**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law & Equity Division**

**Claim No. 2014/CLE/gen/01791**

**IN THE MATTER** of an Indenture of Mortgage made the 10th day of February, A.D. 2003 between Gayle Strachan and Janice Strachan and Finance Corporation of Bahamas Limited

**AND IN THE MATTER** of an Indenture of Further Charge made the 25th day of November, A.D. 2008 between Gayle Llewelyn Strachan and Janice Janet Strachan and Finance Corporation of Bahamas Limited

**AND IN THE MATTER** of the Mortgages Act, Chapter 156 of the Revised Laws of the Commonwealth of The Bahamas

**B E T W E E N**

**FINANCE CORPORATION OF BAHAMAS LIMITED**

Plaintiff

**AND**

**GAYLE STRACHAN**

First Defendant

**AND**

**JANICE STRACHAN**

**also known as JANICE JANET SMITH**

Second Defendant

| | |
|---|---|
| **Before:** | **The Honourable Mr. Justice Neil Brathwaite** |
| **Appearances:** | Jonathan Deal for the Plaintiff<br>Akiré Nicolls and Dwana Davis for the First and Second Defendants |
| **Date of Hearings:** | 1st December 2022; 23rd March 2023 |

## DECISION

**BRATHWAITE, J**

## INTRODUCTION

**[1.]** This is the Court's ruling on the Plaintiff's application for declaratory and consequential relief arising out of a mortgage and further charge over property situate at Lot 80, Misty Gardens Subdivision, New Providence, The Bahamas (the "Mortgaged Property").

**[2.]** The application was commenced by Originating Summons filed on 4th November 2014. The Originating Summons was later amended and re-filed on 6th December 2022. By the Amended Originating Summons, the Plaintiff seeks:

i. A declaration that the Plaintiff is entitled to vacant possession of the Mortgaged Property;
ii. A declaration that the Plaintiff is entitled to exercise the power of sale with respect to the Mortgaged Property;
iii. An order directing the Defendants to deliver the possession of the Mortgaged Property to the Plaintiff within Twenty-Eight (28) days of the Order;
iv. Judgment for the sums outstanding under the said Indenture of Mortgage and the said Further Charge;
v. Further or other relief as deemed expedient; and
vi. Costs of this application.

**[3.]** The Defendants entered an appearance on 26th August 2019 and filed the Affidavit of Gayle Strachan and Janice Strachan on 25th September 2019, and the further affidavits of Janice Strachan on 21st October 2019 and 20th January 2023 in opposition. They contend, inter alia, that the proceedings are premature, constitute an abuse of the process of the court, disclose no reasonable cause of action, and therefore ought to be dismissed.

**[4.]** By the Affidavit of Janice Strachan filed 20th January 2023, the Defendants seek:

i. An Order that the Plaintiff provides a proper and accurate accounting with respect to the Defendant's loan history;
ii. A Declaration that the Notice as agreed between the Plaintiff and the Defendants' via the Mortgage document was not served upon the Defendants prior to the commencement of these proceedings and that as a result of the same, the Plaintiff's

application for the exercise of the power of sale in respect of the Mortgaged Property was premature; and

iii. An Order that this action is dismissed on the grounds that it is premature.

## BACKGROUND

**[5.]** The Plaintiff, Finance Corporation of Bahamas Limited ("FINCO"), is a company duly incorporated under the laws of the Commonwealth of The Bahamas carrying on the business of banking from several branches situate across the island of New Providence and elsewhere.

**[6.]** The Defendants are and were at all material times customers of the Plaintiff. They maintain two loan accounts with the Plaintiff, accounts 2002494 and 2004316, both of which are presently in arrears.

**[7.]** By Indenture of Mortgage dated 10th February 2003, the Plaintiff granted the Defendants an instalment mortgage loan in the principal sum of $126,000.00 (the "Mortgage Loan"). The Mortgage Loan was secured by a mortgage over Lot 80, Misty Gardens Subdivision, New Providence. The Mortgaged Property comprises a residential duplex apartment building, of which one unit is and was occupied exclusively by the Defendants at the material time.

**[8.]** Thereafter, by Commitment Letter and an Indenture of Further Charge, both dated 25th November 2008, the Plaintiff granted a further loan to the Defendants in the principal sum of $35,000.00 (the "Further Loan"), secured by a Further Charge over the same Mortgaged Property.

**[9.]** Over time, the Defendants fell into arrears under both loan facilities. They admit to having missed payments on each loan account and attribute their defaults to financial hardship.

**[10.]** On 12th July 2011, the Plaintiff issued a demand letter in respect of the arrears. Further, by letter dated 21st September 2011, it purported to notify the Defendants of its intention to exercise its power of sale.

