

**COMMONWEALTH OF THE BAHAMAS**

**2019/CLE/gen/00899**

**IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION**

**BETWEEN:**

**ALVIN JACK**

**Plaintiff**

**AND**

**THEDA JACK**

**Second Plaintiff**

**VS**

**SHADAINA MONCUR**

**Defendant**

**Before The Hon Mr. Justice Neil Brathwaite**

**Appearances:** Attorney Tanya Wright for the Plaintiffs  
Attorney Hope Strachan for the Defendant

**DECISION**

1. The Defendant is the owner of a home at Lot 119 Jubilee Gardens, which was subject to a first demand mortgage held by the Bahamas Mortgage Corporation. On 14<sup>th</sup> July 2015 the Defendant and the Plaintiffs entered into an agreement whereby the house was leased to the Defendants, with an option to purchase. Relevant terms of the lease, which was duly executed by the parties, are as follows:

C. Option to purchase: In consideration of the Lessees meeting all obligations under this lease the lesser hereby grants the lessees an option to purchase under the following terms and condition:

i. The option price is \$150,000.00 (one hundred and fifty thousand) dollars in the currency of the Commonwealth of the Bahamas.

ii. The terms of the purchase have been agreed as a down payment of \$10,000.00 (ten thousand dollars) (receipt of which the lesser acknowledges) a monthly payment of \$1200.00 (twelve hundred per month) representing rent and a consideration towards the price of the property, if Lessees exercises this option to purchase. In the event Lessees failed to exercise the option or default under any terms of the lease, the option will be void and all monies will be retained by the lessor as a rent and not as a penalty. Rent is payable by the 28 day of each month to the lessor or her authorized agent.

iii. If Lessees fail or is unable to meet any of the obligations set forth in the lease option agreement the agreement may fail unless favorably considered by the lessor.

iv. Lessees understand that time is of the essence in this agreement. The option to purchase will expire on or before the end of 96 months (8 years) and be of no further effect if not exercised on or before the commencement date unless extended by the lessor.

v. The option shall be exercised by mailing or delivering written notice to the lessor prior to the expiration of this agreement.

vi. This purchase option is not conditional upon the lessees ability to obtain financing from a lender or if conditional then only with the approval of the lessor.

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vii. Default : if lessees shall fail to pay rent when due or perform any term hereof after written notice of such default given in the manner required by law the lessor at her option may terminate all rights of the Lessee Hereunder unless lessees, within the said time, shall cure such default. If Lessee abandons or vacates the property while in default of payment of rent, lessor may consider any property left on the premises to be abandoned and may dispose of the same in any manner allowed by law. In the event the lessor reasonably believes that such abandoned property has no value, it shall be (sic) it may be discarded.

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x. Examination of Title: the lessor shall produce good title to the lessees within thirty (30) days after full payment is made. If the lessees object to any exception to the title lessor shall use all due diligence to remove such exception at her own expense within sixty (60) days thereafter. But if such exception adversely affects the title that cannot be removed within the sixty (60) days all rights and obligations hereunder may allowed the lessees to terminate and end this agreement, without any obligation to purchase unless further extension is given to lessor to perfect title

2. In June 2016 a letter from the Bahamas Mortgage Corporation, addressed to the Defendant, was delivered to the home, which was by then occupied by the Plaintiffs, indicating that the mortgage was in arrears totaling \$1,895.66, and demanding

payment of the same, failing which the power of sale under the mortgage would be exercised. The Plaintiffs conveyed this information to the Defendant, who promised to address the matter.

3. A second letter was received by the Plaintiffs in January 2017, again addressed to the Defendant, advising that the account was again in arrears, reminding the Defendant that payment was due on the first of the month, and urging the Defendant to ensure timely payment in the future.
4. In the meantime, the Plaintiffs, claiming to have a reasonable fear that the Defendant was not meeting the mortgage obligations, demanded an accounting from the Plaintiff of the allocation of the monthly payments, and confirmation that all was well.
5. In March 2019 a third letter was received, indicating arrears of \$2,756.14, and again demanding full payment of the principal and interest, and indicating that if the arrears were not paid, the power of sale would be exercised. This was again communicated to the Defendant.
6. On 16<sup>th</sup> April 2019 the Plaintiffs instructed their attorney to write to the Defendant demanding receipts for payments to the Bahamas Mortgage Corporation for January, February, and March 2019, a printout from the BMC showing the outstanding balance on the mortgage, or a letter from BMC confirming that the balance due was less than \$100,000.00. This demand was refused, with the Defendant threatening eviction should the required payments not be made. The Plaintiffs responded by paying the sum of \$1200.00 for the month of April directly to the BMC, following which the Defendant on 10<sup>th</sup> May 2019 caused the Plaintiffs to be served with an eviction notice dated 6<sup>th</sup> May 2019, requiring the Plaintiffs to vacate the home within sixty days.
7. Following the eviction notice, the Plaintiffs initiated legal action, seeking the following reliefs:
  1. An injunction restraining the Defendant whether by her servants or agents from taking any or any further steps to evict the Plaintiffs from the said home until the final hearing or determination of the matter.
  2. An Order against the Defendant for specific performance of the purchase option under the said contract.
  3. An accounting of the apportionment of the monthly sum of \$1,200.00 paid to the Defendant by the Plaintiffs since 14<sup>th</sup> July 2015.
  4. A declaration damages (sic) for breach of contract 14<sup>th</sup> July 2015 to March 2019.
  5. An Order that the Defendant do disclose to the Plaintiffs the balance outstanding on the said Mortgage.
  6. Alternatively damages for breach of contract.
  7. Interest from the date of loss to the date of judgment.
  8. Interest pursuant to the Civil Procedure Award of Interest Act.
  9. Further or other relief.
  10. Costs.
8. The Defendant filed a Defence and Counterclaim, seeking the following:

1. That the Plaintiffs injunction order dated 17<sup>th</sup> July 2019 be set aside with costs to the Defendant.
  2. That the Plaintiff's Statement of Claim herein be dismissed with costs to the Defendant.
  3. An Order that the Plaintiffs vacate the subject property.
  4. An injunction restraining the Plaintiffs whether by themselves or by their servants or agents or otherwise howsoever from doing any or all of the following acts:
    - a. Entering or remaining upon or carrying on any business upon the said property.
    - b. Living or residing upon the said property.
    - c. Cutting down or removing trees, shrubs, timber, rock, fill or anything from the said property by any means and by any manner whatsoever.
    - d. Interfering with the Defendants right to use and enjoy the said property without being disturbed by the Plaintiffs or by any person or persons claiming under the Plaintiffs.
  5. Possession of the subject property.
  6. Arrears of rents owed.
  7. Mesne profit until possession is delivered up:
  8. Damages;
  9. Such further or other relief as to this Honourable Court may be just and fair;
  10. Costs.
9. Prior to the filing of the Defence and Counterclaim, the Plaintiffs also obtained an injunction blocking the eviction, and continued to make payments directly to the Bahamas Mortgage Corporation until June 2020 when, following an interlocutory hearing, the learned Thompson J ordered that "all terms and conditions of the lease purchase agreement be adhered to especially as it relates to the payment of the monthly sums due under the said agreement and that the said sum be paid to the Defendant in a timely manner until the final determination of this matter."

