

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division**

**2021
CLE/gen/000443**

IN THE MATTER of an Indenture of Mortgage made on the 12th day of July A.D., 2006 between Scotiabank (Bahamas) Limited of the one part and Phyllis A. Sullivan of the other part now of record in the Registry of Records in Book 9902 at page 314 to 325.

IN THE MATTER of a Further Charge made on the 19th day of May, A.D., 2008 between Scotiabank (Bahamas) Limited of the one partn and Phyllis A. Sullivan of the other part now of record in the Registry of Records n Book 11129 at page 049 to 052.

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

BETWEEN

GATEWAY ASCENDANCY LTD.

Plaintiff

AND

PHYLLIS A. SULLIVAN

Defendant

THE ATTORNEY GENERAL

Third Party

Before: The Honorable Madame J. Denise Lewis-Johnson
Appearances: Cyd Ferguson for the Plaintiff
Raphael Moxey for the Defendant
Kenria Smith and Monique Millar for the Attorney General
Hearing Date: 7 July 2022; 14 July 2022; 27 July 2022; 2 August 2022; 5 August 2022; 8 August 2022;

Civil - Land - Land Acquisition Act - Mortgagor - Land compulsorily acquired - Outstanding mortgage debt - Whether Promoter liable to redeem mortgage on behalf of mortgagor -

JUDGMENT

Introduction

1. Gateway Ascendancy and Phyllis Sullivan both commenced separate actions in the Supreme Court involving the same subject property.
2. By a Specially Indorsed Writ of Summons filed 23 November 2020 Phyllis Sullivan commenced action 2020/CLE/gen/01158 against the Government of The Bahamas alleging that her property was compulsorily acquired on their behalf. She seeks, inter alia, purchase money and interests owing for the compulsory acquisition of the subject property.
3. By an Originating Summons filed 4 May 2021 Gateway Ascendancy (“the Plaintiff”) commenced action 2021/CLE/gen/00443 pursuant to Order 77 of the Rules of the Supreme Court of The Bahamas. Gateway Ascendancy claims against Phyllis Sullivan, inter alia, an order that she pays to \$273,709.59 and \$162,553.72 representing sums outstanding under the Mortgage of the subject property as at the 4th day of March 2021.
4. As the matters experienced an expected overlap in facts and evidence, Phyllis Sullivan sought leave to join the two matters.
5. On 23 November 2021 by Order of the Court Justice Ian Winder (as he then was) granted leave for Phyllis Sullivan to issue a Third-Party Notice against the Attorney General of the Commonwealth of The Bahamas as the intended Third Party. The third-party notice was filed 28 July 2022, joining the Attorney General to the action.
6. The parties are now Gateway Ascendancy as the Plaintiff, Phyllis Sullivan as the Defendant and the Government of The Bahamas (represented by the Attorney General) as the Third Party.

Background Facts

7. By virtue of a Vesting Deed dated 13 September 2001, between Personal Representatives of the Estate of the late Horatio Vernon Litchmore Tynes (Pauline Holmes and Sheena Dawkins) and Phyllis Anita Sullivan and recorded in Volume 8189 at pages 511 to 516 the relevant property was vested in the Plaintiff. The property is described as:

“ALL THAT piece parcel or lot of land containing 16,251 square feet by survey situated 262 feet west of Faith Avenue on the southern

Side of Carmichael Road in the western District of the Island of New Providence which said piece parcel or lot of land is with its position shape marks boundaries and dimension more particularly described by and delineated on the Subdivision Plan” (“the subject property).

