of the Transfer and Assignment being given by the Plaintiff or by the former mortgagee to the Defendants. I have found that the contract between the parties does not require consent from the mortgagor or a formal notice to the mortgagor for the transfer to be effected as a legal assignment. The contract is silent in this respect. The issue therefore is whether the lack of formal notice goes to the validity of the assignment such that it prevents the Plaintiff from enforcing the mortgage, the guarantee and further charge and from realizing the security.

[39.] The case of **AIB Mortgage Bank v. Nadine Thompson** ([2017] IEHC 515, [2018] 3 IR 172), relied on by the Plaintiff, involved a dispute over the validity of an assignment of a debt and whether the assignee as plaintiff could recover the debt from the defendant. The defendant had argued that she had not received the required statutory notice of the assignment per Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. That section provided that express notice in writing to the debtor...of an absolute assignment of a debt or legal chose in action...operate to make that assignment effectual in law... “to pass and transfer the legal right to such debt or chose in action...”

[40.] In that case, Baker J determined that for an assignment to be actionable at law under Section 28(6), the debtor must receive express written notice of the assignment, identifying the assignee and providing sufficient certainty about the assignment. Finding that there had not been a notice compliant with the statute, the learned judge found, nonetheless, that the plaintiff could still pursue the debt as an equitable assignee, the assignor having ceased to have any rights or obligations regarding the debt. The judge therefore entered judgment against the defendant in favour of the plaintiff. The relevance of notice was addressed by the learned judge thus, at paragraphs 27 to 28, 48 to 49, 53, 61 to 62:

[27] That a debtor be given notice of the assignment of a debt or chose in action is important for practical and legal reasons. A debtor must know to whom the debt is due and from what date a debtor may with certainty pay a debt to an assignee.

[28] Section 28(6) identifies the date at which the assignment of a debt or chose in action becomes effectual in law to transfer or pass the legal right to such debt or chose in action and all legal remedies for enforcement. Thereafter, and following upon notice, the power to give a good discharge for the debt thereby vests in the assignee without concurrence of the assignor.

....

[48] The authorities suggest that a court will look to the substance and not the form of a notice.

[49] I consider that in order to be a valid notice under s 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is relevant, and this must be so because s 28(6) expressly

provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law.

...

[53] While a notice does not have to be sent with the intention of constituting a statutory notice, a notice must be sufficiently clear as the legislation requires that the notice be express. This precludes the argument advanced by the plaintiff that it is sufficient that documents sent to a debtor by implication identify an assignment, and I do not consider that s 28(6) leaves open an argument that a notice which impliedly identifies an assignment can be sufficient, or that a prior general consent performs the statutory function of a notice. A notice must be given, it need not be formal, it need not refer to the statute, but it must be an express notice of an assignment and not merely a claim to the debt by another party. The existence of a prior assignment ought not to be implied. ...

....

[61] The absence of notice does not of itself prevent the assignee from starting the action although in that circumstance he is an equitable assignee: *Weddell v Pearce & Major* [1988] 1 Ch 26 at p 42.

[62] A valid equitable assignment of an existing debt does not require notice to a debtor: *Law Society of Ireland v O'Malley* [1999] 1 IR 162.

[41.] Provisions similar to Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 are to be found in section 2 of the local Choses in Action Act, Chapter 148. Neither counsel in this matter sought to rely on those provisions although Counsel for the Plaintiff sought to argue the effect of the **AIB Mortgage Bank v. Nadine Thompson** in the absence of formal notice.

[42.] I am satisfied that no formal written notice of the assignment, or of the name change, or of the effective date of the assignment and of the assignee was given to the Defendants.

[43.] In this case, counsel for the Plaintiff submits that at the very least, in the absence of formal notice, the Plaintiff holds an equitable assignment which it can enforce. I accept that submission. The evidence is that ColinaImperial Insurance, having transferred and assigned the mortgage debt, sought to register the assignment and has not pursued the debt despite the untidy nature of the documents later sent to the Defendants. The effect of notice is to effect a right of action in law. The lack of notice does not preclude the assignee from pursuing proceedings based on a right in equity.