### **Plaintiff's Evidence**

10. The Plaintiffs in this case gave virtually identical witness statements, which stood as evidence in chief, and were subjected to cross-examination thereon. Those witness statements were in the following terms:

I, Theda Jack, of 119 Jubilee Gardens in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:-

1. That I am a permanent resident.
2. That I am also domiciled and resident in the Commonwealth of The Bahamas and reside at No. 119 Jubilee Gardens.
3. I am employed with The Bahamas Technical & Vocational Institute (BTVI) as a Receivable Manager.
4. I am the Second Plaintiff in the Action and the First Plaintiff is my husband.

5. The defendant is a citizen of the Commonwealth of the Bahamas and the registered owner of a three-bedroom single-story residential home located on number 119 Jubilee Gardens.

6. As at 15th July 2015 and at all material times the said home is the subject of a first legal demand mortgage granted by the Defendant to the Bahamas Mortgage Corporation.

7. Sometime on or before 14th July AD 2015 the defendant agreed that I would enter into occupation of the said home and continue to live in the home while the sum of \$1200 which would be applied towards the rent and towards the mortgage at Bahamas Mortgage Corporation with a view to owning the said home.

8. That me and the defendant reduced the option to writing by a contract dated 14th of July AD 2015 wherein it was agreed that the defendant would lease the said home to me with an option to purchase the said home for the sum of \$150,000 in the currency of the Commonwealth of the Bahamas. In consideration of this agreement my wife and I would meet all of the payment terms under the said agreement and at the end of the term of the agreement the defendant would convey the home to us. A copy of the sale agreement is attached to the bundle of agreed documents and that page is 1- 6.

9. It was an express term of the said contract that I would duly pay a lump sum of \$10,000 in the said currency and monthly payments of \$1200.

10. In the exercise of the said option I duly paid the sum of \$10,000 which said sum was agreed to be applied as a down payment for the purchase of the said home for the sum of \$150,000. There was no further option to exercise once we had agreed to pay this lump sum. Thereafter all that was required of us was to continue to make the monthly payments within the agreed time frame.

11. It was also expressly agreed that the monthly sum of \$1200 would represent payment towards rent for the said home and towards the purchase price. And it was further agreed that I would continue to pay the said \$1200 per month for a term of eight years or 96 months in full satisfaction of the agreed purchase price of \$150,000 after which time the defendant would convey her ownership in possession to me. It was always our intention to increase the payments so that we could complete the purchase ahead of the agreed term

12. That since 15th July A.D., 2015 I duly paid the sum of \$1,200.00 to the Defendant every month, which Said sum the Defendant apportioned in her discretion to the rent and towards the purchase price. The Defendant never advised us of the amount she was applying towards the mortgage despite our repeated request of her to disclose this amount.

13. The Defendant never disclosed how much of the monthly payments she was paying to the mortgage and how much she was keeping for herself. However the Defendant fully disclosed that there was a mortgage over the property but expressly promised under the agreement that she would convey the home after all sums of money owed under the agreement was paid. We relied on the Defendant's promise to convey and her expressed or implied representation that she could possess the right to convey when we had made all of the payments under the agreement.

14. By virtue of this promise and the agreement we entered into in good faith I held the reasonable belief that provided all sums were paid the Mortgage would be satisfied by the end of the Eight (8) years or 96 months payment term under the agreement so that the Defendant would be free to convey a good and marketable title to me and my [wife] to the said home.

15. In or around June 2016, The Bahamas Mortgage Corporation wrote to the Defendant demanding payment of the full principal and interest outstanding on the said mortgage with notice that if the full payment of arrears totaling \$1,895.66 were not paid within the prescribed period that the said Bahamas Mortgage Corporation would proceed with its powers of sale under die said Mortgage. A copy of the said letter is attached to the Bundle of Agreed documents and at page 7.

16. When I became aware that the mortgage over the said home had fallen into arrears to the extent that the Bank was making a formal demand I became very alarmed and fearful that the said home, the acquisition of which my [wife] and I had just depleted our entire life's savings for, could be taken by the Bahamas Mortgage Corporation.

17. The June 2016 envelope from The Bahamas Mortgage Corporation was delivered to the said home. At this point my [wife] and I still enjoyed a cordial, amicable and professional relationship with the Defendant stemming from our mutual membership of the same church family. At this and all material times we held the honest belief that the Defendant would consent to the opening of the correspondence from The Bahamas Mortgage Corporation as it held the mortgage over the property we were under contract to purchase.

18. The Defendant was living abroad at the time and we only had a telephone contact for her which we could only use through Whatsapp.

19. At the time that we received correspondence addressed to the Defendant from The Bahamas Mortgage Corporation we were already in occupation of the property which is the subject of the said mortgage and the mail was hand delivered to the home where we live

20. My [wife] and I contacted the Defendant to inform her about the Bahamas Mortgage Corporation demand and sent her a Whatsapp image of the letter.

21. At no time during this initial communication did the Defendant object or raise any objection to the opening of this correspondence. She freely and apologetically explained the contents of the letter and discussed with us the course of action she would take with respect thereto.

22. After the Defendant purported to speak with the bank in connection with the contents of the letter she voluntarily provided us with an update to comfort us that everything was ok.

23. Moving forward this was the way that we communicated with the Defendant. Whenever we got anything from Bahamas Mortgage Corporation we would open it and send her the information for her to address with us and TBMC.

24. This was NEVER a problem for the Defendant until we started asking her questions about the mortgage arrears, the payments she was making to the mortgage based on an honest and genuine fear that she may not have been making timely payments.

25. Despite the demand from the bank we continued to meet our obligations under the said contract as the Defendant assured us that the arrears demand was a misunderstanding and would be sorted out.

26. In January 2017, The Bahamas Mortgage Corporation again made written demand of the Defendant for payment of arrears on the said mortgage. A copy of the said letter is attached to the Bundle of Agreed documents and at page 8.

27. Upon becoming aware of this demand I continued to make request both orally and in writing for an accounting of the allocation of the said monthly payments and the Defendant failed and refused to provide the said accounting.

28. Despite the Defendant's failure and refusal I continued to meet our obligations under the said contract. By this time the defendant was showing increasing impatience with our questions regarding the mortgage payments and although she was still assuring us that everything with the bank was a misunderstanding and that it would all be sorted out, she was becoming very uncooperative with us and the relationship was noticeably deteriorating.

29. On or around 8th March 2019 I came home to find an envelope addressed to the Defendant from The Bahamas Mortgage Corporation (TBMC). I called the Defendant to advise her of the said envelope and on the telephone call she instructed me to open it and read the contents to her. A copy of the said letter is attached to the Bundle of Agreed documents and at page 9.

30. Upon reading it to her she gave me instructions to contact her mother with instructions for her mother to go to TBMC to make certain arrangements on her behalf the details of which I do not recall at this time. The Defendant asked us to contact her mother to coordinate the action she would take with respect to that letter.

31. Later that evening I sent the Defendant a WhatsApp message seeking her mother's telephone contact so that I could contact her as per our conversation earlier that day.

32. In that same WhatsApp conversation the Defendant asked me to send her a pic of the mail that I had opened with her expressed consent on the telephone call earlier that day.

33. A copy of the WhatsApp message following our conversation where she asked me to open the BMC envelope is attached to the Bundle of Agreed documents and at page 14.