8. On 12 July 2006, the Defendant entered into a Mortgage Agreement with Scotiabank (Bahamas) Limited (“Scotiabank”) for the sum of \$125,000.00 which is recorded in Volume 9902 at pages 314 to 325.
9. On 19 May 2008 the Defendant obtained a Further Charge from Scotiabank in the amount of \$77,500.00 and recorded in Volume 1129 at pages 049 to 052.
10. As collateral for both lines of credit the Defendant pledged the subject property.
11. By a Notice of Possession dated 21 February 2011 and published in the Extra Ordinary Gazette dated 22 February 2011, the Minister responsible for the Acquisition and Disposition for Land gave notice of his opinion that possession of the lands described in the Schedule thereto should be obtained before payment is made to the rightful owner thereto and declared the said lands appropriated by the Minister for the purpose mentioned in the Amended Declaration of Intended Acquisition with effect from 21 February 2011.
12. The Defendant's last payment on the further Charge was made on or about 6 September 2011 leaving an outstanding principal balance of \$73,094.16 and as of 22 April 2022 interest has accrued to the sum of \$84,049.55, add on charges has accrued to the sum of \$6,880.85 and interest on add on charges has accrued to the sum of \$7,006.58. The total outstanding amount for the Further Charges is \$171,031.14.
13. On 1 April 2014 the Defendant made her last payment towards the Mortgage leaving an outstanding principal balance of \$109,408.95 and as of 22 April 2022 interest has accrued to the sum of \$106,878.56, add on charges has accrued to the sum of \$43,842.92 and interest add on charges has accrued to the sum of \$27,116.42. The total outstanding sum owed for the Mortgage is \$287,246.85.
14. By letter dated 29 September 2014 to the Office of the Prime Minister from Halsbury's Chambers, attorneys for Scotiabank, Counsel indicated that they were retained to commence foreclosure proceedings with respect to the subject property against the Defendant.

15. By letter from the Office of the Prime Minister dated 24 July 2015 to the Defendant, a Compensation Offer was made in settlement for the compulsorily acquired property of \$573,067.44.
16. By letter dated 7 October 2015 from Halsbury's Chambers to the Office of the Prime Minister, the then Mortgagee accepted said offer.
17. By letter dated 11 December 2015 then Counsel for the Defendant, McKinney Bancroft & Hughes, to the Office of the Prime Minister accepted the aforementioned offer on the Defendant's behalf.
18. By a Deed of Transfer dated 26 February 2018 Scotiabank transferred certain Mortgages to the Plaintiff which included the Defendant's Mortgage and Further Charge.

Issue

19. Whether pursuant to Section 24 of the Acquisition of Land Act the Promoter is required to satisfy any outstanding mortgage on property compulsorily acquired on their behalf.
20. The amount of compensation payable for the acquisition.

Law

Section 24 of the Land Acquisition Act provides:

24. The Promoters may purchase or redeem the interest of the mortgagee of any land which may be acquired under this Act, whether they shall have previously purchased the equity of redemption of the land or not, and whether the mortgagee thereof be entitled thereto in his own right or in trust for any other party, and whether he be in possession of the land by virtue of the mortgage or not, and whether the mortgage affects the selected land solely or jointly with any other unselected land; and in order thereto the Promoters may pay or tender to the mortgagee the principal and interest due on the mortgage together with his costs and charges (if any) and also six months' additional interest, and thereupon the mortgagee shall immediately convey his interest in the selected land comprised in the mortgage to the Promoters, or as they shall direct, or the Promoters may give notice in writing to the mortgagee that they will pay off the principal and interest due on the mortgage at the

end of six months computed from the day of giving the notice and if they shall have given any such notice, or if the party entitled to the equity of redemption of the land shall have given six months' notice of his intention to redeem the same, then at the expiration of either of such notices, or any intermediate period upon payment or tender by the Promoters to the mortgagee of the principal money due on the mortgage, and the interest which would have become due at the end of six months from the time of giving either of such notices, together with his costs and expenses (if any), the mortgagee shall convey or release his interest in the land comprised in the mortgage to the Promoters or as they shall direct.

The Plaintiff's Submissions

21. The Plaintiff's case is that the Defendant is solely liable to repay the mortgage debt owed. Its application is founded upon **Order 77 of the Rules of the Supreme Court Ch,53** ("the RSC"). Order 77 of the RSC provides:

1. (1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely —

(a) payment of moneys secured by mortgage;

(b) sale of the mortgaged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security; (g) delivery of possession by the mortgagee.

(2) In this Order "mortgagee" includes legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.

(3) An action to which this Order applies is referred to in this Order as a mortgage action.

22. The Plaintiff supports its right to claim for mortgage debts owed referring to the case of **Citibank N.A. v Major [2001] BHS J No. 6** where Ganpatsingh J stated:

“Unless there is a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud on or irregularity in the exercise of the power of sale, the Courts will not intervene to prevent a mortgage from exercising his lawful right under the mortgage deed.”

23. The Plaintiff contends, it is not in issue that the Plaintiff is owed the monies owing under the Mortgage and Further charge. It is determining the appropriate party to satisfy such debt.