**[11.]** The Defendants deny having received the 2011 Demand and Notice letters prior to the commencement of these proceedings and, on that basis, dispute the Plaintiff's entitlement to exercise its power of sale under section 22 of the *Conveyancing and Law of Property Act (the "Act").*

**[12.]** The Plaintiff, however, maintains that by Clause 15 of the Mortgage deed and Clause 5 of the Further Loan Agreement the parties expressly contracted out of section 22 of the Act.

In any event, it contends that upon default the respective loan balances became due and payable and that, in the absence of any realistic prospect of redemption, it is entitled to exercise its rights as mortgagee under the governing documents, which it contends the Defendants' have obstructed by their refusal to deliver vacant possession of the Mortgaged Property.

**[13.]** Notwithstanding the foregoing, and in an effort to regularize the Mortgage Loan, the Plaintiff maintains that the parties entered into a revised repayment arrangement evidenced by a Commitment Letter dated 3rd July 2015, duly executed by the parties. The revised repayment arrangement applied solely to the Mortgage Loan, while the Further Charge repayment arrangement remained unchanged. While the Defendants neither expressly admit nor deny the existence of this revised arrangement, the Plaintiff avers that in any event the Defendants defaulted under the revised agreement as well.

**[14.]** As of 16th November 2022, the Plaintiff asserts that the Defendants total indebtedness comprised of the sums of $225,562.77 under the Mortgage Loan, $39,990.78 under the Further Charge, and $10,541.05 in respect of appraisal and advertising expenses. The Plaintiff therefore pursues this application seeking, inter alia, vacant possession of the Mortgaged Property and authority to exercise its power of sale in order to recover the outstanding indebtedness.

**PLAINTIFF'S CASE**

**[15.]** In support of its application, the Plaintiff relies on the Affidavit of D'Andrea M.A. Sumner filed on 4th June 2015 (the "Sumner Affidavit"), the Supplemental Affidavits of Cedric B Moss II filed on 16th and 22nd August 2019, and the Affidavit of Harewood Higgs filed on 30th November 2022 (the "Higgs Affidavit").

**[16.]** Ms. Sumner deposed that the Defendants breached their contractual obligations and were notified of their default by a letter dated 12th July 2011, exhibited to her affidavit, which required them to remedy the arrears within fourteen (14) days, failing which legal proceedings could be commenced against them.

**[17.]** In addition, Ms. Sumner stated that by letter dated 21th September 2011, the Defendants were notified of the Plaintiff's intention to exercise the power of sale, that the Mortgaged Property would be advertised for sale, and that access was required for inspection and appraisal.

[18.] Ms. Sumner also deposed that an appraisal of the Mortgaged Property was carried out on 16th May 2014, assessing its market value at approximately $219,000.00 and its forced sale value at approximately $164,000.00.

[19.] According to Ms. Sumner, despite repeated requests, the Defendants failed to regularize their accounts and declined to vacate the Mortgaged Property, thereby preventing the Plaintiff from exercising its power of sale. She stated that as of 22nd April 2015, the Defendants were indebted in the sums of $137,283.89 under the Mortgage and $31,683.82 under the Further Charge, with interest and late fees continuing to accrue.

[20.] The continuing indebtedness of the Defendants was corroborated in the First Supplemental Affidavit of Mr. Cedric B. Moss, who deposed that as of 11th August 2019, the loan accounts stood outstanding in the sums of $164,565.19 and $31,054.13 respectively. He stated that the combined indebtedness of $195,619.32 comprised principal, accrued interest, and late fees, and that those sums remained wholly unsatisfied.

[21.] In the Higgs Affidavit, Mr. Higgs confirmed that although a revised repayment arrangement was entered into in 2015, the Defendants failed to comply with its terms. He further deposed that as at 16th November 2022, the indebtedness stood at $225,562.77 under the Mortgage Loan and $39,990.78 under the Further Charge. Despite repeated demands, it was his evidence that the Defendants had neither discharged the indebtedness nor delivered vacant possession of the Mortgaged Property to the Plaintiff.

**Plaintiff's Submissions**

Counsel for the Plaintiff relied on sections 21, 22, 23, and 27 of the *Conveyancing and Law of Property Act*, which confer statutory powers upon a mortgagee to take possession of and sell mortgaged property upon default, and submitted that the Defendants were notified that their accounts were in arrears and were afforded opportunities to remedy the defaults. Having failed to do so, Counsel submitted that the Plaintiff became entitled to exercise its rights as mortgagee, including possession and sale, but were frustrated in their efforts by the refusal of the Defendants to vacate.