34. Once again we sent the Defendant a copy of the letter from the bank. We had never missed a payment on the agreement and yet we felt that the Defendant was not being upfront with us. We felt exposed by the terms of the said agreement and that our investment was becoming increasingly more in jeopardy and our concerns became even more so escalated as the Defendant became hostile towards us.

35. On 16th April A.D., 2019 and by letter of even date I caused a formal written demand to & written on our behalf to the Defendant seeking inter alia,

- a) Receipt of payment to Bahamas Mortgage Corporation for the months January, February, and March 2019 and,
- b) Printout from Bahamas Mortgage Corporation showing outstanding balance including principal and interest or
- c) Letter front Bahamas Mortgage Corporation confirming that the balance due on the said loan is less than \$100,000.00

36. The said formal written demand was delivered to the Defendant via Whatsapp as the Defendant no longer resides in the Commonwealth of The Bahamas. A copy of the said letter is attached to the Bundle of Agreed documents and at page 10 and 11.

37. The Defendant duly received the formal written demand and responded directly to me via Whatsapp, while refusing to give the requested accounting, threatened eviction should the monthly payments of \$1,200.00 not be made.

38. Subsequent to the Defendant's reply, I made the \$1,200.00 payment due for the month of April 2019 directly to the Defendant's mortgage account with The Bahamas Mortgage Corporation.

39. On Friday 10th May A.D., 2019 the Defendant served me with an eviction notice dated 6th May A.D., 2019, demanding that my [wife] and I vacate the said

home within 60 days in breach of contract. A copy of the said eviction notice is attached to the Bundle of Agreed documents and at page 13.

40. That at or around 5.30pm Thursday 4th day of July 2019 I received a telephone call from one P.C 1067 Bodie attached to the Carmichael South Western Police Station.

41. I was informed by the said P.C Bodie that he was calling on behalf of Shadaina Moncur who requested him to inform us to vacate her place this week.

42. I immediately told him to contact my attorney Tanya N. Wright.

43. At the time of this call the Defendant was not in the jurisdiction.

44. That the Defendant has alleged to the Police and in these proceedings that we have repeatedly opened her mail without her expressed or implied consent.

45. Making the allegation that the Defendant has made was done with the deliberate and malicious intent to paint a false criminal and negative picture of our relationship and our Character in the mind of this Honorable Court and the general public at large.

46. At no time on each of those occasions that I opened letters from the Bank did the Defendant ever express any displeasure, anger or any negative sentiments towards me or my [wife] for having opened the letters from TBMC.

47. Quite the contrary, the Defendant was initially very cooperative in seeking to do what she could to mitigate against the threats of action by TBMC to take action against her with respect to the property. This initial cooperation turned to anger defiance and hostility as we kept asking her to account to us. But even in this anger and hostility she never complained about us opening and sending the Bahamas Mortgage Corporation letters until she made up her mind to try to evict us.

48. At the time that we received correspondence addressed to the Defendant from The Bahamas Mortgage Corporation we were already in occupation of the property which is the subject of the said mortgage and the mail was hand delivered to the home where we live.

49. We never intercepted any mail transmitted via the postal service.

50. The Defendant was living abroad and we only had a telephone contact for her which we could use through Whatsapp.

51. In each case we opened the envelopes we immediately communicated the contents of the letter to the Defendant.

52. At no time during this initial communication did the Defendant object or raise any objection to the opening of this correspondence. Had the Defendant at any point communicated her objection to us opening the BMC letters I would not have done so, but she continued to receive the information with gratitude and no objection.

53. We have never opened any mail addressed to the Defendant which was not sent by The Bahamas Mortgage Corporation.

54. The Defendant raised the issue of us opening mail from The Bahamas Mortgage Corporation when she with the assistance of a police officer tried to evict us from the property. She only did this to paint a false and negative picture of us. This was wrong and very unfair to us.

55. We have faithfully and diligently paid all of the payments due under the agreement. Copies of receipts of all payments made to The Bahamas Mortgage Corporation from January 2019 to February 2020 are attached to the Bundle of Agreed documents and at pages 50 to 53.

56. Also attached to the Bundle of Agreed documents and at pages 30 to 49 is a transaction history from my bank showing that we never once missed a payment to the Defendant.



57. We have never made a partial payment to the bank. All payments to the bank for the relevant months have been in full.

58. There is not now nor has there ever been any legitimate reason for the Defendant to turn so offensive towards us and to seek to malign us in the manner she has.

59. Since the commencement of this action the Defendant has provided records of the mortgage loan including inter alia, the balance outstanding on the said loan, the amount of the mortgage payments, the maturity date. This is precisely the information which we requested from the Defendant prior to the commencement of this action. The fact that the Defendant has freely and voluntarily provided these details shows that her initial failure and refusal was in all the circumstances unreasonable.

60. However despite the fact that we have resumed direct payments to the Defendant, the Defendant has failed and refused to provide confirmation to the Plaintiffs or otherwise through her counsel that the Bahamas Mortgage Corporation mortgage payments are being made in a timely manner and that the account is not in arrears.

61. Neither I nor my [wife] in my presence has ever used any profanity or obscene or offensive language towards the Defendant or anyone representing her.

62. I now see that the contract was very badly worded. But the intention was crystal clear. We used our entire savings to purchase a home. And we spent most of our combined salary to meet the payments under the contract.”

### **Defendant's Evidence**

11. The Defendant also proffered a witness statement, which stood as evidence-in-chief. Counsel for the Plaintiff elected not to cross-examine the Defendant, and takes the position that, rather than consider that evidence to be uncontradicted, the court should note that this evidence is to be contrasted with the evidence of the Plaintiff's, which they say should be preferred. Material portions of the witness statement of the Defendant are in the following terms:

“5. I am the owner of a house and premises situate Lot No. 19 Jubilee Gardens, No. 2 Subdivision, Nassau, Bahamas. I wish to tender into evidence a copy of the Conveyance dated 27th day of June, 2004 The Minister of Housing and National Insurance the Minister Responsible for Housing to Shadaina Moncur recorded in Volume 9609 at pages 16 to 28 and mark as an exhibit.

6. My property is mortgaged to Bahamas Mortgage Corporation as evidenced by the Mortgage Deed dated 7th February, 2005 and a Further Charge dated 25th September, 2006. I wish to tender the same as an exhibit.

7. That I rented my home to the Plaintiffs under specific terms contained in a lease dated the 13th day of July. A.D., 2015. I wish to refer to the Lease Agreement as an exhibit.

8. The Plaintiffs agreed to lease my property for the sum of One Thousand Two Hundred Dollars (\$1,200.00) per month payable in advance with an option to purchase the same for the sum of \$150,000.00 within a period of Eight (8) years provided they met all obligations under the contract.

9. By Clause ii. of the Lease Agreement it was stated "in the event Lessees fail to exercise the option or default under any terms of the lease, the option will be void and all monies will be retained by the Lessor as rent and not as penalty. Rent is payable by the 28<sup>th</sup> day of each month to the Lessor or her authorized agent."

10. It was arranged that the Plaintiffs would pay the rent directly into my RBC Bank Account No. 05456-7073965. Initially, they complied but stopped and fell into arrears.