24. To this end, the Plaintiff stated that **Section 24 of the Act** does not give a mandatory direction to the Government to satisfy the existing mortgage and further charge. The use of the term ‘may’ in statute generally means not mandatory but discretionary.

25. The Plaintiff further contended according to **In words and phrases legally defined 3rd Edition, Volume 3, 1989**, the learned author defined “may” as a permissive or enabling expression which may, prima facie, convey that the authority which has the power to do such an act has an option either to do it or not to do it.

26. The Plaintiff then went on to state, in **Stroud’s Judicial dictionary of Words and Phrases, 6th edition, Volume 2, 2000**, the learned authors express that:

“It seems a plain conclusion that ‘may’ ... and such phrases, give in their ordinary meaning, an enabling and discretionary power. They are potential and never (in themselves) significant of any obligation.” [Emphasis added]

27. The Plaintiff submitted that the Third Party, in accordance with Section 24 of the fact, has no mandatory legal obligation to pay off the outstanding mortgage of the Defendant if this property was compulsorily acquired.

28. The Plaintiff further contends that the full acquisition of the subject property is rendered incomplete as the consideration for the acquisition is still outstanding. Further, it is not until the expiry of the relevant notices as expressed in Section 24

and the payment of the sum reflected in same that, "... the mortgagee shall convey or release his interest in the land comprised in the mortgage to the Promoters or as they shall direct".

29. The Plaintiff asserts there being no evidence of consideration, satisfaction of mortgage and the Defendant remains legally in possession of the property, she should be held responsible for all encumbrances attached thereto.

30. The Plaintiff stated that the Defendant's argument is also debunked by the Plaintiff as the Defendant has not produced the alleged notice of possession posted on 21 February 2011 gazette and as to date, there is no official transfer of land and proper title to the government of the Bahamas.

The Defendant's Case

31. The Defendant stated she accepts that she is indebted to the Plaintiff for the sum which was due and owing on the mortgage and further charge up to the date when the property was compulsorily acquired by the Government on 21 February 2011. She denies however liability for any amount, sums or charges levied on the Mortgage or Further Charge after said date.

32. The Defendant's case is that as the Government of The Bahamas compulsorily acquired the mortgaged property on 21 February 2011, the Government has assumed her debt to the Plaintiff.

33. The Defendant stated that her contention that if she is liable to pay interest on the mortgage after 1 April 2014, and on the further after 6 September 2011 then, and in that case, the Third Party should indemnify the Defendant against all such interest payable to the Plaintiff. In support of this argument, the Defendant relies upon Section 24 of the Act.

34. The Defendant contends that Section 24 of the Act creates an obligation upon the Promoter (the Government) to satisfy any existing mortgage over property which it has compulsorily acquired. The Defendant contends that the word 'may' in the relevant section allows the Promoter the option of 'how' it may wish to satisfy the interest of the mortgage i.e. to purchase or redeem the interest of the mortgagee. However, the use of the word 'may' does not extinguish the Promoter's obligation to satisfy the interest of the mortgagee by paying off the mortgage debt. In paying off the mortgage debt the Promoter extinguishes the encumbrance (the mortgage) over the acquired property and the mortgagee would have been put in a position to pass the unencumbered fee simple title of the acquired property.

35. Further Section 24 makes it mandatory for the mortgagee to transfer title to the Promoter once the Promoter pays off the mortgage debt.
36. The Defendant averred as the Promoter failed to satisfy the mortgage and further charge on the date of acquisition, the interest on both debts accumulated. By this breach of Section 24 of the Act, the Defendant asserts that the Promoter should be condemned with all damages, if any, which flows therefrom.

The Third Party's Case

Liability to redeem mortgage

37. The Third Party contends that there is no obligation, either imposed by statute or contract, on their behalf to discharge the Defendant's mortgage. Thus, the Third Party is not liable to discharge the personal liability of the Defendant or to indemnify the Defendant against the mortgagee.
38. The Third Party cited the case of **Shewu v Hackney London Borough Council [1999] All ER (D) 888** where Sheimann LJ stated:
- "In so far as the Shewus have any complaint, it is that Hackney failed earlier to exercise a power either to acquire the mortgagee's interest or to pay off the mortgage. That power is given, not for the benefit of the mortgagor, but for the benefit of the acquiring authority ... nor does statute impose such duty ... if (Hackney) [the acquiring authority] had acquired the mortgagee's interest that would not have the effect of releasing the (Shewus) [Plaintiff] from their obligations under the mortgage.**

It is important to keep conceptually separate the mortgagors' liabilities to the mortgagees, the acquiring authority's liabilities to the mortgagees and the authority's liabilities to the mortgagors.