[22.] In support of the Plaintiff's entitlement to possession, Counsel relied on **Four-Maids Ltd v Dudley Marshall (Properties) Ltd [1957] 2 WLR 931**, where it was held that at common law a mortgagee is entitled to possession of mortgaged property even where the mortgagor is not in default. Counsel acknowledged, however, the principle articulated in **Quennell v Maltby [1979] 1 All ER 568**, that it is customary to allow a mortgagor to remain in possession where possession is not sought bona fide to enforce or preserve the security.

**[23.]** Counsel further relied on *Fisher and Lightwood's Law of Mortgages* and on the decision of the Court of Appeal in **Citibank N.A. v Paul Major et al [2001] BHS J No. 6**, where Ganpatsingh JA held that under an instalment mortgage, the entire mortgage debt becomes payable upon default and the Court has no jurisdiction to vary contractual rights or restrain a mortgagee from enforcing its security absent fraud, invalidity, or material irregularity.

**[24.]** Counsel submitted that no such circumstances arise in the present case, as the Defendants do not challenge the validity of the Mortgage or Further Charge and raise no allegation of fraud or material irregularity capable of engaging the Court's intervention.

**[25.]** The Plaintiff submits that the Defendants' objections disclose no substantive defence to the enforcement of the Plaintiff's security. It was emphasized that the Defendants do not dispute having received the loan proceeds nor the validity of the securities, but instead admit persistent default extending over many years. Counsel outlined the lending history between the parties, noting admissions in the Defendants' affidavit of missed payments from as early as 2004, arrears at the time the Further Loan was advanced, sporadic payments thereafter, and a cessation of payments by 2018.

**[26.]** Counsel further emphasized that the Plaintiff restructured the Mortgage Loan in 2015 to accommodate the Defendants' financial difficulties, but the Defendants defaulted under the revised arrangement as well. Counsel submitted that the Plaintiff's records, corroborated by the Defendants' own evidence, show that the last payment under the Mortgage Loan was made on $24^{th}$ January 2018 and the last payment under the Further Charge was made on $30^{th}$ April 2018.

**[27.]** As to the quantum of the claim, Counsel submitted that the sums outstanding as at $16^{th}$ November 2022, namely $225,562.77 under the Mortgage Loan and $39,990.78 under the Further Charge were supported by detailed loan statements and transaction histories exhibited to the affidavits and that the Defendants have adduced no credible evidence to contradict those figures.

**[28.]** Counsel submitted that procedural complaints advanced by the Defendants, including objections that the Mortgage deed was not properly exhibited to the Sumner Affidavit, amount to no more than technical irregularities which ought to be disregarded, particularly as there is no dispute as to the terms of the mortgage and the Defendants themselves exhibited a copy in their own affidavit evidence.

**[29.]** Addressing the argument of prematurity, Counsel submitted that neither the Mortgage nor the Further Charge imposed any requirement for demand or notice prior to enforcement.

Rather, Counsel clarified that both instruments expressly provide for acceleration, entry into possession, and the exercise of the power of sale without demand or notice, and the parties lawfully contracted out of the statutory notice requirements under section 22 of the *Conveyancing and Law of Property Act.*

**[30.]** In that regard, it was further submitted that the Court is entitled to take into account events occurring after the commencement of proceedings, and that requiring fresh proceedings would serve no useful purpose, particularly where the Defendants have long been aware of the Plaintiff's intention to enforce its security.

**[31.]** Turning to the power of sale, Counsel submitted that the Plaintiff is entitled to sell the Mortgaged Property pursuant to **section 21** of the *Conveyancing and Law of Property Act* and the express terms of the Mortgage and Further Charge. Counsel argued that in the absence of any allegation of fraud or irregularity, the Court should not interfere with the Plaintiff's exercise of its contractual and statutory rights.

**[32.]** Further, Counsel submitted that the Defendants complaints concerning the conduct of the Plaintiff's employees, late fees, escrow charges, and requests for an accounting disclose no cognizable defence. It was submitted by Counsel that a mortgagor is not entitled to an accounting in the absence of a genuine prospect of redemption and that any such complaints are, in any event, stale.

**[33.]** On the applicable law, Counsel relied on **Order 28, rule 4** of the *Rules of the Supreme Court* and on the decisions in **Citibank NA v Paul Major** [2001] BHS J No. 6 (Court of Appeal); **Junkanoo Estates Ltd & Ors v UBS (Bahamas) Ltd (In Voluntary Liquidation)** SCCivApp No 24 of 2018 (Court of Appeal); (**Family Guardian Insurance Company Limited v Adderley** [2013] 3 BHS J No 71) as authority for the proposition that the Court should not interfere with a mortgagee's contractual and proprietary rights in the absence of fraud or irregularity.