11. The Plaintiffs failed and/or refused to pay the rent under the Lease as agreed or to pay the purchase price for the said property and fell into arrears in the sum of Seven Thousand Two Hundred Dollars (\$7,200.00) as of May, 2019 prior to me serving them with an eviction Notice.

12. Despite verbal and written demands for payment made to the Plaintiffs they continued to refuse to pay the rent as stipulated in the agreement, but they remained in the said house. In fact, the first named Plaintiff became verbally abusive towards me by telephone and WhatsApp messages when I demanded payment of the rent. I wish to tender the "Whatsapp" message between the First Plaintiff and I, evidencing the same as an exhibit.

13. It was only after the Plaintiffs breached the lease Agreement, that I, by way of Notice of Eviction dated 6<sup>th</sup> May, 2019 notified the Plaintiffs that they should vacate the subject premises or be subjected to forcible eviction by me.

14. Prior to me serving the Plaintiffs with the Eviction Notice, the last payment I had received directly from the Plaintiffs, as stipulated in the Lease agreement, was in March, 2019. The Plaintiffs purport that they have been paying my mortgage at BMC. This, after illegally intercepting my mails and opening them. This is admitted by them in Paragraph 11, 12, 14 and 17 of the Affidavit of Alvin Jack filed 1<sup>st</sup> July, 2019.

15. In the midst of the communications between me and the Plaintiffs concerning their non- payment of the rent Installments, I received a letter dated 16<sup>th</sup> April, 2019 from the Plaintiff attorney making several demands of me concerning my mortgage with the Bahamas Mortgage Corporation. They were not entitled to these documents. There was no stipulation in the said agreement which entitled them to the same. I wish to tender into evidence a copy of the said letter to be marked as an exhibit.

16. The Plaintiffs obtained an interim Injunction on the 17<sup>th</sup> July, A.D., 2019 against me restraining me whether by my servants or agents from taking any or any further steps to evict them from the home until the final hearing or determination of the matter.

17. A Writ of Summons was filed on behalf of the Plaintiffs on 1<sup>st</sup> July, 2019. Instead of serving me personally, (the Plaintiffs well knew how to find or contact me), they advertised the Writ in the Newspapers on Thursday 19<sup>th</sup> September, 2019 a move totally unnecessary but calculated to embarrass me and/or to cause me not

to appear at the planned Ex-parte Summons application. I wish a copy of the said advertisement entered into evidence and marked as an exhibit.

18. The fact is the Plaintiffs breached the said agreement by failing and/or refusing to pay the monthly Lease installment payments and exacerbated the situation by illegally and totally against my wishes, intercepting my mail from BMC.

19. The Plaintiffs contend in their Statement of Claim that in June 2016 the Mortgage Corporation wrote to me demanding the full principal and interest on the mortgage. They claim also that other letters were written in January, 2017 and March, 2019. Again, the Plaintiffs without my permission intercepted my mail from the post and opened it. They further aver in their Statement of Claim that they made payment directly to The Mortgagee.

20. The Letter dated 6th March, 2019 which I exhibited in my Supplemental Affidavit dated 19th March, 2020) indicated that there were arrears of Two Thousand Seven Hundred and Fifty- six Dollars and Fourteen Cents (\$2,756.14). The Plaintiffs opened my letter, screenshot it and sent it to me via WhatsApp (msg. of 2019 time 7:40 pm). I wish to tender in evidence a copy of the said message as an exhibit.

21. This was done even after I protested on previous occasions and having told them that all my mails would be collected by my mother. I was appalled that they continued to open my mail despite my protest. In fact, the First Plaintiff insisted that he had a right to open my mail because he had investment in the property. I never received the original of this letter from the Plaintiff's.

22. In any event, despite the issue of late payments I did make the following payments to the Corporation during the months of March and April, 2019:

i. 03/05/2019	\$	600.00
ii. 14/03/2019	\$	2,000.00
iii. 02/04/2019	\$	580.00
iv. 16/04/2019	\$	300.00
v. 30/04/2019	\$	300.02

23. The past due amount on the Account was only Four Hundred and Fifty-Five and Two Cents (\$455.02) as at 16th April, 2019. I wish to enter into evidence copies of receipts evidencing my said payments and a copy of the BMC Loan print out dated 30th April, 2019 to be marked as exhibits.

24. I never asked, discussed with, or encouraged the Plaintiffs to ignore their contract and obligations to me or to divert payment from me directly to BMC. In fact, I expressed my disagreement that they were failing to honor the contract in a WhatsApp message exchange between the First Plaintiff and I sometime in 2019 (msg time 6:49 P.M.) prior to the institution of formal legal proceedings. I also never discussed with the Plaintiffs what proportion of their monthly rent would be applied towards the mortgage. I wish to tender in evidence a copy of the WhatsApp message to be marked as an exhibit.

25. I warned the Plaintiffs that I expected the arrangements (the Lease agreement terms) to remain the same and that if they changed anything, I would consider it to be non-payment. I wish to refer to a WhatsApp msg. of 2019 (msg. time 4:58 PM.) to be entered as an exhibit.

26. Notwithstanding that I indicated to them that I was unwilling to accept any change in the terms of the Lease Agreement, (particularly the form of payment) breach of the Lease Agreement and served them with an eviction notice, they ignored the notice and continued to ignore their contractual obligations. I later discovered that they began making payments directly to the BMC. I wish to tender in evidence copies of the Transaction History Inquiry I received from the BMC for the period 02 January, 2019 to 01 January, 2020 as an exhibit.

27. The details of my Mortgage are set out in my Loan Transaction history report which demonstrates clearly that having borrowed the sum of Seventy-Seven Thousand Eight hundred and Twenty-nine Dollars (\$77,829.00) the amount due and owing as at 31st December, 2020 is Forty-seven Thousand Nine hundred and Fifty-one Dollars (\$47,951.00). I wish to tender in evidence a copy of the Loan Transaction History to be marked as an exhibit.

28. On the 2nd June, 2020 The Honorable Justice Keith Thompson ordered the following:

i. That all terms and conditions of the lease/purchase agreement be adhered to especially as it relates to the payment of the monthly sums due under the said agreement and that the said sum be paid to the Defendant in a timely manner until the final hearing or determination of this matter.

ii. That all mail delivered or otherwise to the property presently owned by the Defendant is to be delivered to or made available for collection by the Defendant at the earliest possible opportunity and unopened.

29. The terms of the order amounts to the Courts acceptance of the fact that the Plaintiffs had breached the terms of the Lease and had to be ordered to pay the money to me as the Lease stipulated. Moreover, the Order recognized and was an acknowledgement of the fact that the Plaintiffs were in fact intercepting, opening, and handling my mail as though it was their own and without my permission. This I understand is a criminal act.

30. The Lease agreement did not stipulate what if any of the said sum was to be apportioned towards the payment of the mortgage. So the Plaintiffs assumption that they should apply the entire One Thousand Two Hundred Dollars (\$1,200.00) per month towards the mortgage is clearly wrong. The mortgage instalment is in fact Five hundred and Eighty Dollars (\$530.00). As a result, I had been denied the balance of the sums due under the lease to apply at my discretion.

31. The Lease agreement did not contain any stipulations as to the mortgage or as to the Plaintiffs being entitled to information concerning the mortgage.

