IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2021/CLE/gen/00528

IN THE MATTER of the property comprised in Indenture of Mortgage dated the 15th day of April, 1992 and made between A-1 Security as a Borrower and Willard C. Morley as a Guarantor and First Caribbean International Bank (Bahamas) Limited, formerly Canadian Imperial Bank of Commerce as a Lender

IN THE MATTER of the property comprised in Indenture of Mortgage dated the 9th day of August, 1996 and made between Willard Charlton Morley and A-1 Security Services Limited as Borrowers and First Caribbean International Bank (Bahamas) Limited, formerly CIBC Bahamas Limited as a Lender

IN THE MATTER of the property comprised in Certificate of Up-Stamping dated the 29th day of July, 1999 and made between Willard Charlton Morley and A-1 Security Services Limited as Borrowers and First Caribbean International Bank (Bahamas) Limited, formerly CIBC Bahamas Limited as a Lender

IN THE MATTER of the property comprised in Certificate of Up-Stamping dated the 19th day of July, 2001 and made between Willard Charlton Morley and A-1 Security Services Limited as Borrowers and First Caribbean International Bank (Bahamas) Limited, formerly CIBC Bahamas Limited as a Lender

IN THE MATTER of the property comprised in Certificate of Up-Stamping dated the 16th day of December, 2003 and made between Willard Charlton Morley and A-1 Security Services Limited as Borrowers and First Caribbean International Bank (Bahamas) Limited, formerly CIBC Bahamas Limited as a Lender

AND IN THE MATTER of the Guarantee and Postponement of Claim made between Willard Morley as a Guarantor for A-1 Security Services Limited and First Caribbean International Bank (Bahamas) Limited as Lender

AND IN THE MATTER of the Conveyancing and Law or Property Act, Chapter 138 of the Revised Statute Laws of the Commonwealth of The Bahamas

AND IN THE MATTER of the Homeowner's Protection Act, 2017 Section 4(1)

B E T W E E N

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Plaintiff

AND

(1) WILLARD CHARLTON MORLEY

AND

(2) A-1 SECURITY SERVICES LIMITED
(Guarantor and Borrower)

Defendants

Before: **The Honourable Mr. Justice Neil Brathwaite**

Appearances: Attorney Nicholas Mitchell (holding brief for Attorney Christopher Francis) for the Plaintiff
Attorney Kenneth Wallace-Whitfield for the First and Second Defendants

Date of Hearings: 18th January 2022; 15th February 2022; 16th March 2022; 12th December 2022; 9
March 2023; 14th April 2023

DECISION

BRATHWAITE, J

INTRODUCTION

[1.] This ruling addresses the Plaintiff's application in a mortgage action for vacant possession of property situate at Lot 116, Winton Meadows Estates Subdivision (the "Mortgaged Property"), judgment for the sums secured by mortgage and guarantee, interest on those sums, and consequential relief.

[2.] The application was commenced by Originating Summons filed 18th May 2021. With the leave of this Court, the Originating Summons was subsequently amended and re-filed on 30th March 2023. By the Amended Originating Summons, the Plaintiff seeks the following relief:

1. Delivery up of possession of Lot 116 Winton Meadows Estates Subdivision;

2. Payment of the sum of $19,147.71 being principal and the sum of $10,161.79 representing interest outstanding until the 5th October, 2016 under loan number 100989344 calculated at the rate of 8.25% per annum these sums being due to the Plaintiff under the respective covenants contained in the Indenture of Mortgage dated the 15th day of April, 1992, Indenture of Mortgage dated the 9th day of August, 1996, Certificate of Up-Stamping dated the 29th day of July, 1999, Certificate of Up-stamping dated the 19th day of July, 2001, and Certificate of Up-Stamping dated the 16th day of December, 2003 and made between the First Defendant, Willard Charlton Morley, as a mortgagor and the Second Defendant, A-

1 Security Services Limited as Guarantor and mortgagor and the Plaintiff as mortgagee;

3. Payment of the sum of $21,739.79 being principal and the sum of $13,483.56 representing interest outstanding until the 12th August 2016 under loan number 100989427 calculated at the rate of 10.25% per annum these sums being due to the Plaintiff under the respective covenants contained in the Indenture of Mortgage dated the 15th day of April, 1992, Indenture of Mortgage dated the 9th day of August, 1996, Certificate of Up-Stamping dated the 29th day of July, 1999, Certificate of Up-stamping dated the 19th day of July, 2001, and Certificate of Up-Stamping dated the 16th day of December, 2003 and made between the First Defendant, Willard Charlton Morley, as a mortgagor and the Second Defendant, A-1 Security Services Limited as Guarantor and mortgagor and the Plaintiff as mortgagee;

4. Payment of the sum of $10,024.81 outstanding as of 31st January, 2023 under the Overdraft Facility/Loan No. 201733600 at the rate of 17.5% per annum until payment due to the Plaintiff under the respective covenants contained in the aforesaid Deeds;

5. Interest pursuant to Section 2 of Civil Procedure (Award of Interest) Act, 1992 on the aforesaid total amount of $171,229.08 under the respective loans at such rate and for such period as the Honourable court thinks just and equitable;

6. Alternatively, damages for breach of the aforesaid loan facilities;

7. Costs; and

8. Such further and other relief as the Cout may deem just.

[3.] The Amended Originating Summons was supported by the Affidavits of Garth McDonald filed 13th July 2021 and Tricia Johnson filed 31th March 2023.