**[34.]** Accordingly, Counsel submitted that the Plaintiff is entitled to vacant possession of the mortgaged property, to exercise its power of sale, and to judgment for the outstanding sums claimed, together with interest.

## <u>DEFENDANTS' CASE</u>

**[35.]** The Defendants do not dispute the existence of the lending relationship, the receipt of the loan proceeds, or the validity of the Mortgage and the Further Charge. Rather, the crux of the Defendants' case is that the Plaintiff's enforcement proceedings were premature, irregular and brought in bad faith having regard to the parties' course of dealing and the statutory regulation of the power of sale.

**[36.]** In the First Strachan Affidavit, the Defendants explained that the Mortgage was entered into in 2003 for the purpose of completing construction of their family home. They stated that, prior to the execution of the Mortgage, the Plaintiff was expressly informed that the First Defendant earned his income as a fisherman, with earnings that were seasonal and inherently irregular, particularly during the off-season and following adverse weather conditions.

**[37.]** They further deposed that the Second Defendant's income as a preschool teacher provided the family's only consistent source of earnings during those periods. The Defendants asserted that the Plaintiff approved the Mortgage with full knowledge that strict monthly compliance might not always be possible, and that temporary shortfalls would be addressed through additional payments when funds permitted.

**[38.]** Consistent with that understanding, the Defendants stated that although occasional payments were missed beginning in 2004, they often made multiple payments in subsequent months, a pattern they say is reflected in the account records. They maintained that they remained in regular communication with the Plaintiff's agents and consistently reiterated their commitment to servicing the loans.

**[39.]** In that same affidavit, the Defendants further alleged that agents of the Plaintiff occasionally altered payment due dates when notified in advance that a payment would be late, reinforcing their belief that the Plaintiff was *"working with them"* rather than treating the accounts as being in formal default.

**[40.]** Against that backdrop, the Defendants stated that they were genuinely *"surprised"* when served with the Originating Summons, believing that the Plaintiff remained aware of their financial position and had elected not to pursue enforcement at that time.

**[41.]** As to the Further Charge, the Defendants explained that in 2008 they obtained an additional loan of $35,000.00 to consolidate debt and purchase a vehicle. They emphasized that the Plaintiff advanced the further loan despite being aware of their existing payment history.

**[42.]** The Defendants further stated that from 2014 they experienced increased financial hardship following emergency surgery undergone by the Second Defendant. As a result, they explained that payments became more sporadic, though they maintained that they continued to communicate their circumstances to the Plaintiff and made payments when able.

[43.] In the First Strachan Affidavit, the Defendants alleged that following service of the Originating Summons, they contacted a loan officer, Mr. Kemp, who advised them that the proceedings had been commenced in error and that no action was required on their part. These alleged assurances, they say, caused them to believe that the matter would be withdrawn.

[44.] Several months later, the Defendants stated that they were shocked to be served with the Sumner Affidavit and a hearing notice. They described subsequent interactions with the Plaintiff's attorneys and branch staff, including statements allegedly suggesting that the referral to counsel had been a mistake. Relying on these representations, the Defendants maintained that they believed the dispute would be resolved administratively.

[45.] However, the Defendants further explained that the relationship deteriorated significantly after 2015, coinciding with staff changes and increasing confusion regarding the status of their accounts. While acknowledging that arrears accrued, the Defendants denied any refusal to pay, asserting instead that they became overwhelmed by mounting legal fees and uncertainty as to what sums were required to bring the accounts current.

[46.] By 2018, they admitted that they ceased making further payments, believing that continued deposits would be pointless in light of the Plaintiff's insistence on full repayment together with legal fees.

**Notice and Service**

[47.] A central contention of the Defendants' case is that they were never properly served with any demand for payment or notice of intention to exercise the power of sale prior to the commencement of these proceedings. In the First Strachan Affidavit, they relied on specific notice provisions in Clause 29 of the Mortgage and Clauses 3(5) and 5(1) of the Further Charge, and asserted that the purported demand letters were sent to an incorrect post office box and did not comply with the agreed contractual method of service.

[48.] On that basis, the Defendants contended that, as at the date the Originating Summons was filed, they had neither failed nor refused to comply with any demand for payment or request to vacate the property, rendering the proceedings premature.

**Complaints as to Account Administration**

[49.] The Defendants also raised extensive complaints regarding the administration of both loan accounts in the First Strachan Affidavit. In relation to the Further Charge, they asserted that they did not agree to the opening of a second account, or to paying late fees, and questioned the application of substantial sums to interest without explanation.