32. I wish to rely on the specific terms of the Lease as follows:

a. By Clause ii. of the Lease it was stated “in the event Lessees fail to exercise the option or default under any terms of the lease, the option will be void and all monies will be retained by the Lessor as rent and not as penalty. Rent is payable by the 2th day of each month to the Lessor or her authorized agent.”

b. Clause iii. “if Lessees fail or is unable to meet any obligations set forth in the lease option agreement, the agreement may fail unless favorably considered by the Lessor.”

I did not consider their failure to meet their obligations favorably and informed the Plaintiffs of my disapproval.

c. Clause D (iv) “Lessee shall make no alteration to the buildings or improvement on the Premises without the prior written consent of the of Lessor.”

The Plaintiffs in contravention of this clause poured a concrete driveway at the property, installed an electric gate and put up security cameras. When I protested to them that I did not approve of these alterations to the property they used abusive language towards me.

33. That up to the time of the court proceedings and in particular the Court Order dated 2nd June, 2020 the following actions of the Plaintiff must be taken into consideration:

The Plaintiff s breached the Lease Agreement in several ways.

ii. The Plaintiff s perpetrated a criminal act against me.

iii. The Plaintiffs were arrogant, rude, and abusive towards me.

iv. I exercised my right to rescind the contract as a consequence of the Plaintiffs' breach, and as specifically provided for in the Lease Agreement.

v. The Plaintiffs run to the court to obtain injunctive relief when it was them who was at fault and had breached the Lease Agreement.

vi. The Plaintiffs refused to recognize that while there was an agreement with an option to purchase that I have the right to the equity of redemption, from Bahamas Mortgage Corporation.

vii. The term for the purchase under the option had not matured.

34. The Plaintiff's actions have resulted in real loss and damage to the Defendant and the Court's assistance is prayed to have them vacate the premises and to cancel the said agreement more particularly the option to purchase.

35. That in all the circumstances of the case, I intend to exercise my option to rescind the contract as stipulated in the terms agreed in the Lease.

### **Plaintiff's Submissions**

12. The Plaintiffs accuse the Defendant of multiple examples of bad faith and deceit, notably in alleging that the Plaintiffs were in arrears when the evidence is that all payments were made either to the RBC account of the BMC account; by accusing the Plaintiffs of intercepting mail from the post when the mail was delivered instead to the home; by attempting to conceal the existence of the mortgage from the Plaintiffs; by saying that the 2019 letter from the BMC was in error, even while acknowledging making payments \$3780.02 during March and April 2019, which

could only have been meant to reduce arrears as the monthly payment was on \$580.00; and by refusing to amicably provide information on the status of the mortgage when asked.

13. The Plaintiffs submit that the Defendant has not complied with the provisions of the lease requiring written notice of default in the manner required by law, with time to remedy, and the observation of the requisite time period before requiring the Plaintiffs to vacate the premises. The Plaintiffs rely on **Afovos Shipping Co. v. Pagnan & Fratelli (The Afovos)** [1983] 1 WLR 195, in which they say a termination notice was issued at 16:40 p.m. for failure to provide “punctual payment” under the terms of a charter party agreement, as the ship owners thought it impractical for the charterers to pay the instalment after that time, although payment was not due until midnight on the same day. The House of Lords held that the notice purporting to terminate the contract was invalid, as the owner had issued the notice early. The Plaintiffs therefore submit that strict compliance is imperative, and the absence of strict compliance renders the Defendant’s attempt to evict and to void the lease ineffective.
14. In addition to relying on the express terms of the lease with respect to the issue of notice, the Plaintiffs submit that the court should imply terms of fact into the contract, relying on **Liverpool City Council v Irvin** (1977) AC 239, and **Attorney General of Belize v Belize Telecom** [2009] UKPC 10, by interpreting what the parties must have intended. The Plaintiffs also cite the decision **Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Anor** (2015) UKSC 72, which in turn at paragraph 18 cites the decision of Lord Simon in the Privy Council case of **BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hasting** (1977)52 ALJR 20, 26. Lord Simon said the following:

"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied:

- (1) it must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that 'it goes without saying';
- (4) it must be capable of clear expression;
- (5) it must not contradict any express term of the contract."

15. With respect to determining the intentions of the parties, the Plaintiffs submit that an objective test must be applied, and that “what matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.” (**Pacific Carriers Ltd v BNP Paribas** (2004) 208 ALR 213). The Plaintiffs also cite the “officious bystander” test as set out in **Shirlaw v Southern Foundries Ltd** (1939) 2 All ER 113, where Lord McKinnon said:

"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some

express provision for it in the agreement, they would testily suppress him with a common "Oh, of course".

16. The Plaintiffs therefore submit that the intentions of the parties were clear, and that implied terms are necessary to give business efficacy to the lease.
17. The Plaintiffs also rely on section 16(1) of the Conveyancing and Law of Property Act Chapter 138 which provides as follows:

"16. (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until:

  - i. the lessor serves on the lessee a notice specifying the particular breach complained of and,
  - ii. if the breach is capable of remedy, requiring the lessee to remedy the breach, and,
  - iii. in any case requiring the lessee to make compensation in money for the breach, and the lessee, fails within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. Lessee may apply for relief."
18. The Plaintiffs submit that the Defendant did not serve any or any reasonable notice of the breach on the Plaintiffs, and gave no opportunity to rectify or to compensate for the alleged breach. They therefore submit that the attempt to forfeit the lease must fail.
19. Should the court conclude that it is appropriate to imply terms in this contract, the Plaintiffs submit that the Defendant has committed numerous breaches, three of which are as a result of failure to pay the mortgage on time or at all resulting in three notices of default and demand from the mortgage corporation; failing to give statutory notice of default with an opportunity to remedy; and by failing to comply with the express term of 60 days notice for eviction. The Plaintiffs therefore submit that in the circumstances, it would be appropriate to order specific performance of the agreement, so that the home would be conveyed to the Plaintiffs.
20. With respect to the counterclaim of the Defendant, which is as a result of the Plaintiffs making payments to the BMC as opposed to RBC, the Plaintiffs submit that the payments were all made to an account in the name of the Defendant and the benefit of the payments inured to the Defendant. The Plaintiffs insist that they always stood ready to resume direct payments, and reasonably requested details of the status of the mortgage, which were refused. The Plaintiffs also submit that the Defendant readily accepted the resumption of payments to RBC, albeit as a result of a court order, which could amount to a waiver of any alleged breach. They therefore submit that the counterclaim should be dismissed, with costs of the entire action to the Plaintiffs.

### **Defendant's Case**

21. The Defendant denies breaching the agreement, and submits instead that the Plaintiffs committed criminal acts in opening the Defendant's mail without

permission, leading to the Plaintiffs' unilaterally changing the mode and method of payment of rent. The Defendant further contends that the Plaintiffs failed to cure the breach despite the protestations of the Defendant, carried out works at the home without approval, also amounting to a breach, and were generally belligerent and rude when confronted.