[44.] The notice also operates to protect the assignee so that the debt obligations are not paid to the assignor. The notice further operates to inform the debtor that his obligations to the assignor have been transferred to another. In this case, the Defendants have not demonstrated that they have suffered any prejudice from a lack of formal notice. The lack of formal notice does not, in this case, place the Defendants at risk of facing a demand on an obligation from Colina Imperial Insurance, original mortgagee.

[45.] I find that the Defendants were aware, or at the very least, “put on notice” that the Plaintiff claimed an entitlement to the payments. The evidence is that the Defendants have, by their course of dealings, recognized the Plaintiff as the person entitled to their payments on the debt and have made payments to the Plaintiff on the debt.

[46.] In this case, having considered the full circumstances, I find that the Defendants were made aware that the Plaintiff had assumed the capacity of mortgagee. It seems to me that a mortgagor who has dealt with an assignee as mortgagee cannot avoid enforcement on the purely technical basis as to form of notice. In this case, the Defendants cannot acknowledge the existence of the indebtedness and attempt to address same by making payments to the Plaintiff on the one hand and yet deny the Plaintiff’s entitlement to exercise a right of enforcement on the other.

[47.] Further, the absence of notice does not prevent the Plaintiff from suing the Defendants in its own name where the transfer and assignment operate at least equitably: **AIB Mortgage Bank v. Nadine Thompson.**

[48.] In the circumstances, I hold that Colina Mortgage Corporation is entitled, in equity, to enforce the benefits of the Transfer and Assignment against the Defendants and to do so in its own name.

ISSUE 1(III)STAMP DUTY

[49.] The Transfer and Assignment is duly registered and recorded. However, no payment of stamp tax is discernible on the face of the Transfer and Assignment. This Defendants submit that this raises two issues. The Defendants argue that:

1. “It appears that in spite of the fact that the security documents executed by the Defendants were transferred to the Plaintiff the actual debts in relation to those documents were never transferred. We submit that these debts were never transferred and could not have been lawfully transferred in any event as there is no indication on the document to show that Stamp duty was paid. The lack of stamp duty paid or exempted could be inferred that no stamp duty was paid on the transfers and if so the Court can infer that the debts were not legally and properly transferred.”
2. “...under the law the transfer documents submitted in evidence do not conform with the provisions of the Stamp Act.”

[50.] The Defendant raises the issue of what was transferred and assigned, and whether the assignment ought to be properly before the court as a matter of evidence. The Plaintiff’s position was that there was no stamp duty payable. The Court, at the conclusion of the hearing, gave the parties an opportunity to further address the matter by way of affidavit evidence and written submissions. Both parties furnished and filed further affidavit evidence.

[51.] The Plaintiff produced the second affidavit of D’Andra Johnson, filed November 30, 2023, which shows, inter alia:

5. Upon review of our internal records, it was discovered that the Transfer and Assignment of Mortgages and other Documents dated 16th March 2010 (more particularly) described in paragraph 8 of the Beverly Ferguson Affidavit dated 29th August 2019) (“**the Transfer**”) was not stamped by the Public treasury Department. However, I can confirm that the Transfer was recorded at the Registry of Records in Volume 11173 at pages 124 to 182 on the 1st day of September, 2023.
6. By letter dated 30th July 2010 from Miss Miriam L. Curtis of the Public Treasury Department addressed to Alexiou, Knowles & Co, it was confirmed that the

Transfer was exempted from stamp duty pursuant to the Stamp Act, Chapter 370. A copy of the letter is exhibited here marked “**DJ.4**”.

7. I am not aware of the circumstances as to why the Transfer was not stamped by the Public Treasury Department evidencing that same was exempted from stamp duty as was then applicable.

[52.] The referenced letter at DJ4 is a letter on the letterhead of “Public Treasury Department”, signed for Miriam L. Curtiss. It is dated July 30, 2010 and is addressed to Alexiou, Knowles & Co, attorneys for the Plaintiff. I will refer to this letter as the “Curtiss letter”. It reads:

Dear Sir,
Re: Transfer of Mortgage – Colina Insurance Limited to Colina Mortgage Corporation Ltd.

We write in response to your letter of July 30, 2010 regarding the captioned acknowledging receipt of the enclosed Affidavit of Sandra J. Knowles.