[4.] The Defendants filed an appearance on 15th February 2022. They resist the application on the grounds of alleged non-compliance with the Rules of the Supreme Court, 1978, limitation, defects in the service of the purported demands made for payment, the asserted insufficiency of the Plaintiff's affidavit evidence and the miscalculation of certain sums alleged to be due. In opposition to the application, the First Affidavit of Willard Charlton

Morley, Jr was filed on 15th March 2022, and a Second Affidavit of Willard Charlton Morley, Jr was filed on 12th December 2022.

BACKGROUND

[5.] The Second Defendant was a customer of FCIB, where it maintained business current account number 11000918 and, together with the First Defendant, obtained various credit facilities from the Plaintiff.

[6.] Those facilities included two term loans held under loan account numbers 100989344 and 100989427 respectively, as well as an overdraft facility held under loan account number 201733600.

[7.] The indebtedness arising under these facilities was secured by Deeds of Mortgage, related Up-Stamping Certificates, and a Guarantee. In particular, the Deeds of Mortgage were executed by the First Defendant and/or by the First Defendant on behalf of the Second Defendant, and the Guarantee was executed by the First Defendant in his personal capacity as Guarantor.

[8.] Pursuant to those instruments, the Defendants assumed contractual obligations to repay the sums advanced together with interest. It is alleged that, in breach of those obligations, the Defendants failed to make the required repayments in accordance with the terms of the Mortgage instruments. Consequently, demand letters were issued by or on behalf of the Plaintiff requiring payment of the outstanding sums.

[9.] As of 31st January, 2023, the Plaintiff asserts that the Defendants' total indebtedness amounted to the sum of $171,229.08, comprised of $29,309.50 under Loan No. 100989344; $35,223.35 under Loan No. 100989427; and $106,696.73 under Loan No. 201733600, together with continuing contractual interest.

[10.] In light of the continuing default and the sums said to be due and owing, the Plaintiff commenced these proceedings seeking the relief set out at paragraph [2] above.

PLAINTIFF'S CASE

[11.] In his Affidavit, Mr. McDonald averred that several loan facilities were extended to the Defendants between 2001 and 2004 comprised of various term loans and overdraft arrangements advanced for both business and personal purposes. He averred that over time the facilities were restructured and consolidated as evidenced by the relevant Commitment Letters and formal loan contracts exhibited to his Affidavit.

[12.] In particular, Mr. McDonald deposed as follows:

(i) **Under Loan Account No. 100989344** the following advances were extended:

a. **$15,000.00** by way of line of credit for operating expenses, evidenced by Commitment Letter dated 12th November 2001;

b. **$45,000.00** by way of loan contract to consolidate the previous loans, assist with funeral expenses for the First Defendant's father, and liquidate other personal loans, evidenced by Commitment Letter of 15th December 2003; and

c. **$38,652.39** by way of loan contract to reduce the then outstanding loan balance as of December 2003, evidenced by Commitment Letter dated 23rd December 2004.

(ii) **Under Loan Account No. 1009989427** the following advance was extended:

a. **$48,000.00** on or about 17th December 2003;

(iii) **Under Loan Account No. 201733600** the following advances were extended:

a. **$15,000.00** by way of line of credit with revolving demand credit for general business purposes, evidenced by Commitment Letter dated 13th December 2003;

b. **$10,000.00** overdraft facility with revolving demand credit for general business operating purposes, evidenced by Commitment Letter dated 15th December 2003; and

c. **$30,000.00** overdraft facility reverting to **$10,000.00** on 12th January 2005, evidenced by Commitment Letter dated 23 December 2004.

[13.] According to Mr. McDonald, these advances were secured by several mortgage instruments over the Mortgaged Property, including an Indenture of Mortgage dated 15th April 1992 and an Indenture of Mortgage dated 9th August 1996, together with the respective Certificates of Up-Stamping dated 29th July 1999, 19th July 2001, and 16th December 2003.

[14.] In addition to the aforesaid mortgage securities, Mr. McDonald averred that the advances were supported by a written Guarantee executed by the Second Defendant. That Guarantee is expressed to be a continuing security covering present and future liabilities, rendering the Guarantor liable as principal debtor upon written demand, treating the accounts stated as conclusive evidence of indebtedness, and permitting enforcement in the Courts of The Bahamas or elsewhere at the Plaintiff's election.

[15.] Against that background, Mr. McDonald deposed that the Defendants fell into default under the various facilities and remained in arrears, save for a few sporadic payments, the last of which was made in or about 2010. He stated that as of 14th May 2021, substantial sums remained outstanding on each of the loan accounts, inclusive of principal, accrued interest, and arrears, notwithstanding written demands and notices of intention to commence legal proceedings having been duly issued and served upon the Defendants. Further, it was his evidence that, by issuing those demands, the Plaintiff complied with the relevant notice provisions of the *Homeowners Protection Act, 2017*, in that the Defendants were afforded the requisite opportunity to bring the accounts current prior to the commencement of proceedings.

Plaintiff's Submissions

[16.] It was submitted by Counsel that the Defendants, being in admitted default, have no viable defence in law or on the evidence. In support of that position, Counsel relied on **Citibank N.A.**

v Major [2001] BHS J. No. 6 for the principle that where a mortgagee proves default, the Court ought not to interfere with the contractual and proprietary remedies flowing from the mortgage.

[17.] Developing that submission, Counsel contended that the only substantive defence to a mortgage action in which possession is sought is a challenge to the validity of the mortgage instrument itself, by alleging fraud, forgery, mistake, or that the signatures on the deed are not those of the mortgagor. Counsel argued that no such challenge arises in the present case. Rather, it was submitted that the Defendants acknowledge the existence of the duly executed mortgage deeds and do not allege fraud, forgery, or mistake.