22. The Defendant submits that the option to purchase could not be triggered until all monies owed under the option are paid, and that, as the Plaintiffs were in breach by not paying the rent in the manner authorized by the Defendant, the Defendant was entitled, pursuant to clause III and D VIII of the lease, to determine the failure of the agreement. She further submits that the requirement to meet the monthly payment was a fundamental term of the contract, the breach of which went to the root of the contract, entitling the Defendant to repudiate. See **Suisse Atlantique Societe D'armement Maritime SA v NV Rotterdamsche Kolen Centrale (1966) 2 All ER 61**; **Photo Production v Securicor Transport Ltd (1980) 1 All ER 556**.
23. The Defendant further submits that the mortgage was specifically mentioned in the lease, and that as such the Plaintiffs were fully aware that the property was subject to a mortgage. She further submits that there was no entitlement under the lease to the provision of any information concerning that mortgage to the Plaintiffs, and there could therefore be no breach by the Defendant by failing to provide that information when requested.
24. It is submitted that the option to purchase was exercisable at the end of the lease period, at which time the Defendant was obligated to consider the monthly payments as going towards the purchase price. It is further submitted that there was no obligation to produce good title until thirty days after full payment, and there could therefore be no breach by a failure to comply with an implied term to keep the mortgage in good standing.
25. In response to the Plaintiff's contention that other terms were discussed which were not included in the written lease, the Defendant relies on the parol evidence rule that "Where the parties have embodied the terms of the contract in a written document, the general rule is that verbal evidence is not allowed to be given...so as to add to or subtract from, or in any manner to vary or qualify the written contract", citing the case of **Goss v Lord Nugent (1833) 5 B. & Ad. 58, 64**.
26. With respect to the issue of implied terms, the Defendant simply submits that the express terms of the contract would prevail, citing **Clarion Quay Management Company Ltd. By Guarantee v Dublin City Council & Anor**. Given the submission that title did not have to be produced until thirty days after the completion of the payments, the Defendant says that no term could be implied that the mortgage payments had to be kept current, or that information concerning those payments had to be provided to the Plaintiffs.
27. With respect to specific performance, the Defendant relies on **Lamare v Dixon (1873) ILR 6 HL 414**, and **Gregory v Wilson (1851) 9 Hare 683**, and notes that specific performance is an equitable remedy which is only available where damages would not be sufficient. It is submitted that the same should be refused, as the Plaintiffs have done acts which are in contravention of the lease, namely paying in



an unauthorized manner, and carrying out works at the home without prior approval. The Defendant further submits that the Plaintiffs do not come with clean hands, due to their criminal acts in opening the Defendant's mail, taking that mail to their attorney, and that in the circumstances it would not be equitable or just to order specific performance.

28. In all the circumstances of this case, the Defendant submits that the Plaintiffs' claim should be dismissed, and the counterclaim upheld, with costs to the Defendant.

### **DISCUSSION**

29. The Plaintiffs and Defendant in this matter attended the same church, and apparently enjoyed an excellent relationship, involving a large measure of trust. The Plaintiffs say that that trust led them to rush to sign a lease with an option to purchase without appropriate scrutiny. At the outset I must say that Mr. Jack testified that he is a teacher, while his wife is a manager at BTVI, and in testifying, neither Plaintiff appeared unsophisticated, or unable to understand the nature of the agreement they were signing. I also do not accept that there were any discussions of other terms which were not included in the agreement, as Alvin Jack accepted at one point that no discussion occurred about him knowing the terms or status of the mortgage, while in re-examination he stated that verbal discussions prior to the lease were about why there was a mortgage. He also states that prior to signing the lease he was not aware that there was a mortgage, while he says in his witness statement that the sum of \$1200 was to be applied towards the rent and towards the mortgage. These statements are incongruous, and do not mesh with each other. Furthermore, there is no evidence that the Plaintiffs were coerced to sign the lease. They could have stopped, or asked questions. Indeed, in cross examination Theda Jack says that she agreed with the terms of the lease when she signed it. In my view, they were also anxious to secure the agreement, which, if completed, would give them the opportunity to own their own home on reasonable terms. They therefore signed the lease freely and voluntarily, in full knowledge that the property was subject to a mortgage, and all would have been well were it not for the discovery of the mortgage arrears.
30. The next issue to be considered is: When does the option to purchase take effect? The Plaintiffs are of the view that the option was executed upon payment of the initial \$10,000.00, while the Defendant contends that the option could not be executed until completion of the payments. Clause II of the lease says that "The terms of the **purchase** have been agreed as a down payment of \$10,000.00 (ten thousand dollars) (receipt of which the lesser acknowledges) a monthly payment of \$1200.00 (twelve hundred per month) representing rent and a consideration towards the price of the property, if Lessees exercises this option to purchase." The use of the word "purchase" is instructive, as is the requirement for an initial payment of \$10,000.00. This is not merely a rental agreement with an option to purchase at the end of the agreement, but a purchase agreement once the down payment is made, followed by monthly payments of rent which would be consideration towards the purchase price, with all going to the Landlord should the agreement fail. This is not a situation where the initial payment was to be considered an advance on rent, or a security deposit which could have been refundable. This was an outright down payment on the purchase of the property. I therefore find that the option to purchase

was exercised once the initial payment of \$10,000.00 was made, and all that had to be done afterwards was to maintain the monthly payments to complete the purchase.

31. The Plaintiffs suggest that terms should be implied into the contract. In considering this issue, I note the five criteria enunciated by Lord Simon in **BP Refinery v President et al** (paragraph 12 above). In reviewing those criteria, I note the first, which is that it must be reasonable and equitable. On this point the Defendant says that the Plaintiffs should be denied any equitable relief because they do not come with clean hands, and committed a criminal act in opening the Defendant's mail.
32. While no criminal charges have been laid in this matter, I note the provisions of section 335 of the Penal Code Chapter 84 which reads as follows:

“335. (1) Whoever, not being in the employment of the postmaster, wilfully and maliciously, with intent to injure any other person, either opens or causes to be opened any letter which ought to have been delivered to that other person, or does any act or thing whereby the due delivery of the letter to that other person is prevented or impeded, is guilty of a misdemeanour.”
33. The Plaintiffs admit opening at least three letters addressed to the Defendant, claiming that they did not think she would mind due to the nature of their relationship and the agreement to purchase the home. The Defendant in her witness statement said that the opening of the letters “was done even after I protested on previous occasions and having told them that all my mails would be collected by my mother. I was appalled that they continued to open my mail despite my protest. In fact, the First Plaintiff insisted that he had a right to open my mail because he had investment in the property.....”
34. No evidence of any protests was provided by the Defendant, despite the fact that the parties seemed to communicate often by Whatsapp messages, as the Defendant was out of the jurisdiction. Messages have been provided by the Plaintiffs, but while there is an indication that mail would be collected by the Defendant's mother, there is no demand that the Plaintiffs not open any more mail. I therefore do not accept that any such demand was made, although I note that there is no evidence of permission being given, nor was any sought prior to the opening of the mail.
35. In considering the elements of the criminal offence, I note the requirement of a malicious and willful act with an intent to injure. There is no evidence of any such intent. Indeed, the only intent evident in the actions of the Plaintiffs is a desire to protect what was for them a monumental investment. While this is not to excuse the actions of the Plaintiffs, which I find deplorable, I do not find on this basis that it would be inequitable to imply a term into the contract, given all the circumstances of this case, including the justifiable fear of the Plaintiffs that they could lose all they had invested in the property.
36. The second criteria is that of business efficacy, as no contract will be implied if the contract is effective without it. This was a contract to purchase property. The Defendant contends that, pursuant to the terms of the agreement, she was not required to produce good title until thirty days after the purchase price was fully paid. Having reviewed this clause, and noting that the full price would not be paid