Having obtained and reviewed the Annual return of Colina Imperial Insurance Ltd. and Colina Imperial Mortgage Corporation Limited and Colina Holdings Limited we confirm that your clients does [sic] qualify for the exemption on conveyance dated 16 March 2010 in accordance with Item 30 of the third Schedule of the Stamp Act.

Therefore, you can collect your document from our Revenue Section on receipt of this letter.

[53.] The Plaintiff’s evidence is that the document is stamp duty exempt and that it therefore can be received into evidence and that all the objections of the Defendant should fall away.

[54.] The Defendants contend that the Curtiss letter is insufficient evidence of the exemption of stamp duty for the Transfer and Assignment.

[55.] The Defendants produced the 2nd supplemental affidavit of Earl Miller which shows, inter alia:

1. That I have read the Affidavit of D’Andra Johnson and the exhibited letter of Miriam Curtis.
2. That the Affidavit and letter do not assist this court in making a decision,

3. That the Court gave the Plaintiff an opportunity to prove that the subject documents were in fact stamped as required to be relied on as evidence.
4. That the Affidavit conceded at paragraph 7 of the Affidavit that the document was not in fact stamped which in essence is the end of the matter rendering it void of evidential value as per the Provisions of the Stamp Act.
5. That the attached letter of Miriam Curtis is equally of no moment as it is vague and does not even peripherally address the issue of the subject mortgage.
6. That the letter of Curtis speaks on an Affidavit of Sandra J. Knowles that is not before the Court and as such the Court is not aware of its contents or relevance to these proceedings.
7. That the letter of Curtis states generally that “your clients does not qualify for the exemption on the conveyances dated 16th March 2010.” With no supporting documents this is no indication which clients are being referenced or more specifically which conveyances are being exempted.
8. That the Court cannot be required to speculate that the subject mortgage of this application is in some manner related to the contents of the “Curtis letter.”

[56.] I have considered the affidavit evidence of both parties and the letter now before the court. The Defendants do not challenge the authenticity of the Curtis letter but contends that it does not amount to evidence that supports the Plaintiff’s contention that the transfer was exempt from stamp duty.

[57.] My review of the letter shows that it is written from the Public Treasury Department to the attorneys for the Plaintiff concerning a transfer of mortgage from Colina Insurance Limited to Colina Mortgage Corporation Ltd. and a conveyance dated 16th March 2010. The reference to the Affidavit of Sandra J. Knowles appears to be a document submitted to them for consideration. I do not find that, for present purposes, it is necessary for the court to have sight of a document that informed the decision of the Public Treasury Department.

[58.] The decision articulated in the letter from the Public Treasury Department is that the conveyance dated 16th March 2010, which pertains to the transfer of mortgage from Colina Insurance Limited to Colina Mortgage Corporation Ltd., is exempt from stamp duty. The Transfer and Assignment relied upon by the Plaintiff is a registered document dated March 16, 2010, filed by Alexiou Knowles & Co., called “Transfer and assignment of mortgages and other documents” from named party Colina Insurance Limited to named

party Colina Mortgage Corporation Ltd. The Curtiss letter itself is dated July 30, 2010 which is sufficiently proximate in date to the transfer relied upon by the Plaintiff. I am satisfied that the reference in the Curtis letter is a reference to the document before the court.

[59.] The Defendants' submission that there is no indication of "which clients are being referenced" or "which conveyances are being exempted" may, in my view, be answered by a construction of the letter as a whole and in context. I agree that the letter does not specifically "address the issue of the subject mortgage" but that is not the purpose of the letter.

[60.] I find, for these purposes, that the letter is certain and sufficient in its terms to discharge the burden on the Plaintiff to prove that the Transfer and Assignment relied on by the Plaintiff was stamp duty exempt and I so find.

ISSUE 1(IV) NATURE AND EFFECT OF THE TRANSFER

[61.] The Defendants argue that the debts were never transferred to the Plaintiff. They argue that:

1. It appears that in spite of the fact that the security documents executed by the Defendants were transferred to the Plaintiff the actual debts in relation to those documents were never transferred. We submit that these debts were never transferred and could not have been lawfully transferred in any event as there is no indication on the document to show that Stamp duty was paid. The lack of stamp duty paid or exempted could be inferred that no stamp duty was paid on the transfers and if so the Court can infer that the debts were not legally and properly transferred. The Court we humbly submit should take note of the fact that the document exhibited at BF.6, which transfers and assigns the moneys, titles, guarantees and other documents to the Plaintiff does not reflect the payment of any stamp duty calculated on any debt amount or at all and the Court should therefore infer that the debts were not transferred and/or properly transferred, especially in light of the fact that by their own evidence, BF.11, Colina Insurance Limited, who is not a party to these proceedings, are carrying the most current statement of account in respect of the Defendants for the same amount that the Plaintiff is claiming herein.