[50.] As to the Mortgage Loan, the Defendants alleged misapplication of payments, unauthorized late fees, the imposition and capitalization of escrow charges without agreement, and unexplained increases to both the principal balance and the loan term. Particular emphasis was placed by the Defendants on the addition of $47,783.35 to the mortgage principal in July 2015, which they say they neither borrowed nor benefitted from.

[51.] In the Second Strachan Affidavit, Mrs. Strachan addressed matters relating to the property, explaining that it is a duplex, that the Defendants occupied one and for a certain period rented the other, and that rental income was used to intermittently supplement mortgage payments. She stated that the tenant was later given notice to quit due to uncertainty created by the proceedings.

[52.] In that affidavit, Mrs. Strachan also described the personal stress caused by the proceedings and reiterated the Defendants' belief that they had acted in good faith throughout the lending relationship.

[53.] In the Third Strachan Affidavit, Mrs. Strachan made certain formal admissions as to the loans and securities but put the Plaintiff to strict proof as to the authenticity and completeness of the 2015 Commitment Letter. She stated that the Defendants have no recollection of the figures contained therein and questioned whether the exhibited document is a true and complete copy.

[54.] In the same affidavit, Mrs. Strachan further disputed the Plaintiff's calculations of indebtedness, asserting that the loan history statements do not transparently demonstrate how the sums claimed are derived.

[55.] Mrs. Strachan also contended that demand letters issued in 2022 are irrelevant to determining whether the Plaintiff was entitled to commence proceedings in 2014. She denied that the Defendants refused to vacate the property or were asked to do so prior to litigation.

[56.] On these bases, the Defendants sought dismissal of the proceedings, or alternatively, time to secure alternative accommodation and an order that the Plaintiff bear the costs.

**Defendants' Submissions**

[57.] Defence Counsel framed the dispute as turning primarily on notice, prematurity, and the proper regulation of the power of sale. In oral submissions, emphasis was placed on the parties' long-standing relationship, their course of dealing, and the practical consequences of the Plaintiff's conduct prior to commencing proceedings.

[58.] In particular, Counsel submitted that the Plaintiff was at all material times aware of the Defendants' income structure and accepted sporadic payments over many years. It was argued that alterations to payment due dates, reflected in the account records, evidenced a consensual variation of the original repayment arrangement, or at minimum, a cooperative course of dealing.

[59.] Counsel further submitted that staff changes disrupted those informal arrangements and that delays by the Plaintiff in transferring funds from the Defendants' savings account to service the mortgage resulted in additional interest and late fees, which they say the Plaintiff now improperly relies upon to justify enforcement.

[60.] Turning to the power of sale, Counsel argued that section 22 of the *Conveyancing and Law of Property Act* imposes mandatory conditions precedent, including proper notice and the lapse of the statutory period, which cannot be wholly excluded by contract.

[61.] While accepting that section 21 permits variation of the statutory power of sale, Counsel submitted that it does not permit obliteration of the statutory safeguards. On that basis, Counsel submitted that Clause 15 of the Mortgage Agreement is ultra vires section 21(2) of the Act to the extent that it purports to exclude section 22 entirely.

[62.] Counsel further submitted that even if the statutory regime could lawfully be varied, no notice was in fact properly served in accordance with either the Act or the contractual provisions, rendering the proposed exercise of the power of sale irregular.

[63.] Similar submissions were advanced in respect of the Further Charge, Counsel arguing that even if Clause 5 constituted a valid variation of the statutory regime, no notice was delivered in compliance with its terms.

[64.] On prematurity, Counsel relied on **Odgers on Pleading and Practice** (19th ed.) for the principle that a cause of action must be complete at the date proceedings are commenced, and cannot be cured by subsequent events. It was submitted that the Defendants never refused to vacate and that declaratory and possessory relief was therefore unnecessary and abusive.

[65.] Counsel further challenged the quantum of the indebtedness claimed, relying on unanswered queries raised in the First Strachan Affidavit and submitting that the Plaintiff's failure to respond amounted to an admission that the sums claimed were not properly substantiated.

[66.] Accordingly, Counsel urged the Court to dismiss the proceedings, to declare that the Plaintiff failed to comply with section 22 of the Act, and to direct the Plaintiff to provide a proper accounting.

**Plaintiff's Reply**

[67.] In reply, Counsel for the Plaintiff emphasized the Defendants' admitted default, the absence of any realistic prospect of repayment, and their continued occupation of the Mortgaged Property since at least 2018. It was submitted that the commencement of these proceedings constituted a clear response to any request for additional time to vacate. Counsel further rejected any suggestion of variation by conduct, relying on the "entire agreement" clauses in both the Mortgage and the Further Charge agreements, which provide that no variation is effective unless reduced to writing and executed by the parties.