[18.] Counsel further relied on the principle stated in **Birmingham Citizens Permanent Building Society v Caunt** (1962) 1 AER 163, as cited with approval in **Citibank v Major** (supra), that once the mortgage money has become due and the mortgagee is entitled to possession, the Court has no jurisdiction to refuse an order for possession or to vary the parties' contractual rights, save possibly to grant a short adjournment where redemption is a reasonable prospect.

[19.] In the same vein, Counsel referred to **Four Maids Ltd. v. Dudley Marshall** 1957 1 AER 35, cited in **Colina Insurance Limited v. Miller** [2014] 1 BHS J. No. 20, for the proposition that a mortgagee's right to possession arises from the security itself and, absent a contractual restriction, it may be exercised notwithstanding the mortgagor's hardship. Particular reliance was also placed on paragraphs [33] and [54] of **Colina Insurance v Miller** (supra), in which the Court reiterated that where default is established, the Court has no power to refuse the mortgagee its contractual rights.

[20.] In summary, Counsel submitted that: (i) default is undisputed; (ii) the mortgage deeds are acknowledged and unchallenged; (iii) no allegation of fraud or invalidity is raised; and (iv) accordingly, no defence arises in law. On that basis, Counsel invited the Court to grant possession and judgment for the mortgage monies alleged to be due and owed.

Compliance with Order 73 and 77 of the Rules of the Supreme Court

[21.] Counsel next addressed the Defendants' complaints of alleged non-compliance with **Orders 73** and **77** of the **Rules of the Supreme Court, 1978** ("RSC").

Orders 73

[22.] In oral argument, Counsel submitted that the question of whether mortgage actions must comply with **Order 73** has already been considered by this Court. Counsel relied on **Commonwealth Bank Limited v Julia Pedican** (2021/CLE/gen/00368), in which the Court cited with approval

the decision of Hilton J, in **Scotiabank (Bahamas) Limited v The Personal Representative of Freddie John Archer, deceased and another** [2016] 2 BHS J. No.212, holding that the appropriate procedural regime governing such mortgage actions is **Order 77** rather than **Order**

73. On that basis, Counsel submitted that the Defendants' reliance on **Order 73** is misplaced and inapplicable to the present proceedings.

[23.] Turning to the contention that the Originating Summons and the Affidavit of Garth McDonald fail to comply with **Order 77,** Counsel rejected this submission, and argued that even if any procedural irregularity existed (which was denied), such irregularity was waived by the Defendants' entry of an unconditional appearance and by the filing of affidavits addressing the substance of the Plaintiff's claim.

[24.] In support of that position, Counsel relied on **Saunders Trucking Co. v. Cain Services Corp.** [1992] BHS J. No. 43, where Sawyer J (as she then was) held at paragraph [29] that the entry of an unconditional appearance constitutes a waiver of any irregularity in the issue of the writ, particularly where the defendant proceeds to join issue on the merits.

[25.] Accordingly, Counsel submitted that the Defendants, having taken positive procedural steps in the action, cannot now seek to rely on alleged technical defects in the Originating Summons as a substantive defence.

[26.] In summary, Counsel contended that **Order 73** is inapplicable and **Order 77** has been complied with, alternatively, any procedural defect has been waived, and in any event, no alleged irregularity displaces the Plaintiff's substantive entitlement to possession and judgment upon proof of default.

Demand and Service

[27.] Counsel then addressed the Defendants' allegations of defective demand and service. It was contended by Counsel that proper written demand was made pursuant to the relevant provisions of the mortgage deeds, including Clause 5(3) of the Indenture of Mortgage dated 15th April 1992 and Clause 10(1)(vi)(a) of the Indenture of Mortgage dated 9 August 1996. In particular, Counsel relied on the Demand Letter and Notice of Intention to Commence Legal Action dated January 15th, 2021, exhibited to the Affidavit of Garth McDonald. Counsel submitted that this correspondence set out the arrears due, advised the Defendants of their available options, and provided contact information if they wished to engage with the Plaintiff.

[28.] Further, Counsel submitted that the First Defendant was personally served on 12th February 2021 and that the Second Defendant was served by registered mail at its registered office and business address. Both modes of service, Counsel submitted, were supported by service receipts

purportedly signed by the First Defendant and the Registered Agent of the Second Defendant, respectively, which were duly exhibited to the Affidavit of Garth McDonald.

[29.] In those circumstances, Counsel maintained that service was properly effected in accordance with both the contractual provisions of the mortgages and the applicable procedural rules, and that the allegation of improper demand or service is without merit.

Mortgagee's Powers

[30.] Finally, Counsel submitted that the mortgage deeds expressly authorize and empower the Plaintiff, upon default, to accelerate the sums due, enter into possession and exercise the power of sale. Again relying on **Citibank N.A. v Major** (supra), Counsel contended that it is *"inescapable"* that the Court should not interfere with remedies flowing from mortgage default. Counsel submitted that where no defence is available and default is established, the mortgagee's rights subsist and must be given effect.

[31.] Counsel further emphasized that the Defendants have not challenged the validity of the mortgage instruments themselves and remain bound by their contractual terms. In light of the longstanding default, the absence of any viable defence, and the Plaintiff's compliance with the applicable procedural regime, the Court was invited by Counsel to grant the relief sought in the Amended Originating Summons, including judgment on the sums owing and vacant possession of the mortgaged property.

DEFENDANTS' CASE

[32.] The Defendants rely on the Affidavit of Willard Charlton Morley, Jr filed 15th March 2022 ("First Affidavit"), his Second Affidavit filed on 12th December 2022 ("Second Affidavit"), their written submissions and the oral submissions of their Counsel.

[33.] In his First Affidavit, Mr. Morley deposed that, as of 2022 he attained retirement age, and as such he is primarily dependent on his modest pension income and any income generated by the business of the Second Defendant. He averred that the Mortgaged Property is his home and that he is desirous of saving it.