until the expiration of the agreement, to accept the interpretation by the Defendant would mean that all monies due would have been paid, but that a failure to produce good title by the Defendant, who would have received full value, would mean only that the Plaintiffs could terminate the agreement, with no provisions made for any compensation even though the agreement would have failed due to no fault of the Plaintiffs. While this is a consequence of a poorly drafted agreement, the contention of the Defendant also ignores the fact that a foreclosure by the mortgagor would mean that the Defendant would not only not be able to perfect title, but would not have a title to perfect. In my view, this would mean that the agreement could not be effective without the mortgage being paid in a timely fashion to avoid the risk of a foreclosure, and the clause relied upon by the Defendant does not absolve the Defendant of the requirement to properly service the mortgage, which was clearly not being done, as is evidenced by the letters from the BMC, and by the evidence of the Defendant herself that she made payments totaling \$3,780.02 during March and April 2019. With a monthly payment of \$530.00, it is clear that this was done to attempt to bring arrears current. This is extremely dangerous, as the mortgage itself provides that the right to foreclosure and to exercise a power of sale take effect if any payment is past due for thirty days. I therefore find that the agreement could not be effective without an implied term that the mortgage be properly serviced to prevent foreclosure. I also find that the third and fourth criteria are satisfied, as the implied term is capable of clear expression, and is so obvious that it goes without saying.

37. The Defendant suggests that such an implied term contradicts the clear terms of the agreement that title be provided thirty days after completion of the payments. I have already indicated that I do not accept this argument, and, in my view, such an implied term would not contradict any other clause of the agreement.
38. The Plaintiffs have indicated six implied terms as follows, which they say should be considered:
  - a. The Defendant had the Mortgagor's consent to enter into this agreement.
  - b. That the Defendant would pay the mortgage
  - c. Not to do anything to place the said property in jeopardy of foreclosure with the first legal demand mortgagor.
  - d. The Defendant would give reasonable notice to the Plaintiffs of termination of the agreement in the manner required by law.
  - e. In the event of actual default either party would give the other reasonable notice to correct breach in the manner required by law.
  - f. The Defendant would not take steps to prematurely evict the Plaintiffs from the said property.
  - g. Not to serve any notice to evict prematurely.
39. In my view, the only two which would be necessary to give business efficacy to the agreement, and which would satisfy the objective test of the intention of the parties, as exemplified by the officious bystander test as explained by Lord McKinnon in **Shirlaw**, are (b) and (c), as (a) is not obvious and there is no evidence that the agreement would be ineffective without such consent once the mortgage was properly satisfied.

40. With respect to (d), (e), (f) and (g) of the implied clauses suggested by the Plaintiffs, all relate to the manner in which the agreement could be terminated. I note that clause CVIII of the lease provides that written notice be given in the manner required by law, and an argument could be made that clause E is also relevant, as it provides that the agreement is governed by the laws of the Commonwealth of the Bahamas. The said laws include statute and common law, and I note that in the noted text Commonwealth Caribbean Property Law by Gilbert Kodilinye, the author says at page 47 that “The procedure for forfeiture for non-payment of rent differs from the procedure for forfeiture for breaches of other covenants. At common law, unless exempted by the terms of the lease, a landlord who intends to assert his right of re-entry is required before doing so to make a ‘formal demand’ for the rent due.”
41. The lease is silent on the issue of an exemption from a requirement for a formal demand, and there is no evidence that any such formal demand was made. The Defendant speaks in her witness statement to verbal and written demands for payment, but none have been produced in evidence, and the Whatsapp messages which are in evidence do not amount to a formal demand, as in those messages the Defendant merely tells the Plaintiff that any payment other than in the usual method would be considered non-payment.
42. I am therefore satisfied that it is not necessary to imply the terms set out at (d), (e), (f) and (g), as it is a matter of law that a formal demand is required, and it is also a matter of law pursuant to section 16 Conveyancing and Law of Property Act which requires that notice be provided before forfeiture of a lease for a breach other than non-payment of rent,
43. Having regard to the above reasoning, I am satisfied that it is appropriate and just in the circumstances of this case to imply a term into the contract that the Defendant would pay the mortgage, and would do nothing to place the property in jeopardy of foreclosure. I am satisfied that this must have been the intention of the parties, as to assume otherwise would mean that the Defendant entered into the agreement with impure motives, and the Plaintiffs knowingly entered the agreement with the contemplation that the property might be lost to foreclosure. Either proposition is unthinkable.
44. Having concluded that an implied term is appropriate, I am satisfied that the Defendant breached that implied term on at least three occasions, as evidenced by the demand letters sent by the Bahamas Mortgage Corporation in June 2016, January 2017, and March 2019. These breaches were, of course, eventually rectified.
45. The Plaintiffs claim that the Defendant also breached the agreement by improperly attempting to evict them. The evidence, which I accept, is that an eviction letter dated 6<sup>th</sup> May 2019 was delivered to the Plaintiffs on 10<sup>th</sup> May 2019, after a payment due 28<sup>th</sup> April 2019 was not made to the designated RBC account of the Defendant. As I have already concluded that no formal demand was made as is required, I am of the view that the attempt to evict was improper and in breach of the agreement.

46. The evidence is also that that payment was made directly to the Bahamas Mortgage Corporation. The Plaintiffs claim that this was in compliance with the agreement, as the account at BMC was one in the name of the Defendant.
47. The evidence of the Defendant, which is not disputed, is that the payments of \$1200 were to be made to a designated RBC account. The agreement itself provides that the payments were to be made to the lessor or her designated agent. In my view, it was for the lessor to designate the agent, and she did not designate the BMC as authorized to receive the monthly payments, notwithstanding the fact that that account was in her name. The authority to designate an agent was the Defendant's, and it was not for the Plaintiffs to choose the place of payment. I am therefore satisfied that the Plaintiffs breached the agreement by failing to make the requisite payments in the manner designated by the agreement, even though I accept that, until the payments to the RBC account resumed after an order of the court, the intervening payments were made to the account at BMC to the benefit of the Defendant.
48. The Defendant also contends that the Plaintiffs breached the lease by carrying out works at the premises without authorization by building a dog kennel, pouring the driveway, and putting up fencing and security cameras. The Plaintiffs accept that they did these things, but testified that the driveway was already formed up when they took occupation, and they merely completed what had been started, Mr. Jack also testified that the wall was already there, and that the Plaintiffs merely added a fence to the wall. He further stated that they discussed the fence and cameras with the Defendant, and were told to go ahead as it was to be their home and they had to be secure. I am also mindful of the fact that this was for years an amicable relationship, and problems only arose after the Plaintiffs started making payments directly to the Bahamas Mortgage Corporation. It is therefore reasonable in my view that these alterations would have caused no difficulty, and have only become an issue now that the relationship has broken down. On these points I accept the evidence of the Plaintiffs, and conclude that the Defendant was aware of and approved the minor work done. There was therefore no breach of the agreement on this point.
49. The Conveyancing and Law of Property Act Chapter 138 provides at section 16 that:
16. (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. Lessee may apply for relief.
50. By virtue of subsection 9, this provision does not apply to forfeiture for non-payment of rent. However, the provision would apply to any breach by making unauthorized alterations or additions, such as those complained of by the

Defendant. While I have found that there was no breach on this point, I am also constrained to conclude that there was no compliance with section 16(1) in any event, so that any attempt to forfeit the lease for these complaints must fail.