[68.] On notice and prematurity, Counsel submitted that the parties lawfully contracted out of section 22, and that the authorities support the permissibility of such variation. It was further submitted by Counsel that affidavits in originating summons proceedings do not operate as pleadings and that the Defendants' reliance on alleged non-responses do not amount to admissions.

[69.] In those circumstances, Counsel submitted that the Plaintiff has established its entitlement to the relief sought, and the Defendants have failed to raise any serious issue warranting the Court's intervention.

## ISSUES

[70.] The issues for determination by this Court are as follows:

i. Whether the Plaintiff is entitled to vacant possession of the mortgaged property;
ii. Whether the Plaintiff is entitled to exercise its power of sale in respect of the mortgaged property; and
iii. Whether the Plaintiff is entitled to judgment for the sums outstanding under the Mortgage and Further Charge, and if so, in what amounts.

## LAW

**General Principles Governing Mortgage Enforcement**

[71.] The law governing mortgage enforcement in this jurisdiction is well settled. Subject to statute and to established equitable limitations, a mortgagee is entitled to the benefit of its security strictly in accordance with its contractual terms.

[72.] In the case of an instalment mortgage, where the mortgage deed provides for acceleration upon default, the effect of default is to render the entire mortgage debt immediately due and payable. Once that occurs, the mortgagee becomes entitled to exercise its contractual and proprietary remedies, including the rights to possession and sale.

[73.] These principles were authoritatively affirmed by the Court of Appeal in **Citibank N.A. v Paul Major** et al [2001] BHS J. No. 6. The Court held that upon default under an instalment mortgage, their isno jurisdiction to vary the parties' contractual rights or to deprive a mortgagee of the remedies flowing from that default. Ganpatsingh JA emphasized at [10], [11], [17] and [25] that, absent fraud, invalidity of the mortgage, or material irregularity in the exercise of the power of sale, the Court will not restrain a mortgagee from enforcing its security. The mortgagor's remedy lies in redemption, not in continued occupation while remaining in default.

[74.] The same approach was reaffirmed by the Court of Appeal in **Junkanoo Estates Ltd and Ors v UBS (Bahamas) Ltd (In Voluntary Liquidation)** SCCivApp No. 24 of 2018. In that case, the Court reiterated that a mortgagee's right to possession is an incident of its estate in the land and is not to be treated as abrogated or restricted absent clear contractual or statutory language. Importantly, the existence of a dispute as to quantum or a cross-claim does not, without more, defeat a mortgagee's entitlement to possession or sale.

**Statutory Power of Sale under the Conveyancing and Law of Property Act**

[75.] The statutory power of sale is governed by Sections 21 and 22 of the **Conveyancing and Law of Property Act**, Ch.138 ("CLPA"). Section 21(1)(a) confers upon a mortgagee a power of sale once the mortgage money has become due. Section 21(3) expressly provides that this statutory power operates only "if and as far as a contrary intention is not expressed in the mortgage deed" and is subject to the terms agreed between the parties.

[76.] In addition, section 21(2) expressly permits the provisions of the Act relating to the power of sale, including those regulating its exercise, to be "varied or extended by the mortgage deed". Section 22 thensets out three alternative conditions regulating when the statutory power of sale may be exercised, including the service of a notice requiring payment and the lapse of prescribed periods following default.

[77.] It is now well-established in this jurisdiction that the conditions prescribed by section 22 are not mandatory in the sense of being incapable of contractual modification. In **Family Guardian Insurance Company Limited v Adderley** [2013] 3 BHS J No 71, Winder J (Actg.) (as he then was) confirmed that section 21 of the CLPA permits parties, by clear language, to contract outside the operation of section 22. Similar conclusions were reached in **McQueen's Resorts Development Co. Ltd v Anguilla Beach Development Co.** [1998] BHS J No. 52 and **CIBC v Gamma Construction Ltd** [1993] BHS J No. 107.

**[78.]** This interpretation is consistent with established common law authority. As stated in **Fisher and Lightwood's Law of Mortgages**, a mortgagee may, unless restrained by contract or statute, enter into possession and enforce its security without demand or notice. Likewise, in **Jobson v Capital & Credit Merchant Bank Ltd** (2007) 70 WLR 204, the Judicial Committee of the Privy Council upheld a mortgage provision entitling the mortgagee to exercise the power of sale without notice or demand once an instalment remained unpaid for the stipulated period.