[34.] Turning to the history of payments, Mr. Morley addressed payments made in 2010. He averred that those payments followed receipt of a demand letter issued in or about mid-2010 by the Plaintiff's former attorneys seeking payment of the sums then claimed to be due. Although unable to locate a copy of that letter, he maintained that the payments were made in response to it.

[35.] Building on that position, Mr. Morley raised a statutory limitation defence. He contended that, pursuant to **section 32(5)** of the ***Limitation Act 1995,*** the Plaintiff is precluded from recovering arrears of interest by action for any period beyond six years from the date such interest became due. On that basis, he asserted that interest accruing after approximately 12th August 2016 and/or 5 October 2016 is statute-barred.

[36.] In addition to limitation, Mr. Morley in his First Affidavit challenged the Plaintiff's calculation of interest. Referring to the Commitment Letters dated 23rd December 2004 exhibited to the McDonald Affidavit, he noted that the facilities were expressed to bear interest at Prime (6%) plus 4%, totaling 10% per annum. He therefore questioned how the rates now claimed by the Plaintiff vary between 8.25%, 10.25%, and 17.25% across the facilities.

[37.] With particular emphasis on the overdraft facility, Mr. Morley addressed the claimed sum of $106,696.73, said to comprise a principal overdraft balance of $10,024.81 and accrued interest of $96,671.92 at a rate of 17.25% per annum. He described this figure as *"exorbitant"* and highlighted what he considered to be inconsistencies in the Plaintiff's accounting, including the stated per diem rates of interest across the accounts.

[38.] Mr. Morley further averred that he has been unable to ascertain with certainty the true sums properly due. He stated that he is desirous of refinancing his indebtedness, whether with the Plaintiff or another institution, but that such efforts have been impeded by the absence of a clear and comprehensive statement of account. Accordingly, he seeks a true accounting of the sums claimed, together with copies of all relevant bank statements and supporting documentation relating to the Second Defendant's accounts.

[39.] In his Second Affidavit, Mr. Morley further addressed the overdraft issue. He explained that his efforts to locate company records were hindered by the tragic murder of his son. Nonetheless, he deposed that on 6 January 2005, he and his wife deposited $100,000.00 into their business current account held with the Plaintiff Bank, and that, following a series of withdrawals and bank charges, the account ultimately stood overdrawn in the sum of $93.13.

[40.] He further deposed that thereafter the Second Defendant ceased utilizing that account and commenced banking elsewhere. On that basis, he disputed that the substantial overdraft indebtedness now claimed is properly due and contended that such claim may in any event be statute barred.

[41.] Finally, in his Second Affidavit, Mr. Morley maintained that he requested documentation substantiating the overdraft claim and that, at a time when he had capacity to refinance, he awaited confirmation of the corrected sums allegedly owed. However, according to his evidence, no response was received.

[42.] In summary, the Defendants' position, as advanced through Mr. Morley's affidavits is that the sums claimed, particularly in respect of interest and the overdraft facility are uncertain,

excessive, and in part statute-barred; that a proper accounting has not been provided; and that in the absence of such accounting the Plaintiff ought not to obtain the relief sought.

Defendants' Submissions

Commitment Letters and Interest

[43.] The Defendants' challenge begins with the Commitment Letters dated 23rd December 2004, exhibited to the Affidavit of Garth McDonald. In written submissions, Counsel contended that those letters are binding on the Plaintiff and form part of the overall mortgage transaction. In support, Counsel relied on the case of **Bank of the Bahamas Limited v Munroe-Cooper** (2005/CLE/gen/00433) (2005) 7 BHS J No. 495, in which Watkins J held that a Letter of Commitment may operate subsidiary to and in conjunction with a Mortgage Deed and that its payment terms are binding.

[44.] Counsel further argued that the 2004 Commitment Letters replaced all prior Commitment Letters and therefore govern the applicable interest regime. Counsel further contended that interest rates had declined between 1996 and 2004, and that, upon execution of the 2004 Commitment Letters, the agreed rate across the facilities was 10%. He contrasted that rate with those now claimed by the Plaintiff, viz. 8.25%, 10.25%, and 17.25%, characterizing the higher rate as *"excessive, harsh and unconscionable"*, a submission Counsel said derived directly from the *Money Lending Act*.

[45.] Although Counsel accepted orally that the *Rate of Interest Act* does not apply to financial institutions, he maintained that the *Money Lending Act* does apply and provides a statutory basis upon which the Court may examine whether the interest charged is excessive.

Default Interest and the Overdraft Facility

[46.] In oral submissions, Counsel identified the overdraft facility as the central source of dispute. While accepting that the Commitment Letters provided for a default rate of *"the rate for that credit plus 18% per year"*, he submitted that such enhanced rate was only chargeable on sums exceeding the agreed credit limit.

[47.] In that context, Counsel argued that the threshold issue is the agreed overdraft limit. While the Plaintiff asserted that the limit was $30,000.00, Counsel contended that the Defendants' position is that it may have been lower, at $10,000.00. Counsel submitted that if the limit was in fact $30,000.00, there would have been no excess attracting the default rate.

[48.] Proceeding on the Plaintiff's pleaded overdraft of $10,024.18, Counsel argued that default interest could only be applied to the excess of $24.18, with the balance attracting interest at 10% or such reduced rate as may have applied over time. In any event, he submitted that the claim for approximately $96,000.00 in interest is manifestly excessive, harsh and unconscionable.