The Shewus entered into a mortgage contract with the mortgagees. The Shewus' liabilities to the mortgagees can not be taken away without the mortgagees' consent or the authorisation of statute. There was no such consent and there is no statutory authorisation for the removal of the mortgagees' rights prior to payment. Mr Village has not contended the contrary.

39. The Third Party stated that the powers granted to an acquiring authority and hence the government by virtue of the Law of Eminent Domain, are made for the benefit

of the acquiring authority - it is not meant to be a lottery conducted for the benefit of a mortgagor. Resultantly, the Defendant cannot claim benefits that were not rightfully hers.

40. The Third Party averred that their submission is based on Section 24 of the Act. However, similar to the argument of the Plaintiff, the use of the word “may” in Section 24 of the Act clearly indicates that redeeming the mortgage and the interest is merely an option. The Third Party explains that this option becomes of critical importance when the mortgagor has been dispossessed of the land. An acquiring authority may satisfy the mortgage, obtain a discharge from the mortgagee, then take a conveyance of the unencumbered fee simple from the mortgagor.
41. The Third Party averred that Section 24 of the Act does not speak to the mortgagor, nor does it place any obligation upon the Promoter to discharge the mortgagor’s mortgage liabilities. The relevant section merely sets out options by which the Promoter may acquire the clear title to the property should it choose to do so. The Section clearly maintains a separation between the mortgagor’s liabilities to the mortgagees, the acquiring authority’s liabilities to the mortgagees and the authority’s liabilities to the mortgagors.
42. The Third Party submitted as the acquisition process is not completed as the agreed purchase price is not agreed, the Defendant was not required to deliver up possession. Further, as the property is mortgaged, the Defendant could not by herself give clear title. In **Prasad and another v Wolverhampton Borough council [1983] 2 All ER 140**, Fox LJ states:

“the result, it seems to me is, that where there is merely a service of a notice to treat (the purchase price not yet having been determine) there is no ‘acquisition’ of the land by the acquiring authority.”
43. The Third Party further submitted that the Defendant was still legally in possession and control of the property and collecting rental income since February 2011, the Third Party could not rightfully receive the property. As a mortgagor in possession, the Defendant remains liable.
44. The Third Party averred if a mortgagor is not in possession of the property and the mortgage has been foreclosed, the Promoter has the option of satisfying the mortgage principal and any interest due to be deducted from the agreed acquisition

value. The Defendant asserts that in the circumstances the Promoter is no longer required to deal with the Defendant. However, under no circumstances is the Promoter liable to pay interest on the mortgage and further charge that represent personal liabilities of the mortgagor in addition to the agreed compensation.

Compensation Value

45. The Third Party further requests the Court to determine the amount of compensation due to be paid.

46. Section 28 of the Act provides:

“28. In determining the amount of compensation to be awarded under this Act the magistrate or the court sitting with or without assessors, as the case may be, and any other assessor appointed under the provisions of this Act shall take into consideration the matters mentioned in paragraph (a) of this section and shall not take into consideration the matters mentioned in paragraph (b) of this section —

(a) (i) the market value of the selected land at date of the declaration made under section 6 of this Act;

(ii) the damage (if any) sustained by the persons interested at the time of awarding compensation by reason of severing such land from other land of the persons interested;

(iii) the damage (if any) sustained by the persons interested at the time of awarding compensation by reason of the acquisition injuriously affecting other property belonging to him whether real or personal in any other manner or his actual earnings;

(iv) if in consequence of the acquisition he is compelled to change his residence or place of business, the reasonable expenses (if any) of such change;

(v) any accommodation works offered by the promoters and the execution of which is to the satisfaction of the magistrate or of the court sitting with or without assessors secured to the persons interested;

(b) (i) the degree of urgency which has led to the acquisition;

(ii) any disinclination of the persons interested to part with the selected land;

- (iii) any damage sustained by the persons interested which if caused by a private person would not constitute a good cause of action;
- (iv) any damage which after the time of awarding compensation is likely to be caused by or in consequence of the use to which the selected land will be put;
- (v) any increase in the value of the selected land likely to accrue from the use to which it will be put when acquired;
- (vi) any increase in the value of unselected land likely to accrue from the use to which selected land will be put;
- (vii) any outlay or improvements on selected land made, commenced or effected with the intention of enhancing the compensation to be awarded under this Act.”