**Subsequent Events and Prematurity**

**[79.]** It is accepted that, as a general rule of practice, a cause of action should be complete at the date proceedings are commenced. That rule, however, is not inflexible. As observed by Lord Denning MR in **Alfred C. Toepfer v Peter Cremer** [1975] 2 Lloyd's Rep 118, the principle against reliance on subsequent events is one of practice rather than substantive law and may be departed from wherever justice so requires.

**[80.]** Modern authority recognizes that courts may properly take into account matters arising after the commencement of proceedings, particularly where insisting on fresh proceedings would result in unnecessary delay. This approach has been endorsed in **Hendry v Chartsearch Ltd** [1998] EWCA Civ 1276, **Maridive and Oil Services (SAE) v CAN Insurance Company** [2002] EWCA Civ 369, and applied locally in **Colina Insurance Limited v Marina Miller** 2011/CLE/GEN/FP/00357. It is also consistent with the overriding objective of dealing with cases justly and proportionately.

## ANALYSIS & DISPOSTION

**[81.]** It is undisputed that the Defendants executed the Mortgage dated 10th February 2003 and the Further Charge dated 25th November 2008, that they received the proceeds of both loans, and that they fell into arrears under each facility. The Defendants expressly admit that payments were missed from an early stage and that the accounts remain in arrears, although the precise quantum of the indebtedness is disputed.

**Entitlement to Vacant Possession**

**[82.]** Clause 5 of the Mortgage deed provides that upon default in payment of any monthly instalment, the principal monies secured shall forthwith become due and payable, *"whether formally demanded or not"*, and that the Plaintiff may, inter alia, *"enter into possession of the Mortgaged Property"*.

[83.] On the admitted evidence, default occurred. The mortgage monies therefore became due, and the Plaintiff became contractually entitled to exercise its remedies. On the face of the Mortgage, there is no contractual requirement for demand or notice as a precondition to the exercise of the right to possession.

[84.] The Defendants submit that possession was never expressly demanded prior to the commencement of these proceedings and that they were willing to vacate if afforded time. That submission does not, in my view, defeat the Plaintiff's entitlement. Once the mortgage monies became due, the Plaintiff was entitled to seek possession in order to protect and realize its security. I accept the submission of Counsel for the Plaintiff that the commencement of these proceedings constituted a clear and unequivocal assertion of that right.

[85.] In those circumstances, I find that the Plaintiff is entitled to vacant possession of the mortgaged property.

**Entitlement to Exercise the Power of Sale**

[86.] Against that background, the central issue which then arises is whether the Plaintiff is entitled to exercise its power of sale notwithstanding the Defendants' complaint that no statutory notice was served pursuant to section 22 of the *Conveyancing and Law of Property Act* ("CLPA").

[87.] Section 21(1)(a) of the CLPA confers upon a mortgagee a statutory power of sale once the mortgage money has become due. Section 21(3) makes clear that this power applies only in the absence of a contrary intention expressed in the mortgage deed, while Section 21(2) expressly permits the provisions regulating the power of sale to be varied or extended by contract.

[88.] Clause 15 of the Mortgage deed expressly provides that sections 19, 20 and 22 of the CLPA *"shall not apply"*. I find that this language constitutes a clear and unambiguous expression of a contrary intention within the meaning of section 21 of the CLPA.

[89.] Nevertheless, the Defendants contend that such a clause amounts to an impermissible *"obliteration"* of statutory safeguards. I do not, however, accept that submission. The authorities in this jurisdiction establish that section 22 operates as a default regulatory regime rather than a mandatory minimum. Where the parties clearly agree that the statutory notice regime shall not apply, the power of sale thereafter derives from the contract, not from section 22 of the CLPA.

[90.] In such circumstances, the mortgagee does not exercise an "unregulated" power. Rather, it exercises a contractual power of sale, the scope and conditions of which are defined by the mortgage deed itself and constrained by well-established equitable principles, including the duty to act in good faith and to take reasonable care to obtain the best price reasonably obtainable at the time of sale (**Michael v Miller [2004] EWCA Civ 676**).

**[91.]** The Mortgage deed and the Further Charge deed in this case expressly provide for acceleration, entry into possession, and sale upon default, without demand or notice. That contractual machinery replaces the statutory mechanism set out in section 22. This is expressly permitted by section 21 of the CLPA and is consistent with the decisions in **Family Guardian Insurance Company Limited v Adderley** [2013] 3 BHS J No 71 and **Jobson v Capital & Credit Merchant Bank Ltd** (2007) 70 WLR 204.

**[92.]** Accordingly, I find that the Plaintiff was not required to comply with section 22 of the CLPA prior to seeking to exercise its power of sale and that the proceedings are not premature on that ground.