[49.] In support, Counsel relied upon **section 3** of the *Money Lending Act,* which he submitted empowers the Court to reopen the transaction and take an account where the interest charged in respect of money lent is excessive, or otherwise such as a court of equity would grant relief against. While acknowledging that statutory interest ceilings under the **Rate of Interest Act** do not apply to financial institutions, Counsel maintained that the Court's equitable jurisdiction survives. He therefore submitted that, at minimum, the appropriate course would be to take accounts and inquiries for a recalculation of the sums claimed.

[50.] Notwithstanding those arguments, Counsel accepted that the mortgage facilities have not been serviced since approximately 2010. However, he maintained that the overdraft remains the principal impediment to resolution. The Defendants, he suggested, may be able to refinance the mortgage loans, but he explained that they are unable to refinance the overdraft so long as the quantum claimed remains uncertain.

Limitation: Arrears of Interest

[51.] Turning specifically to limitation, Counsel relied on the **Limitation Act 1995**, submitting that the overdraft claim is statute-barred.

[52.] Referring to the Affidavit of Tricia Johnson and the exhibited account enquiry, Counsel submitted that the monies became due in or about March or April 2005 and that there has been no activity on the referenced account since February 2005.

[53.] Accordingly, it was argued that the claim, issued some sixteen years after accrual, is barred, whether under the six-year limitation period for contractual debts in **section 5** or the twelve year limitation period applicable to mortgage claims under **section 32**.

Demand and Service

[54.] Additionally, Counsel contended that no valid demand was made and that service was defective. Counsel argued that valid demand is a precondition to the mortgage monies becoming due and to the exercise of the mortgagee's powers. Counsel contended that none of the demand letters identified the total sums claimed or specified the applicable per diem rate of interest. Without a clear statement of the full indebtedness and daily accrual, he submitted, the demands were defective.

[55.] Further, Counsel argued that service did not comply with Clause 10(1)(vi)(a) of the 1996 Mortgage. Although the registered letters were addressed appropriately, he submitted that the envelopes containing the letters and the registered post receipts did not reflect service on both the Mortgagor and Borrowers in the manner prescribed.

[56.] While acknowledging receipt of one registered letter addressed to the Second Defendant, Counsel disputed the authenticity of the signature on the receipt said to evidence personal

service on the First Defendant, asserting that it was not his signature and that he had no recollection of signing it.

[57.] In support, Counsel relied on **Lawrence McKinney v Bahamas Development Bank & Ors** (1997/CLE/gen/00629), in which Hepburn J held that a failure to serve a demand notice in accordance with the mortgage terms meant that the power of sale had not arisen. Further, Counsel emphasized the principles that the notice must be properly served, sums demanded must be accurate and consistent, and defective demand letters cannot be combined to constitute one valid demand. On that basis, Counsel submitted that no valid demand was effected, the mortgage monies did not become due, and the Plaintiff's powers were not properly engaged.

Order 73 and Order 77

[58.] Counsel further suggested that both **Order 73** and **Order 77** apply to these proceedings. Although accepting that mortgage actions are generally governed by **Order 77**, Counsel argued that the overdraft component constitutes an independent money-lending transaction secured by mortgage.

[59.] In support, Counsel relied upon the reasoning of Georges CJ in **Imperial Life Assurance Co. v Efficient Distributors Ltd** (1989) J No. 85, for the proposition that where a lending transaction exists independently of the mortgage, such as in the case of an overdraft, **Order 73** applies.

[60.] Counsel submitted that that reasoning should be preferred to the approach adopted by Hilton J (as he then was) in **Scotiabank (Bahamas) Limited v The Personal Representative of Freddie John Archer**, which he characterized as reflecting an overly broad exclusion of **Order 73** in mortgage matters.

[61.] It was further argued by Counsel that the requirements under **Order 73** including **rule 4** mandate specification of due dates and contractual particulars, which Counsel submitted are not reflected in the Originating Summons.

[62.] As to **Order 77**, Counsel contended that the McDonald Affidavit does not comply with **rule 4**, in that it fails to adequately particularize the arrears, explain the method of calculation, or state the per diem rate of interest (save in respect of the overdraft). In support, Counsel relied on **Simeon Peter Cooper v Bank of The Bahamas Limited** (SCCivApp No. 42 of 2020), for the proposition that **Order 77** constitutes a mandatory procedural code requiring strict compliance.

[63.] Counsel rejected the Plaintiff's reliance on **Saunders Trucking Co v Cain Services Corp.** submitting that procedural non-compliance with **Orders 73** and **77**, cannot be cured by reliance on general provisions of the *RSC* such as **Order 2 rule 1**.

The Guarantee

[64.] Counsel further contended that the guarantee is ineffective. In oral submissions, he submitted that while the 2003 Commitment Letter was manually corrected to reflect that the First Defendant and his wife, Juanita Morley, were intended to be joint guarantors, the continuing guarantee was only executed by the First Defendant, leaving a space for Mrs. Morley's signature.

[65.] Relying on Sheldon's *Practice and Law of Banking (10th Ed.),* Counsel submitted that where co-suretorship is intended and not all sureties execute the instrument, those who signed in faith may be discharged.

[66.] Accordingly, Counsel maintained that the guarantee, being intended as a joint obligation but not fully executed, is ineffective and that no properly particularized claim has been advanced against the First Defendant as guarantor.

The Operative Mortgage

[67.] Finally, in the Defendants' written submissions, Counsel contended that the only operative security is the Mortgage dated 9th August 1996, which entirely replaced the 1992 Mortgage. Although the 1992 Mortgage was not formally satisfied, Counsel submitted that it ceased to have effect upon the taking of the 1996 Mortgage, which was intended to refinance and consolidate the facilities.

[68.] Counsel pointed to alleged execution defects in the 1992 Mortgage and to the fact that both instruments purport to be first mortgages, with the 1996 Mortgage declaring itself free of encumbrances, indicating that it was intended to stand alone.