47. The Third Party further relies on **Halsbury’s Laws of England 5th Edition, Volume 77 (2021)** which provides guidance regarding the Discharge of Mortgage in the compulsory acquisition of mortgaged land:

“For the value of land to be assessed, the valuation must be made as at the relevant valuation date ... If the land is the subject of a general vesting declaration, the relevant valuation date is the earlier of: (a) the vesting date; and (b) the date when the assessment is made ... No adjustment is to be made to the valuation in respect of anything which happens after the relevant valuation date.”

48. The Third party contends that it is accepted that compensation following a compulsory acquisition of land is based on the principle of equivalence. This means that one should be no worse off in financial terms after the acquisition than one was before. Likewise, one should not be any better off. Thus, it is necessary to value the land on the basis of its open market value without any increase or decrease attributable to the scheme of development which underlies the compulsory acquisition.

49. The Third party avers that pursuant to **Cooke v London County Council [1911] 1 Ch.604**, mortgagees are entitled to a notice to treat. In the instant case the mortgagee at that the time of valuation was Scotiabank who retained the legal representation of Halsbury Chambers. The valuation was agreed in writing by Scotiabank and the Defendant of \$573,067.44.

50. The Third party submitted that pursuant to the guidance set out by the learned editors of Halsbury’s Laws of England, it is the Third Party’s submission that no

adjustment in compensation need be made for the present mortgagee. The Plaintiff, the present mortgagee in possession, merely supplants Scotiabank as the mortgagee benefiting from the previously agreed valuation.

51. The Third Party further submitted that statute requires that the Promoter is liable to pay to the mortgagor and mortgagee, the agreed compensation price. With that in mind, a mortgagor in possession would be entitled to the agreed compensation, less the amount outstanding on the mortgage.

Claim for Interest Statute-Barred

52. The Defendant stated that the Plaintiff's claim for interest and add on charges are statute barred. The Defendant made the last payment on the mortgage on 1 April 2014, and the last payment made on the further charge on 6 September 2011. The Originating Summons was filed on 4 May 2021

53. **Section 32(5) of the Limitation Act** reads as follows:

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiry of six years from the date on which the interest became due: Provided that —

(a) where a prior mortgagee or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, that encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrances or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

54. The Defendant avers that Section 32(5) establishes six years as the time period in which an action claiming interests and other charges on a mortgage can be brought in the court. The Defendant argues therefore that the present action brought by the Plaintiff is in breach of Section 32(5).
55. The Defendant made the last payment on the mortgage debt on 1 April 2014 and the further charge on 6 September 2011.
56. As stated, on 26 February 2018 the Plaintiff's mortgage and further charge were transferred to the Plaintiff from Scotiabank. The Defendant argues that the last date upon which the Plaintiff could have commenced an action for the recovery of any interests (and other charges levied) on the Mortgage (accruing after 1 April 2014), was 31 March 2020; and for any interest the Further Charge (and other charges levied) was 6 September 2017.
57. The Plaintiff filed its Originating Summons on 4 May 2021, approximately a seven-year lapse in the case of the mortgage debt and more than a nine-year lapse in the case of the Further Charge.
58. The Defendant submits that in accordance with the Limitation Act the Plaintiff's claim(s) for any amount of interest on the mortgage after 1 April 2014 and on the further charge after 6 September 2011 are both statute-barred.
59. The Defendant submitted that they accepts that the proviso in Section 32 (5) (a) of the Limitation Act, in some instance, allows for an extension of the time by one year to commence an action. This proviso provides for a situation where a subsequent mortgagee takes a mortgage portfolio, that subsequent mortgagee has one year to commence an action even if at that commencement date more than six years has elapsed. It is submitted however, that this proviso does not assist the Plaintiff's claim. The transfer of the mortgage from Scotiabank to the Plaintiff on 26 February 2018 was approximately three years and ten months after the Defendant ceased paying the mortgage on 1 April 2014. In all the circumstances, the Plaintiff's claims for any interest on the mortgage accruing after 1 April 2014, and on the further charge after 5 September 2017 are fatally flawed and the claim should be dismissed/denied.
60. The Plaintiff avers that they accepted that no claim can be brought to recover arrears of interest after the expiry of six years. However, the limitation period for arrears of interest did not end until 12 December 2021.

