

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division  
2021/CLE/gen/00084**

**IN THE MATTER OF** property comprised in an Indenture of Mortgage dated the 24<sup>th</sup> January A.D. 2011 between Mark Oscar Gibson of the one part and Commonwealth Bank Limited of the other part and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 11324 at pages 274 to 296.

**IN THE MATTER OF** property comprised in a Certificate of Upstamping dated the 30<sup>th</sup> day of August A.D. 2012 between Mark Oscar Gibson of the one part and Commonwealth Bank Limited of the other part and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 11903 at pages 365 to 388.

**BETWEEN**

**COMMONWEALTH BANK LIMITED**

**Plaintiff**

**AND**

**MARK OSCAR GIBSON SR.**

**Defendant**

**Before:** The Honorable Senior Madam Justice Deborah E. Fraser

**Appearances:** Michela Barnett Ellis of Graham Thompson Attorneys for the Plaintiff  
The Defendant (Pro Se)

**Hearing Date:** 6<sup>th</sup> June 2023 & 13<sup>th</sup> May 2023

**Civil – Mortgage – Mortgagee’s action for Vacant Possession – Outstanding Mortgage Debt  
- Mortgagee’s action for the debt claimed – Judgment for Sums Owed**

**JUDGEMENT**

## **Fraser Snr J.**

[1.] This is a trial of an action brought on behalf of the Plaintiff, Commonwealth Bank Limited, alleging default of a loan against the Defendant, Mark Oscar Gibson (“Mr. Gibson”).

### **BACKGROUND**

[2.] The Plaintiff is a company incorporated under the laws of the Commonwealth of The Bahamas carrying on the business of banking in The Bahamas.

[3.] The Defendant is a citizen of the Commonwealth of The Bahamas and a customer of The Plaintiff.

[4.] The Defendant (“Mortgagor”) entered into an Indenture of Mortgage (“The Mortgage”) dated 24<sup>th</sup> January 2011 with the Plaintiff (“Mortgagee”).

[5.] On the 9<sup>th</sup> March 2011, Mr. Gibson executed a loan agreement with the Plaintiff in the sum of \$176,250.00 which was secured by The Mortgage.

[6.] The property so mortgaged is described as follow: All that piece parcel or lot of land being Lot Number Twenty-Six (26) on a plan of lots of the Subdivision laid out by “The New Providence Land Company Limited” in the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas.

[7.] Before proceedings commenced, the parties agreed to restructure the Mortgage Loan twice: 23<sup>rd</sup> April 2014; and 23<sup>rd</sup> December 2016.

[8.] The parties on 22<sup>nd</sup> December 2016 restructured the mortgage loan (“The Mortgage Loan”), for the last time, in the sum of \$206,496.00 plus interest.

### **ISSUES**

[9.] The central issues are:

- a) Did the Defendant breach the terms of The Mortgage Loan?
- b) Is the Plaintiff entitled to an order requiring the Defendant to deliver up possession of the mortgaged property to the Plaintiff?
- c) Is the Plaintiff entitled to judgment in the sums sought?

### **EVIDENCE**

#### *The Evidence of Commonwealth Bank Limited*

[10.] The Plaintiff relies on the following witness statements and their accompanying exhibits: The Witness Statement of Ms. Kayla Darville dated 29<sup>th</sup> July 2022; The Expert Witness statement of Ms. Kershala Albury dated 24<sup>th</sup> August 2022; and The Affidavit of Nicolette Jacobs dated 16<sup>th</sup> September 2022.

#### *The Evidence of Mr. Gibson*

[11.] The Defendant relies on the following witness statements and their accompanying exhibits: The Witness Statement of Mark Oscar Gibson Sr. dated 24<sup>th</sup> April 2023; The Expert Witness Statement of Mr. Milford E. Lockhart dated 27<sup>th</sup> May 2022; and the Witness Statement of Mr. Tony Scriven dated 27<sup>th</sup> May 2022.