2. It is trite law that an assignment of this nature can't be partially made, therefore we humbly submit that if the statement of account is still with Colina Insurance Limited in conjunction with the fact that no stamp tax is marked as paid on the transfer deed itself, makes the Plaintiff's claim suspicious and under the law the transfer documents submitted in evidence do not conform with the provisions of the Stamp Act.

[62.] My finding on review of Clause 7(22) of the Indenture of Mortgage between ColinaImperial Insurance Ltd and Miller Enterprises (set out above), is that it provides for the right of the mortgagee to transfer the mortgage and the rights thereto and remedies thereof. The security is the referenced property, described in its schedule. The Further Charges recite that they are further advances made “upon the security granted to [the Lender] by virtue of the Principal Indenture. The Guarantee dated March 31, 2006, given to ColinaImperial Limited (Lender) by Earl Miller (Guarantor) is given in relation to the loan to Miller Enterprises and is a continuing guarantee which “the Lender may assign or otherwise transfer its interest herein to any other person or entity and such other person or entity shall thereupon become vested with all the rights in respect thereof granted to the Lender herein or otherwise.”

[63.] The registered “Transfer and assignment of mortgages and other documents” from named party Colina Insurance Limited to named party Colina Mortgage Corporation Ltd. dated March 16, 2010, by its terms, transfers the sums secured by the charges, rights of action, title to interests under any guarantees and heriditaments comprised in same. By a schedule, it lists the subjects of transfer which include items 517 (mortgage), 518 (further charge) and 520 (guarantee). Those items are the subject of this action.

[64.] It is my determination that, properly construed, the Transfer and Assignment carried with it the enforceable chose in action secured by the mortgage and further charge, and not merely a bare security detached from the debt.

[65.] I also find that the evidence regarding the course of conduct of the parties is consistent with a construction of that document that the benefits, including the security and

chose of action were transferred and assigned. The conduct and evidence that lend to such a conclusion, includes:

- i. The same account/loan reference persisting beyond the transfer and assignment;
- ii. The continued servicing of the facility by the First Defendant;
- iii. demands issued on the debt to the Defendants by the Plaintiff;
- iv. payments received from the First Defendant by the Plaintiff;
- v. payments made to the Plaintiff by the First Defendant
- vi. Correspondence to the Plaintiff from the Defendants or to persons on their behalf and
- vii. no rival Plaintiff asserting title to the debt.

[66.] I find that the assignment of the mortgage and further charge passed both the debt and the security to the assignee, the Plaintiff. I find that the assignment of the guarantee made the guarantor liable on its terms to the assignee, the Plaintiff.

ISSUE 2 - NATURE OF THE PROCEEDINGS

[67.] This matter was initiated by Originating Summons under the now repealed and replaced Rules of the Supreme Court (R.S.C. 1978, as amended) (RSC).

[68.] The Defendants also submit that the Defendants have a meritorious defence which would necessitate this matter being prosecuted under a Writ of Summons instead of an Originating Summons.

[69.] The Defendants further submit that “as against the 2nd defendant who is not a Mortgagor nor is there any claim made by the Plaintiff that the 2nd Defendant is anything more than a Guarantor for the repayment of Debt and as such we humbly submit that the Originating Summons filed herein pursuant to Order 77 of the R.S.C. 1978 does not apply to the 2nd Defendant in the circumstances.”

[70.] Under Order 77, rule 1 RSC, a mortgage action could be brought either by writ of summons or by originating summons. In practice, an originating summons was the default procedure. A writ of summons was appropriate in certain instances, such as where there was a substantial factual dispute and where contested facts would need to be tested and tried. A writ of summons was suitable for contentious matters. Nonetheless, the action could be started in one form and continue in another, by court order.