61. The Plaintiff contends that pursuant to **Section 4 of the Emergency Powers (COVID 19) (Special Provisions) Order 2020** made on 30 March 2020, under the heading "Limitation Act":

"Any limitation of time provided under the Limitation Act Ch.83 is suspended from the 17th day of March, 2020 for the duration of the state of public emergency and extending thirty days thereafter".

62. The Plaintiff stated that accordingly on 31 March 2020 the Limitation Period as stated in Section 32 (5) of the Limitation Act had not yet expired and the Plaintiff was not out of time when it filed its Originating Summons on 4 May 2021.

63. The last payment made on the mortgage by the Defendant and the date of breach was 1 April 2014 and would have expired 31 March 2020.

64. The Plaintiff further submitted that the State of Emergency ended on 13 November 2021. Pursuant Section 4 of the Emergency Powers (COVID 19) (Special Provisions) Order 2020, the Limitation Period for arrears of interest would have ended on 12 December 2021 being thirty days after the state of public emergency ended.

65. The Plaintiff submitted that they accept that the Limitation Period for arrears of interest in relation to the further charge only ended on 5 September 2017. As a result, the Plaintiff will claim only the outstanding interest up to the said date.

Decision

1. This action was commenced by Originating Summons which concerns land subject to a mortgage compulsorily acquired by the Government in 2011 pursuant to Acquisitions of Land Act "the Act". The court when adjudicating matters of this nature is guided by statute and considers all the surrounding circumstances of the case.
2. The **Constitution of the Bahamas** "the Constitution" protect its citizens from deprivation of property pursuant to article 27 (1) which provides: -

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say- (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and

country planning or the development or utilization of any property in such manner as to promote the public benefit or the economic well-being of the community; and (b) the necessity thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition- (i) for the making of prompt and adequate compensation in the circumstances; and (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and (d) any party to proceedings in the Supreme Court relating to such a claim is given by law the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction...the former Colony of the Bahamas Islands.”

3. In conjunction with the constitutional provisions regarding the right of citizens not to be deprived of their property, the **Acquisitions of Lands Act** “the Act” provides for the Government to acquire private property for a public purpose as outlined in S. 27 (1) pursuant to S. 6 (1) which states: -

“ Whenever it appears to the Minister that any particular land is needed for a public purpose a notice to that effect signed by the promoters shall be published in the Gazette and posted on some conspicuous part of such land, but no such notice shall be published or posted unless the compensation to be paid for such land is to be paid out of public revenue or out of the funds of some statutory corporation.”

4. Notice of Possession was published in the Gazette on the 22 February 2011 and the Third Party by Gazette declared their vesting interest of the subject property on the 18 March 2011.
5. An appraisal of the property was done 5 November 2010 with an appraised value of \$630,000.00. By letter dated 29 September 2014 Halsbury Chambers wrote the Prime Minister’s Office on behalf Scotiabank (Bahamas) Limited for clarity on whether the subject land was compulsory acquired by the government, as they would have been instructed to commence foreclosure and vacant possession on the subject property, which was due to non-payment of the security.

6. By letter dated the 24 July 2015 the Office of the Prime Minister informed the Defendant of the compensation offer in the sum of \$573,067,44. By Letter dated 7 October 2015 Halsbury Chambers (acting on behalf of Scotiabank) indicated that they accepted the offer of the government as legal title owners to the property. This security was then transferred to the Plaintiff by Deed of Transfer dated 26 February 2018.
7. The Defendant claims that since the date of the acquisition the government introduced Value Added Tax at 12% on all purchase end-users. The Defendant is now claiming the additional 12% to be added to the final settlement.
8. The Third party has requested that the Court assesses the compensation value. Pursuant to S. 15 of the Act and from the evidence, the court shall only determine the compensation value if the parties are unable to agree the purchase. In the normal course of assessing the value for compensation the Court would assess the valuation and market value at the time of intention to acquire the land coupled with the legal rate of 5% per annum from the date of publication of the Declaration of Intended Acquisition to the time of compensation.
9. However, as an offer was made on the 24 July 2015 and accepted on the 7 October 2015, and on behalf of the Defendant by letter dated 11 December 2015 the agreed compensation sum will apply with the 5% interest per annum until payment is made. Any additional claims ought to have been addressed in negotiations before the offer was finalized and accepted.
10. In **Ross v The Prime Minister et al BS 2013 SC 43**, Issacs J adopted this same approach stating,