### **Findings of Fact**

[12.] I have considered the testimony of the witnesses. I shall provide my summary of their oral evidence and findings of fact based on such evidence, along with written evidence before me. Four witnesses were called in this case.

#### Ms. Kayla Darville

[13.] Ms. Darville's written testimony was uncontroversial and that she was reliable in her oral testimony.

[14.] Ms. Darville would state in the following that: The Mortgaged Loan was restructured in 23<sup>rd</sup> December 2016 which was perfected by promissory note; Mr. Gibson was in default of his mortgage obligations on 5<sup>th</sup> August 2019; Mr. Gibson made payments in the sum of \$10,000 and \$37,373.94; Mr. Gibson made, as of 27<sup>th</sup> October 2021, a \$180,353.66 contribution towards the total principal sum and interest of The Mortgage Loan; Mr. Gibson's monthly payment obligation, under the terms of the Mortgage Loan when it was refinanced for a final time was \$2,033.35 plus accruing interest; and Mr. Gibson was habitually missing those monthly payments.

#### Ms. Kershala Albury

[15.] Ms. Albury's written testimony was uncontroversial and she was reliable in her oral testimony.

[16.] Ms. Albury would state the following that: She is an expert in accounting; The Mortgage Loan was restructured and not consolidated; The Defendant defaulted on his loan obligation on 5<sup>th</sup> August 2019; and The Amortization Schedule only sets out how the Mortgage Loan would have aged in its lifetime if the Defendant serviced it properly and conveys nothing else.

#### Mr. Milford E. Lockhart

[17.] That gaps appear in his expert evidence, in that Mr. Lockhart didn't formulate his report with a complete knowledge of the history of Mr. Gibson's loan with the Plaintiff when compared with Ms. Albury. So much so, that the Court questions the veracity of the report he made filed on 26<sup>th</sup> August 2022 and his worth as an expert witness for the Defendant.

[18.] Mr. Lockhart set out in the hearing that: The Amortization Schedule for 2016 refinancing of the Mortgage Loan was used by him to prepare his report contained within The Defense Expert Report; The Amortization Schedule does not show the payments Mr. Gibson made; He never received from Mr. Gibson the Commonwealth Bank Insurance Renewal Disbursement Forms; Mr. Gibson did not furnish him with the necessary information to make a determination on Mr. Gibson's status under the Mortgage Loan; He understood the loan to have commenced in 2016 and not in 2011; He did not look into the history of the Mortgage Loan.

Mr. Gibson

[19.] Mr. Gibson's oral testimony was mired with inconsistencies and unhelpful assertions while the contents of his witness statement conveyed his deep misunderstanding of the nature of The Mortgage Loan and his duties going forward after the second restructuring in December 2016.

[20.] Mr. Gibson would state during his oral testimony that he found the records relied upon by the Plaintiff to be inaccurate despite not taking this position in his witness statement.

[21.] Furthermore, Mr. Gibson's responses to the Plaintiff's counsel regarding the late payments made while servicing The Mortgage Loan were evasive, consisting largely of blanket denials and attempts to deflect the inquiry.

## SUBMISSIONS

### *The Plaintiff*

[22.] The Plaintiff first submits that the Defendant has defaulted on his payment obligations to the Plaintiff under The Mortgage Loan and thereby owes the Plaintiff as of 19<sup>th</sup> October 2021 a principal sum of \$182,175.92 inclusive of other charges.

[23.] Secondly, the Plaintiff posits that the common law entitles it to vacant possession of the mortgaged property and that the Defendant's default of the terms of The Mortgage Loan further confirms this position.

### *The Defendant*

[24.] The Defendant submits that he is not in default of his obligations under The Mortgage Loan as claimed by the Plaintiff and avers that he was overcharged in the amount of \$62,422.96 and seeks in substance a third restructuring of his loan with the Plaintiff.