[71.] Under the RSC, initiating action by the wrong originating process did not render the proceedings void: Order 2, rule 1, RSC. The court had power to make corrective orders and regularize the proceedings. An appropriate matter could be converted to the writ procedure on the Defendant showing a full defence that required pleadings and answer to pleadings.

[72.] In this case, the Defendant raised various procedural objections. The Defendants have submitted that the Defendants ought to be allowed to “mount a defence” but have not discharged the onus on them of showing that there is a defence to the claim, which is a claim arising out of default on the various contractual obligations (viz, mortgage, further charge and guarantee). No defence to the allegation of default is discernible in any affidavit filed by the Defendants.

[73.] The Defendants have not denied the contractual relationship by way of the mortgage, further charge and guarantee. The affidavit evidence of the Defendants by affidavit filed February 13, 2019 was to challenge the capacity of the Plaintiff. I have already addressed that matter and resolved it in favour of the Plaintiff, Colina Mortgage Corporation Ltd.

[74.] The claim before me is a conventional mortgage enforcement claim for foreclosure or sale and payment of sums due under the security. The existence of the objections of the Defendants which were raised as areas of dispute do not, in my opinion, render the originating summons procedure unsuitable in this instance. The issues raised are largely documentary and suitable for determination on affidavit evidence.

[75.] The Second Defendant is properly before the court because he executed a guarantee supporting the secured obligations. The inclusion of the guarantor does not change the mortgage proceedings into proceedings triable by writ only. Mr. Miller's liability as a guarantor arises out of the same lending transaction underpinning this action.

[76.] I therefore find that the matter is properly constituted and initiated against both Defendants.

ISSUE 4: CASE FOR RELIEF

[77.] The case of the Plaintiff is set out in several affidavits, commencing with that of Beverly Ferguson. That sets out the details of the Indenture of Mortgage, Guarantee, loan facility letter, further charge and assignment as noted above. In relation to the default, Beverly Ferguson avers:

9. Clause 5(3) of the Defendant's Mortgage requires that the First Defendant at all times during the continuance of the security will punctually pay all taxes rates assessments outgoings and impositions whatsoever for the duration of the mortgage period.
10. The First Defendant for the period 2006 to 2017 has defaulted in paying Real Property Taxes assessed on the mortgaged property. The Plaintiff advised the First Defendant by letter dated 8i11 November, 2017 that Real Property Taxes in the amount of \$257,170.79 were due and owing on the said property and provided the First Defendant with a copy of its Tax Certificate. A copy of the letter and the Tax Certificate are exhibited hereto and marked '**BF.7**'.
11. The First Defendant failed and or refused to settle the amount due and owing and as a result, the Treasurer of the Commonwealth of The Bahamas instituted legal proceedings against the Defendant by Writ of Summons in Common Law Action 201 8/ CLE/ gen/ 00475 seeking payment of the outstanding sums, interest and costs. A copy of the Writ of Summons is exhibited hereto and marked '**BF.8**'.
12. The Plaintiff has incurred the following charges in relation to and/or as a result of the First Defendant's default under the Mortgage.
13. Legal Fees- \$4,395.22
14. Appraisal fees-\$1,050.00

- i. Copies of the letters advising that the said charges were paid by the Defendant are exhibited hereto as a bundle and marked **'BF.9.'**