“In the result the plaintiff is entitled to the reliefs claimed in the Originating Summons. With regard to reliefs 4 and 5, the value of the land at the time of acquisition was \$500, 000.00 and no further assessment need be made, and the legal requirement of the payment of interest at the rate of 5% per annum from the date of publication of the Declaration of Vesting to the time of compensation obtains.”

11. In **Bethel and Others (Appellants) v The Attorney General of the Commonwealth of Bahamas (Respondent) [2013] UKPC 31** it is stated:-

“Where possession is taken in advance of payment of compensation, the promoters must pay, “in addition to the purchase money or compensation” agreed or awarded, interest at a prescribed rate from the date of the notice in the Gazette until payment.”

12. This concept/method of compensation aligns with the statutory requirement and interest rate pursuant to S. 28 (a) of the Act.
13. The Plaintiff argues that the Defendant had defaulted on the mortgage payments which has accrued interest over the years while the Defendant claims that the mortgage in arrears is largely attributed to non-payment of compensation by the Government in a timely fashion and as a result, she ought to be indemnified of all liabilities under the mortgage agreement as the Government is mandated to satisfy the mortgage in the acquisition.
14. The Court further note that the Defendant defaulted on the mortgage only after the acquisition took place in 2011.
15. At the date of the commencement of this action, the Defendant was in default of the mortgage at \$109,408.95 with an accrued interest at the 22 April 2022 at \$106,878.56 and add on charges in the sum of \$43,842.92, the last payment being made on 1 April 2014. The Defendant was also in default of the further charge in the sum of \$73,094.16 and with the accrued interest the total sum of \$84,049.55 and add on charges in the sum of \$6,880.85 and with accrued interest the total sum of \$ 7,006.58. The last payment on the further charge was made 6 September 2011.
16. The Act pursuant to section 24 states: -

“The promoters may purchase or redeem the interest of the mortgagee of any land which may be acquired under this Act, whether they shall have previously purchased the equity of redemption of the land or not, and whether the mortgagee thereof be entitled thereto in his own right or in trust for any other party, and whether he be in possession of the land by virtue of the mortgage or not, and whether the mortgage affects the selected land solely or jointly with any other unselected land; and in order thereto the promoters may pay or tender to the mortgagee the principal and interest due on the mortgage together with his costs and charges (if any) and also six months’ additional interest, and thereupon the mortgagee shall immediately convey his interest in the selected land comprised in the mortgage to the promoters, or as they shall direct, or the promoters may give notice in writing to the mortgagee that they will pay off the principal and interest due on the mortgage at the end of six months computed from the day of giving the notice and if they shall have given any such notice, or if the party entitled to the equity of redemption of the land shall have given six months’ notice of his intention to redeem the same, then at the expiration of either of such notices, or any intermediate period upon payment or tender by the promoters to the mortgagee of the principal money due on the mortgage, and the interest which would have become due at the end of six months from the time of giving

either of such notices, together with his costs and expenses (if any), the mortgagee shall convey or release his interest in the land comprised in the mortgage to the promoters or as they shall direct.”

17. The Act does not mandate the Third Party to satisfy the mortgage on the subject property but provides them with an option to purchase or redeem the interest of the mortgage on land acquired under the Act.
18. However, the provisions of the Act must be read and applied as a whole. Pursuant to the Act, s. 6 (4) the notice ought to have been served upon the occupier of land as well as the mortgagee. The effect as the Court see it of this provision is to ensure that all interested parties are included in the negotiations relating to compensation and the process of the acquisition.
19. In the case of *Shew v Hackney London Borough Council* [1999] All ER (D) 888 relied on by the third party Sheimann LJ stated:

“In so far as the Shewus have any complaint, it is that Hackney failed earlier to exercise a power either to acquire the mortgagee interest or to pay off the mortgage. That power is given, not for the benefit of the mortgagor, but for the benefit of the acquiring authority ... nor does statute impose such duty ... if (Hackney) [the acquiring authority] had acquired the mortgagee’s interest that would not have the effect of releasing the (Shewus) [Plaintiff] from their obligations under the mortgage. It is important to keep conceptually separate the mortgagors; liabilities to the mortgagees, the acquiring authority liabilities to the mortgagees and the authority liabilities to the mortgagors.