[69.] It was further argued that the 1996 Mortgage operates as an instalment mortgage, with automatic acceleration upon default, in contrast to the demand structure of the Mortgage instrument executed in 1992.

[70.] Notwithstanding those arguments, Counsel accepted that the facilities have remained un-serviced for many years. However, he maintained that the sums claimed, particularly in relation to the overdraft, are excessive and require proper accounting.

[71.] In summary, the Defendants' position is that the overdraft interest is excessive and unconscionable, the overdraft claim is statute-barred, valid demand and service were not effected, **Orders 73** and **77** have not been complied with, the guarantee is ineffective, and only the 1996 Mortgage remains in operation. Accordingly, the Defendants submit that the claim should be dismissed or, alternatively, that accounts and inquiries be directed.

THE ISSUES

[72.] Having regard to the pleadings, the affidavit evidence, and the written and oral submissions of the parties, the issues the Court must determine are:

(i) Whether the 1992 and 1996 Mortgages remain valid and operative securities;

(ii) Whether demand was required under the operative mortgage(s), and if so, whether it was validly served;

(iii) Whether the claim, or any part of it, is statute-barred pursuant to the Limitation Act 1995;

(iv) Whether the indebtedness claimed, particularly in regard to the interest applied to the overdraft facility, has been sufficiently proved, including whether the transaction should be reopened; and

(v) Whether, in light of the foregoing, the Plaintiff is entitled to possession and judgment for the sums claimed.

THE LAW

Mortgagee's Right to Possession

[73.] The law concerning a mortgagee's right to possession is well settled. In **Citibank N.A. v Major** [2001] BHS J. No. 6, the Court of Appeal affirmed that once default is established under a legal mortgage, the mortgagee is entitled to possession as of right. The Court has no general jurisdiction to refuse possession or to re-write the parties' contractual bargain, save for the limited equitable discretion to grant a short adjournment where there is a realistic and immediate prospect of redemption.

[74.] In adopting the reasoning of Russell J in **Birmingham Citizens Permanent Building Society v Caunt** [1962] 1 All ER 143, the Court emphasized that equity does not interfere with the mortgagee's security itself nor suspend the mortgagee's contractual remedies once the right to possession has arisen. The mortgagor's equity lies in redemption, not in resisting enforcement of the security.

[75.] This approach has been consistently followed in this jurisdiction. In **Colina Insurance Ltd v Miller** [2014] 1 BHS J. No. 20, Gray-Evans J reaffirmed that the mortgagee's right to possession is contractual and arises independently of hardship. Absent a successful challenge to the validity of the mortgage or proof that the mortgagee's rights have not arisen in accordance with its terms, possession must follow.

Statutory and Equitable Controls on Interest

[76.] Although the mortgagee's proprietary remedies are strict, the Court retains statutory and equitable jurisdiction to examine the interest component of a lending transaction, in appropriate cases. **Section 3** of the **Money Lending Act** empowers the Court to reopen a transaction where on the evidence, it is satisfied that the interest charged is excessive or the transaction is otherwise harsh and unconscionable. In such an instance, the Court can take accounts and grant relief accordingly.

[77.] It is, however, equally settled that statutory ceilings under the **Rate of Interest Act** do not apply to licensed financial institutions. In such cases, relief depends upon demonstrating that the statutory reopening jurisdiction is engaged or that the equitable jurisdiction to relieve against penalty or unconscionable bargain is properly invoked. The mere fact that interest has accumulated over a lengthy period of non-payment does not, without more, render the bargain unconscionable in law.

Limitation

[78.] Under the **Limitation Act 1995**, distinct limitation periods apply depending on the nature of the claim. Actions founded on simple contract are generally subject to a six-year limitation period, whereas actions to recover sums secured by mortgage are subject to a twelve-year period from the date when the right to receive the money accrued.

[79.] In a mortgage containing an acceleration clause, time begins to run when the cause of action accrues in accordance with the contractual terms. Where the instrument provides for automatic acceleration upon default, time runs from default and expiry of any contractual grace period. Where demand is expressed to be a condition precedent, time runs only upon valid demand being made. However, the mortgagee's proprietary right to possession is not defeated merely because the personal covenant for payment may be statute-barred, provided the mortgage claim itself is brought within the applicable twelve-year period.

Demand and Service

[80.] Where the mortgage instrument makes demand a condition precedent to enforcement, strict compliance with the contractual machinery is required. In **Lawrence McKinney v Bahamas Development Bank & Ors** 1997/CLE/gen/629, the Court held that failure to serve a demand notice in accordance with the terms of the mortgage prevented the power of sale from arising.

[81.] The sufficiency of a demand is therefore a matter of construction of the instrument. The notice must communicate clearly that payment is required and, where stipulated, specify the sums due. Separate defective notices cannot ordinarily be aggregated to constitute one valid demand.

Procedural Framework: Order 77 and Order 73

[82.] Mortgage actions brought by a mortgagee seeking possession or payment of monies secured by mortgage are governed by **Order 77** of the **Rules of the Supreme Court.** **Order 77** constitutes a self-contained procedural code designed to ensure that the mortgage, the default, and the amount due are verified by affidavit.

[83.] In **Simeon Peter Cooper v Bank of The Bahamas Ltd** (SCCivApp No. 42 of 2020), the Court of Appeal stressed the mandatory nature of compliance with **Order 77 rule 4,** particularly where guarantors are sued. That decision illustrates that material deficiencies in pleading or evidence may be fatal where they obscure the legal foundation of the claim.