**Service of Notices**

**[93.]** The Defendants also placed substantial reliance on the contention that the demand letter dated 12th July 2011 and the notice of intention to exercise the power of sale dated 21st September 2011 were not properly served in accordance with Clause 29 of the Mortgage, having allegedly been sent to an incorrect post office box.

**[94.]** In light of my finding that the parties lawfully contracted out of the statutory notice regime under section 22 of the CLPA, the validity or effectiveness of those notices is not determinative of the Plaintiff's entitlement to possession or sale. Under Clause 5 of both deeds, default in payment operated to accelerate the mortgage monies and entitled the Plaintiff to enter into possession and to exercise the power of sale without demand or notice.

**[95.]** In those circumstances, any alleged defect in service of the notices does not render the proceedings premature nor disentitle the Plaintiff from the relief sought. Further, and in any event, even if notice were required, I would not regard the proceedings as fatally premature. The Defendants were indisputably on notice of the Plaintiff's intention to enforce its security no later than service of the Originating Summons in November 2014. The Court is entitled to take account of subsequent events and to avoid requiring the restarting of proceedings where the substantive conditions for relief are plainly satisfied (**Hendry v Chartsearch Ltd [1998] EWCA Civ 1276; Maridive and Oil Services (SAE) v CAN Insurance Company [2002] EWCA Civ 369; Colina Insurance Limited v Marina Miller 2011/CLE/GEN/FP/00357**).

**[96.]** The Defendants have remained in continuous default for many years and do not suggest that they are in a position to redeem the mortgage. In those circumstances, any purely technical defect in service would be insufficient, standing alone, to justify withholding relief or restraining enforcement of the Plaintiff's security.

[97.] In light of these findings, I make no determination as to whether the 2011 notices were properly served, as I consider it unnecessary to do so.

**Relationship Between the Parties**

[98.] Counsel for the Defendants placed considerable emphasis on the longstanding relationship between the parties and on the history of accommodation extended by the Plaintiff over the life of the loans. It was submitted that this relationship gave rise to an expectation of continued indulgence or more extensive notice prior to enforcement.

[99.] While I accept the parties' dealings extended over a significant period and that forbearance was at times shown, it is my finding that, forbearance does not operate as a waiver of contractual rights, nor does it permanently suspend a mortgagee's entitlement to enforce its security once default has occurred, absent a clear and binding agreement to that effect.

[100.] In commercial mortgage transactions, courts are slow to infer restrictions on enforcement from the mere existence of a relationship or a history of indulgence. Rather, it is trite that equity does not relieve a mortgagor from the consequences of default simply because enforcement appears harsh or inconvenient (**Citibank N.A. v Paul Major et al** [2001] BHS J No.6 (Court of Appeal); **Fisher & Lightwood's Law of Mortgages** ($9^{th}$ ed)).

[101.] I therefore find that the relationship between the parties, while acknowledged, does not displace the express terms of the Mortgage nor the Plaintiff's accrued rights to possession and sale.

**Quantum and Accounting**

[102.] Finally, the Defendants dispute the quantum claimed and seek a full accounting. While a mortgagor is not ordinarily entitled to an accounting absent a genuine prospect of redemption, I accept that there remain unresolved questions concerning the calculation of the outstanding balances, including capitalized sums and fees.

[103.] In the circumstances, I find that the appropriate course is to grant judgment for the Plaintiff's, while directing that an affidavit with an updated accounting be provided by the Plaintiff setting out the exact amounts claimed and the process by which that amount was derived. That affidavit is to be provided within 30 days of the date of this judgment, with any response to be provided within 14 days of service of that affidavit. Thereafter, a decision will be made on the papers. The parties are also at liberty to agree a figure.

## CONCLUSION

[104.] For the reasons set out above IT IS HEREBY DECLARED AND ORDERED that:

i. The Plaintiff is entitled to vacant possession of the property situate at Lot 80, Misty Gardens Subdivision, New Providence.

ii. The Defendants shall deliver vacant possession of the said property to the Plaintiff within sixty (60) days of the date of this Order.

iii. The Plaintiff is entitled to exercise its power of sale in respect of the said property pursuant to the terms of the Mortgage dated 10th February 2003 and the Further Charge dated 25th November 2008.

iv. Judgment is entered for the Plaintiff for all sums properly due and owing under the Mortgage and Further Charge, such sums to be assessed by the Court upon receipt of an updated accounting, if not agreed between the parties.

v. The Defendants shall pay the Plaintiff's costs of this application, to be taxed, if not agreed.

**Dated this 23rd day of April , A.D. 2026**

Neil Brathwaite J.

**Neil Brathwaite**

**Justice**