The Shewus entered into a mortgage contract with the mortgagees. The Shewus; liabilities to the mortgagees cannot be taken away without the mortgagees; consent or the authorization of statute. There was no such consent and there is no statutory authorization for the removal of the mortgagees; rights prior to payment. Mr Village has not contended the contrary.”

20. Despite the statute providing a discretionary provision for the government relating to payment of interest on acquired mortgage property, the Court is of the view that generally, good and marketable title can only manifest once the outstanding funds are paid to the Plaintiff. Further as the mortgage agreement prior to the acquisition was as between the Defendant and Scotiabank (Bahamas) Limited, now Gateway, when the government took possession of the subject property, they now acquired any liability which flowed from the acquisition. These are issues which ought to have been raised and addressed prior to the acceptance of compensation by the Plaintiff and the

Defendant and thus the Court finds that they were considered and form part of the accepted compensation.

21. The Court is further of the view that when the Notice of Intended Acquisition was placed in the Gazette, the rightful owner of the property ought to have been compensated. Surely if compensation took place in accordance with the Act, the outstanding sums would be considerably lower. The length of time of non-payment are vitally important in these circumstances but the court cannot ignore the legislative limitations on payment on the issues raised in these proceedings.

22. The trial judge in *Baker v. Attorney General (1965–70) 1 LRB 279*, puts it best stating,

“the Acquisition of Land Act contained adequate safeguards for the payment of compensation as promptly as circumstances will permit; and (d) that any hardship suffered by the appellant by the compulsory purchase of his interest can be met by the payment of compensation.”

23. The Defendant sought to introduce a defence of limitation during the trial relating to the accrued interest under the mortgage agreement from 2011.

24. In *Johnson v. The Hospital Authority BS 2012 SC 92* Bain J stated:-

“The defendant did not plead a limitation defence. Unless the limitation defence is specifically pleaded the defendant would not be able to rely on the defence at the trial.”

25. Further, Order 18 Rule 8 RSC provide:-

“(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of relevant period of limitation, fraud or any fact showing illegality
(a) which he alleges makes any claim or defence of the opposite party not maintainable; or
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact nor arising out of the preceding pleading.”

26. Limitation was not pleaded by any party in their originating documents neither was leave requested to amend the pleadings of the actions before the Court. As such, the Court is unable to treat with limitation issues arising out this matter.

27. In conclusion, the Court is satisfied that there was an offer and acceptance by the parties, as stated above. The acceptance of the offer by the Plaintiff and the Defendant would have been in compliance with the Act.

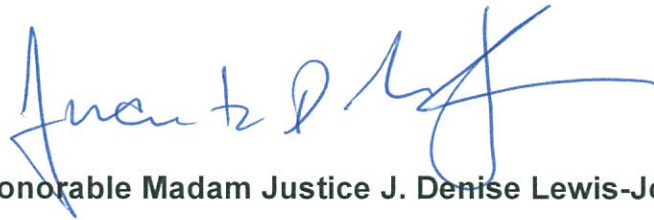
28. The Court accepts the sum of \$573,067.44 as the agreed compensation amount and postulates that 5% interest per annum shall be added to the compensation amount until payment is made per The Acquisition Act.

29. The Court is further of the view that as a result of the acceptance of the compensation price between the parties there is no need for further discussions on the interest, value added tax and penalties as they were not specifically pleaded and there is an agreed compensation sum.

30. I therefore find:-

- i. The value of compensation is as agreed between the parties in the sum of \$573,067.44.
- ii. The Third Party is to pay 5% interest per annum on the compensation amount from the date of acceptance until paid.
- iii. The Plaintiff to satisfy the mortgage and further charge and balance to be paid to the Defendant.
- iv. Cost to the Plaintiff and Defendant to be taxed if not agreed.

Dated this 19th day of October 2023, A.D.



The Honorable Madam Justice J. Denise Lewis-Johnson