15. Clause 4 (1) of the Defendant's Mortgage provided that the full amount of principal and all interest and arrears of interest under the Mortgage shall forthwith become due and payable and all a mortgagees powers of sale, foreclosure, action, possession and of appointing a Receiver (and any other powers and remedies of a mortgagee) shall forthwith be or become available to the Plaintiff to recover the same and all expenses incurred or to be incurred by the Plaintiff in enforcing its security If one of the monthly installments shall be in arrears and unpaid (whether lawfully demanded or not) or if default be made by the First Defendant in the observance of performance of some agreement or covenant provision or condition contained in the mortgage.
16. At various times the First Defendant defaulted on payments due and owing on the loan. The Plaintiff advised the Defendants by a demand letter dated the 22nd December 2015 of the First Defendant's default under the Mortgage and made a demand to the Defendants for repayment of the sums due and owing together with interest but the Defendants have not paid the sums owing or any part thereof. A copy of the letter is exhibited hereto and marked **'BF.10'**.
17. The Statement of Account between the parties as at the 9th August 2016 is as follows:
18. Principal Balance as at 8th August 2018 -\$922,956.12
19. Amount of principal repaid as at 8th August 2018 - \$232,489.10
20. Interest at 8th August 2018 - \$309,922.60
21. Appraisal Fees disbursed by the Plaintiff as at 8th August 2018 - \$1,050.00
22. Legal Fees disbursed by the Plaintiff as at 8th August 2018 - \$4,395.22
23. Pay Off Fee - \$350.00
24. Interest continues to accrue daily at the rate of \$227.58
25. That as at the 8th August 2018, the First Defendant made payments in the amount of \$232,489.10 towards the principal sum and the principal sum of \$922,956.12 is owing; together with interest to that date in the amount of \$309,922.60. Exhibited hereto and marked **'BF.11'** is a copy of the Plaintiff's loan ledger and Statement of Account in respect of the First Defendant's account.
26. That the Plaintiff's attorneys, Alexiou Knowles & Co., by its letters dated the 18th July, 2018 made a final demand to the Defendants for repayment of the sums due and owing together with interest but the Defendants have not paid the sums owing or any part thereof. Exhibited hereto marked **'BF.12'** and

'BF.13' are copies of the letters sent to the Defendants by Alexiou, Knowles & Co.

[78.] The Plaintiff's case is that the First Defendant breached the mortgage agreement by defaulting on the payment of taxes and by defaulting on the payments of the loan obligation. This triggered a demand letter before action dated December 22, 2015 in the name of Colina Mortgage Corporation Ltd. for \$1, 003,752 plus interest and a "final notice" (one of 2) by letter dated January 23, 2013, demanding payment of the "full balance of \$1,007,842.07". The Plaintiff's case is that the First Defendant remains in default.

[79.] The Plaintiff's case is that the Second Defendant became liable on the default of the First Defendant.

[80.] The Defendants have not contested the defaults alleged by the Plaintiff, namely default in payment of loan and default in payment of tax assessments as set out in the affidavit of Beverly Ferguson. Nor have the Defendants contested the amounts said to be outstanding. By way of affidavit evidence filed August 31, 2023, the Second Defendant, Earl Miller, averred in a supplemental affidavit:

9. That with reference to any issue to Inland Revenue I have met with the same and a re-assessment was done with regard to monies outstanding the same of which has been adjusted.
10. That I have had a meeting with the Bahamas Development Bank with regard to financing as recently as three weeks ago at which time a proposal was put to them and as such I am in the final stages of approval. The same will allow me to satisfy the debt that is the subject of this action. That now shown to me and marked "Exhibit EM2" is a copy of the proposal.

[81.] Those averments, to my mind, are, at the very least, non-contesting acknowledgements of default in paying real estate taxes and default in paying the loan.

[82.] By way of affidavit evidence filed December 15, 2023, Earl Miller averred in a second supplemental affidavit:

2. That I swear this Affidavit Supplemental to my Affidavit sworn on the 6th of February 2019 and Supplemental Affidavit sworn in August of 2023.

3. That I have read the Affidavit of D'Andra Johnson and the exhibited letter of Miriam Curtis.
4. That the Affidavit and letter do not assist this court in making a decision,
5. That the Court gave the Plaintiff an opportunity to prove that the subject documents were in fact stamped as required to be relied on as evidence.
.....
10. That the Plaintiff is still not in a position to address the issues raised with reference to the documents that they are seeking to rely on in this application.

[83.] The Plaintiff through the affidavits of Beverley Ferguson, Carlene Farquharson, Wynsome Carey and D'Andra Johnson each time sought to give an updated statement of account as it concerns, in the words of Mr. Miller, "the debt that is the subject of this action". The affidavit to which Mr. Miller lastly responds, the second affidavit of D'Andra Johnson filed November 30, 2023, puts the updated amount at \$1,722,422.88 per Statement of Account dated 27th November, 2023. Significantly, the Defendants having addressed the Plaintiff's efforts at proving a stamp duty exemption, made no demurrer to the statement of account advanced as evidence in the said second affidavit of D'Andra Johnson filed November 30, 2023. Counsel for the Defendants did raise, prior to the affidavit evidence of D'Andra Johnson, that the Plaintiff had statements of account with different figures. My review of the evidence is that the conflict may be resolved by reference to the date of the statement of accounts.