[84.] **Order 73,** by contrast, governs money-lending actions specifically. As explained in **Imperial Life Assurance Co. v Efficient Distributors Ltd.** (1989) J No 85, the characterization of the proceedings depends upon their true nature. Where the foundation of the claim is enforcement of a mortgage security, whether by possession, sale, or recovery of sums secured, **Order 77** provides the governing framework.

ANALYSIS

[85.] It is undisputed that mortgage instruments were executed in 1992 and again in 1996, and no allegations of fraud, invalidity or misrepresentation as regards those instruments were advanced at their inception. It is also undisputed that additional credit facilities were extended by the Plaintiff and that repayments on those facilities ceased in or about 2010.

[86.] What is in dispute, however, are the matters of the Plaintiff's entitlement to enforcement of vacant possession and its calculation of the quantum claimed. In determining whether the Plaintiff is entitled to the relief sought, it is necessary to examine the issues set out at [74] in turn.

The Continuing Validity of the Mortgage Security

[87.] The Plaintiff relies on both the 1992 and 1996 Mortgages as subsisting securities. The Defendants contend, however, that the 1996 Mortgage superseded or replaced the earlier instrument. Particular reliance is placed by the Defendants on the covenant in the 1996 Mortgage that the property conveyed under that instrument was conveyed "free from encumbrances".

[88.] In my view, that submission cannot be sustained. A covenant that property is conveyed free from encumbrances is ordinarily a representation by the mortgagor to the mortgagee. It does not, without more, operate as a discharge of an earlier registered mortgage unless the earlier mortgage was formally released, or the later instrument expressly provided that it was taken in substitution for and in discharge of the earlier one.

[89.] On the evidence before the Court, there is no registered discharge of the 1992 Mortgage, nor is there language in the 1996 Mortgage expressly extinguishing or replacing it. If the 1992

Mortgage remained registered at the time of the execution of the 1996 instrument, the covenant must either have been inaccurate or intended to refer to third-party encumbrances only. It cannot, in my judgment, be construed as an implied release of the mortgagee's own proprietary interest. A mortgage is not extinguished by implication, it is extinguished by release or redemption, and neither has been demonstrated here. Accordingly, absent proof to the contrary, I find that both mortgages remain legally subsisting securities.

Default and The Right to Enforce

[90.] Default itself is not disputed. In fact, it is accepted that the facilities have not been serviced for approximately a decade. The Defendants' challenge, however, relates instead to enforceability, and to whether demand in the form required was issued or served correctly under the 1996 Mortgage instrument, which they say is not expressed to be a "demand mortgage" as was the Mortgage executed in 1992.

Demand

[91.] Clause 10(1) of the 1996 Mortgage provides that if the Borrowers fail to pay any instalment or other amount when due, and such failure continues for seven business days after the due date, the Borrowers are deemed to be in default and *"the entire balance of the loan shall become immediately due and payable"*.

[92.] Properly construed, that clause creates automatic acceleration. The secured debt becomes due by operation of the contract upon default and expiry of the seven-day grace period. It does not become due only upon demand.

[93.] In follows then that demand is not a condition precedent to the accrual of the Plaintiff's right to enforce. The right to enforce arose once default occurred and the contractual grace period expired. As affirmed in **Citibank N.A. v Major** and **Colina Insurance Ltd v Miller,** once default and contractual preconditions are satisfied, the mortgagee is entitled to enforce as of right. In circumstances where acceleration is automatic, the purpose of a demand is evidential. It serves to notify the mortgagor that enforcement will follow but it does not create the debt.

[94.] The Defendants nevertheless contend that the demand and notice letters were not served in accordance with Clause 10(1)(vi)(a) of the 1996 Mortgage instrument. That clause provides that any notice may be served upon the Borrowers or the Mortgagor by prepaid registered post addressed to them at their last known address or addresses, or by leaving the same at the mortgaged property.

[95.] I do not construe that clause as requiring that notices addressed to different persons situated at different addresses must be enclosed in a single envelope or served simultaneously. The clause prescribes permissible modes of service, it does not mandate anything beyond compliance with those modes.

[96.] On the evidence before the Court, registered letters addressed to both the Mortgagor and the Borrower were sent to them in separately addressed envelopes at their respective last known addresses. Proof of service by registered post was exhibited. I am therefore satisfied that service was effected in accordance with the contractual machinery.

[97.] The Defendants also complain that the demands did not contain a detailed breakdown of the sums claimed. However, neither mortgage instrument stipulated that a demand (1992 Mortgage) or notice (1996 Mortgage) must particularize the debt. In the absence of such an express requirement, the omission of detailed calculations does not invalidate them.

[98.] For these reasons, I am satisfied that the indebtedness became due automatically upon default and expiry of the grace period, that service of the demand notices complied with the contractual provisions, and that the Plaintiff's right to enforce was properly engaged.

The Overdraft Facility and the Default Interest

[99.] The principal dispute relates to the overdraft facility (Loan No. 201733600), and in particular, the interest applied to that facility.

[100.] The operative Commitment Letter stipulates a contractual interest rate of 10% per year. It further provides that where the credit limit is exceeded, interest at the Default Rate, defined as *"the rate for that credit plus 18% per year"* is to be applied only "on that excess amount".

[101.] That clause, in my view, confined the enhanced default rate (28%) to the amount by which the facility exceeds its authorized limit. It does not authorize automatic application of the enhanced rate to the entire outstanding balance.

[102.] The Defendants submit that the operative limit at the material time was $10,000.00, that the excess according to the Plaintiff's claim ($10,024.81) was only $24.81, and that accordingly, only that excess could lawfully attract the 28% default rate.