51. I therefore conclude that the Plaintiffs breached the agreement by making payments in a manner not authorized by the Defendant, and I conclude that the Defendant breached the agreement by failing to keep the mortgage current to avoid the risk of foreclosure, by failing to make any formal demand for the rent which she claimed was in arrears prior to attempting to evict the Plaintiffs, and by failing to make any proper demand concerning the improvements at the home before attempting to evict the Plaintiffs.
52. The Plaintiffs also argue that the Defendant waived any breach by seeking and accepting payment of rent following the hearing before Thompson J. this issue has been considered in **Civil Service Co-operative Society Ltd v McGrigor's Trustee [1923] All ER Rep 595** where the court said as follows:

"On 29 December 1922, a receipt was sent by the plaintiffs: "Received of the Liquidators, Sir Charles McGrigor, Bart, & Co, the sum of 203 pounds 15s for rent account Christmas." This amounts to a demand by the plaintiffs (with knowledge of the bankruptcy) for rent (accrued in part before the bankruptcy, in part between the bankruptcy and the writ, and in part subsequent to the writ) followed by payment and acceptance. Does this operate as a waiver of the forfeiture? On a consideration of the authorities, I am of opinion that it does not. The defendant relied on *Dendy v Nicholl* (4) and *Keith Prowse v National Telephone Co* (5). In *Dandy v Nicholl* (4) the landlord, with knowledge of an underletting in breach of covenant, sued the tenant for arrears of rent accruing subsequently to the underletting, and obtained payment thereof. After the issue of the writ for rent, but before actual payment of the amount claimed, the landlord commenced an ejectment action based on non-payment of rent and the underletting. It was held that the bringing the action for rent, and acceptance of the rent in that action, was a waiver of the right of re-entry. The waiver occurred before ejectment brought. *Keith Prowse v National Telephone Co* (5) was not strictly a case of landlord and tenant. It was a case of a telephone company having given notice determining a telephone agreement on December 30, and subsequently claiming and receiving payment of "rent" up to December 31. It was held that by so doing they had waived their notice determining the contract. Neither of those cases touches the real question, namely, whether the issue and service of a writ in ejectment is such a final election by the landlord to determine the tenancy that a subsequent receipt of rent is no waiver of the forfeiture. In my opinion, the authorities establish that this is so. In *Jones v Carter* (6) PARKE, B, held that, after ejectment brought, there being no evidence of actual re-entry by the landlord, the landlord could not sue for rent; and he cites with approval a decision of LORD TENTERDEN that the receipt of rent after ejectment brought for a forfeiture was no waiver of such forfeiture: *Doe d Morecraft v Meux* (7). To the same effect is *Grimwood v Moss* (8) where it is definitely stated that the bringing of an ejectment action is an irrevocable election to determine the tenancy: see also *R v Paulson* (9) and *Evans v Enever* (10). I adopt the words of LORD COLERIDGE, J, in *Evans v Enever* (10) when he says ([1920] 2 KB at p 320): "There is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election

to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."'''

53. In the Defence and Counterclaim the Defendant seeks to rescind the lease, which is in my view an unequivocal election to determine the contract. In line with the reasoning in the above-cited case, I do not find that an acceptance of payments after that election could operate as a waiver of the alleged breaches.
54. The Plaintiffs seek specific performance of the agreement, while the Defendant seeks to have the agreement rescinded. Having concluded that the Defendant committed multiple breaches of the agreement, I decline to rescind the agreement, or to grant any of the reliefs sought by the Defendant. I note specifically that, while the Plaintiffs did not pay to the account designated by the Defendant, the Defendant does not deny receiving the full benefit of the sums paid to the BMC, and indeed the Defendant has now been paid all sums due under the agreement. There is therefore no question of a payment of arrears, nor of mesne profits, which would only be applicable if the Plaintiffs were trespassers, which they are not. The result of a rescission at this point would also be that the Defendant would have received full payment under the agreement, but would still retain the property.
55. The Plaintiffs also seek a number of reliefs. Dealing with them in turn, I do not find that the Plaintiffs are entitled to any accounting of the apportionment of the payments, as there is nothing express or implied in the agreement requiring the same. While the Defendant was required to maintain the mortgage, she was at liberty to use any funds at her disposal to do so, and there was no agreement that the payments by the Plaintiffs were to be used firstly to satisfy the mortgage. Nor are the Plaintiffs entitled at this stage to any details of the mortgage. While the provision of such details could have pacified the situation, I do not find that the provision of such details was required under the agreement. All that is required is that the Defendant be able to pass good title to the Plaintiffs pursuant to the agreement, failing which other issues may arise.
56. The Plaintiffs also seek specific performance, which I accept is an equitable remedy, and note that the conduct of the party seeking specific performance could militate against the grant of such relief. The Defendant complains of the unauthorized opening of her mail, as well as the publication of a notice of these proceedings, which she says was calculated to cause embarrassment, and of rude treatment at the hands of the Plaintiffs. In the circumstances of this case, I do not accept that there was any rude treatment of the Defendant by the Plaintiffs. Further, the evidence is that the Defendant lived abroad. While the Plaintiffs may have known how to contact her, that is not the same as service required under the Rules of the Supreme Court, particularly in circumstances where an injunction was being sought to prevent the eviction. I therefore do not accept that publication of notice of the proceedings, which is commonplace, was calculated to embarrass the Defendant.
57. I have already addressed the issue of the opening of the mail, and do not find this conduct, egregious though it is, to warrant a refusal of relief in all the circumstances of this case. While the Plaintiffs should not have opened the mail, an action which is unthinkable to me, the concerns raised by the contents of the mail were warranted,

and the Defendant resolutely refused to alleviate those concerns. Instead, the court's censure of the conduct of the Plaintiffs would be better expressed, in my view, in terms of costs. I therefore order that the agreement be concluded by the satisfaction of the mortgage by the Defendant, and the conveying of the property to the Plaintiffs, with the costs associated with that conveyance to be borne by the Plaintiffs. Should the Defendant fail to convey the property, The Registrar of the Commonwealth of The Bahamas shall be at liberty to execute the Conveyance.

58. This case provides a number of object lessons. The first is that parties should take proper advice when entering into important agreements, as a failure to do so could prove disastrous. Having hastily signed a poorly drafted agreement, the Plaintiffs discovered an alarming situation, and then chose, on the advice of counsel, to pay directly to a lending institution with respect to a mortgage to which they were not a party, seeking to comply with what they considered to be the spirit of the agreement, while demanding information from the Plaintiff. The wise course in my view would have been to remain fully compliant with the terms of the agreement, and approach the courts, as they eventually had to do in any event, to seek declarations to clarify the position. The course pursued by the Plaintiffs exposed them to the very real risk of losing that which they were fighting to keep, a risk that is only ameliorated by the unique circumstances of this case.
59. Given that I have made findings against both parties, I order that each side bear their own costs. The parties are liberty to apply.



Dated this 28<sup>th</sup> day of September A.D., 2023

Neil Brathwaite  
Justice