[84.] I find in this case that the Plaintiff has proven that the Defendants defaulted on the Indenture of Mortgage and the Guarantee and that the secured debt remains unpaid. I find that the Plaintiff is entitled to enforce the Mortgage, further charge and Guarantee as against the First and Second Defendants. I am satisfied that prior to the issue of a letter of final demand, statements of account were served on the Defendant(s). I am satisfied that a letter of final demand was served on the Defendant(s). I am satisfied that Miller Enterprises, the First Defendant, continues to be in default of its contractual obligations under the Indenture of Mortgage.

[85.] A guarantor's liability is secondary, but it arises upon the principal debtor's default according to the terms of the guarantee. As a general rule, the mortgagee is not required

first to exhaust the security before proceeding against the guarantor. The mortgagee may proceed against a guarantor for the unpaid sums or the amount unrealized if the security is in fact enforced. In this case, the Plaintiff is entitled to relief against the Second Defendant, Mr. Earl Miller, under the guarantee.

[86.] The Plaintiff seeks several remedies. The general incidents of the mortgagee's rights are well established. A mortgagee whose money has become due and remains unpaid is entitled to enforce its security, subject to the terms of the mortgage and the supervisory jurisdiction of the Court where the Court's assistance is sought.

[87.] The Plaintiff cites the following authorities including, **Farnol, Eades, Irvine & Co Ltd v Miller [1915] 1 Ch 22**, **Williams v Morgan [1906] 1 Ch 804** and **Keene v Biscoe (1878) 8 Ch D 201**. From those authorities, the relevant principles to be extracted are that

- i. a mortgagee may enforce when the secured money has become due;
- ii. the court may examine the terms of the security and surrounding default to determine when the right to enforce arises; and
- iii. mortgage remedies are grounded in the mortgagee's proprietary and contractual rights.

[88.] Based on my findings above, it is my determination that the Plaintiff is entitled to the remedies sought and I make the order herein.

CONCLUSION

[89.] In this case, I find that the mortgage, further charge, and guarantee were duly created and that monies were advanced and remain due and therefore the First Defendant is in default. I find that the Transfer and Assignment was effective to transfer the rights of the original mortgagee/lender, including a right of action, to the Plaintiff and that the Plaintiff is entitled to enforce the security. I find that the First Defendant is liable to the

Plaintiff. I find that as a result of the default of the First Defendant, the Second Defendant is liable to the Plaintiff.

COSTS

[90.] Taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6, I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. Therefore, in this matter, the Defendants shall pay the Plaintiff's costs, to be assessed by a Registrar, if not agreed.

ORDER

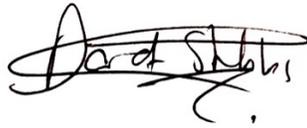
[91.] The ORDER and directions of this Court are as follows.

IT IS ORDERED that:-

1. The Plaintiff is entitled to exercise its power of sale over the property comprised in the Mortgage and Further Charge namely **ALL THOSE** pieces parcels or lots of land being Lots "A", "B" and "C" totaling 2.46 acres situate at the Southwestern Junction of Harrold Road and Knowles Drive in the Western District of the island of New Providence one of the Islands of the Commonwealth of The Bahamas.
2. The Plaintiff is entitled to the Judgment sum of \$1,722,422.88 (comprising the principal amount, accrued interest, pay off fees, legal fees and advertisement and appraisal fees) which sum is hereby adjudged to be due and owing by the First and Second Defendants to the Plaintiff pursuant to the said Indenture of Mortgage, Further Charge and Guarantee; and;
3. The contractual interest at a daily rate of \$231.66 from the 27th day of November, 2023 to March 19, 2026 ; and

4. Interest continuing on the said sum of \$1,722,422.88 at a statutory rate of 6.25 per centum per annum from the 19th day of March 2026 to the date of payment; and
5. The Defendants do pay the Plaintiff's costs of and occasioned by the action such costs to be assessed by a Registrar if not agreed.

Dated this 24th day of March 2026

A handwritten signature in black ink, appearing to read "Carla D. Card-Stubbs, J.", with a stylized flourish at the end.

Carla D. Card-Stubbs, J

Justice