[103.] The Plaintiff, however, does not claim interest at 28%. The rate reflected in the Amended Originating Summons is 17.25% per year. That figure is materially lower than the contractual Default Rate of 28%, and therefore does not, on its face, demonstrate that the enhanced default mechanism was applied to the entirety of the indebtedness in breach of the Commitment Letter.

[104.] Further, the Commitment Letter provides that interest rates are subject to change at the Bank's discretion. While such discretion must be exercised within the contractual framework, there is no evidence before the Court demonstrating that the 17.25% rate was outside the range contractually contemplated or imposed in breach of the agreement.

[105.] While the Defendants raise a legitimate point of construction, that enhanced interest cannot lawfully be applied beyond the excess over the credit limit, they have not demonstrated that the rate applied was in fact contrary to the contractual terms.

[106.] In a mortgage action governed by **Order 77,** sworn affidavit verification of indebtedness supported by account records is sufficient unless displaced by cogent evidence. No has been provided. Therefore, in those circumstances, I am not persuaded that the interest claimed contravenes the governing contractual provisions. The evidential threshold for displacing the Plaintiff's sworn proof has not, in my view, been met. I therefore find that the quantum claimed in respect of the overdraft facility has been proved on a balance of probabilities.

Alleged Unconscionability

[107.] The Defendants rely upon **section 3** of the **Money Lending Act,** which permits the Court to reopen a harsh or unconscionable transaction. That jurisdiction, however, requires persuasive evidence that the bargain was extortionate or oppressive. In the present case, no such evidence was adduced, nor was any comparison drawn to statutory caps applicable to licensed financial institutions. Rather, what the evidence demonstrates is prolonged non-payment resulting in a substantial accrual of interest. That consequence flows from the contractual structure itself.

[108.] In my view, a commercial lending arrangement freely entered into is not rendered unconscionable merely because sustained default renders repayment challenging. On this basis, I find no evidential foundation for reopening the transaction under the Act.

Order 73 and Order 77

[109.] Although the indebtedness includes an overdraft facility, the essential character of these proceedings is the enforcement of mortgage security by way of possession and recovery of sums secured. The claim is not framed as a standalone writ for a simple contract debt.

[110.] Accordingly, I find that **Order 77** provides the governing procedural framework. As emphasized in **Simeon Peter Cooper v Bank of The Bahamas Ltd,** compliance with **Order 77** is mandatory in mortgage proceedings. That said, I find that the affidavit evidence filed in these proceedings satisfies those requirements.

[111.] While the Court may scrutinize banking evidence with the care ordinarily associated with money-lending actions under **Order 73**, that does not convert this claim into an **Order 73** action nor require concurrent procedural compliance.

[112.] I therefore find that **Order 77** governs these proceedings, and the submission that both Orders apply concurrently cannot be accepted.

Limitation

[113.] Section 32(1) of the **Limitation Act 1995** provides a twelve-year limitation period for an action to recover money secured by mortgage or to enforce a mortgage by possession or sale. **Section 32 (5)** of the Act, however, bars recovery of arrears of interest secured by mortgage after six years from the date such interest became due.

[114.] These provisions operate concurrently but address different aspects of the claim. While the right to recover principal and to enforce the mortgage security subsists for twelve years, the recovery of interest is subject to a shorter statutory bar.

[115.] On the evidence, the facilities remained operative and payments were made until approximately 2010. The First Defendant acknowledges making payments in response to a demand in or about mid-2010. Such acknowledgement and part-payment would, in any event, operate to restart time for limitation purposes.

[116.] Thereafter, proceedings were commenced in May 2021. Even assuming accrual in 2010, the claim for recovery of principal and possession falls just within the twelve year limitation period. The claims for recovery of principal and the enforcement of the mortgage security are therefore not defeated by the limitation defence. However, the claims for interest fall well outside the 6 year limitation period, and are therefore barred by statute.

Guarantee

[117.] Finally, although arguments were advanced concerning the incomplete execution of an intended joint guarantee, the Plaintiff's entitlement to relief in this action rests upon the mortgage securities and established default. Further, Counsel has relied upon a quotation from Sheldon's Practice & Law of Banking 10th Ed. which reads as follows:

> "In all cases of co-suretyship the banker should take care that all the proposed guarantors duly execute the contract, and no advance should be made on a guarantee until all the parties have signed. For if one or more of the sureties fail or refuse to sign, and those that have already signed can prove that they agreed to enter into the contract on the faith of its being participated in by one or more of those that have not signed, they will be discharged from all liability."

[118.] What is clear from that passage is that release depends on a guarantor proving that the guarantee was entered into on the understanding that one of those who have not signed would in fact have signed. The signature of the guarantor who did not sign is therefore a basis upon which the guarantor who did sign entered into the guarantee. The Defendants in this case have failed to provide any such evidence of the signature of one being dependent upon the other. There is therefore no basis in my view to conclude that the guarantee is ineffective.

Conclusion

[119.] For the reasons set out above, it is hereby ordered that:

(i) The Plaintiff is entitled to vacant possession of Lot 116, Winton Meadows Estates Subdivision, New Providence;

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

(iii) The Defendants shall pay the sums of $19,147.71 under Loan No. 100989344 and $21,739.79 under Loan No. 100989427, as set out in the Amended Originating Summons;

(iv) In respect of the Overdraft Facility (Loan No. 201733600), the Defendants shall pay to the Plaintiff the sum of $10,024.81.

(v) Pursuant to **section 2** of the **Civil Procedure (Award of Interest) Act, 1992,** I also award interest on the total of the sums found due at the statutory rate from the date of judgment.

(vi) No award for alternative damages for breach of contract is made.

(vii) Costs are awarded to the Plaintiff, to be taxed if not agreed.

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

Neil Brathwaite J.

Neil Brathwaite

Justice