## LAW

[25.] Firstly, the law setting out the Plaintiff's evidentiary duty in these proceedings should be expressed. The Plaintiff has the burden of proof and a particular standard of proof. The burden in civil law was expressed in **Larry Ferguson v RBC Royal Bank (Bahamas) Limited SCCiv App No 79 of 2023**, where Charles JA reaffirmed that a Plaintiff bringing his/her case before the Court must ensure that said case is furnished suitably with evidence:

**“102. The burden of proof often lies with the plaintiff/appellant because he is the party asserting the claim.....”**

[26.] Moreover, with the burden of proof established squarely on the Plaintiff, the level of probability that the Plaintiff's assertions are correct as opposed to mere fiction is set out by Charles J, as she then was, in **Claudia Edwards Bethel v The Attorney General of The Bahamas et al No. 2015/CLE/gen/00245** quoting a hypothetical conjured by Lord Denning:

**“[108] if the evidence is such that the tribunal can say we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not .....”**

[27.] The Court finds the Court of Appeal matter of **DLC Investments Ltd v Donald Cooper et al [2024] SCCivApp No. 6 of 2024** instructive in setting out the constraints a mortgagee would have in exercising its legal rights under the mortgage. Charles JA expresses such constraints in the following.

[27] **“The Courts are loathe to intervene to prevent the mortgagee (or any transferee) from exercising his legal rights under the mortgage unless there is some question as to the validity of the mortgage itself, fraud or irregularity in exercising the power of sale”**

[28.] Charles JA would then cite the dicta of Harman J, who elucidates a right of the mortgagee most relevant to the issues in contemplation before this Court in the following as well:

[29] **“The law is clear: in the absence of any contractual or statutory constraints, the mortgagee (the lender) is entitled to possession of the mortgaged property ‘before the ink is dry on the mortgage’: per Harman J in Fourmaids Ltd. v Dudley Marshall (properties) Ltd. [1957] 2 All ER 35 at 36.”**

[29.] The Court finds the case provided, set out below, by the Plaintiff to be most useful as well.

[30.] The Court finds the locus classicus cited by Isaacs JA, as he then was, in the matter of **Junkanoo Estates Ltd et al v UBS (Bahamas) Ltd (Involuntary Liquidation) [2020] SCCivApp No. 24 of 2018** to be instructive in further setting out the legal rights of the mortgagee:

**“[18] Then Ganpatsingh JA in the Court of Appeal Case of Citibank, N.A. v Major [2001] BHS J. No. 6 who stated at paragraph 10 that: The position at law is that where under a legal mortgage, being an installment mortgage, the whole money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order ....; but this does not exclude a power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so. –**

**The cases cited on the impeachment of mortgage securities , all show that 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 mortgagee from exercising his lawful rights under the mortgage deed. –**

**Now there is a general, though not an inflexible rule of practice, that the Court will not interfere to deprive a mortgagee of the benefit of his security, in the absence of fraud, or irregularity, and a departure from the practice would normally attract the equitable principle , that the mortgagor pay into Court the amount outstanding or claimed or otherwise secure the mortgagee. This rule of paying in was itself not an inflexible one in the nature of a condition. Whether it applied or not depended on the nature of the fraud or irregularity. The Court’s duty in every instance was to do equity between the parties.”**

## **DISCUSSION & ANALYSIS**

*Issue 1 Did the Defendant breach the terms of The Mortgage Loan?*

[31.] After reviewing the written and oral submissions of both parties, the following determination is made.

[32.] That the Defendant did breach the terms of his Mortgage Loan executed in December 2016 when he habitually failed to meet his obligation to pay monthly installments of \$2,033.45. The Defendant's attempt in servicing The Mortgage Loan in the fashion that the Plaintiff's Amortization Schedule predicted (a document he referred to in ad nauseam in his written and oral submissions) even commenced poorly with his first payment being a late payment dated 14<sup>th</sup> February 2017.

[33.] The evidence given by Ms. Albury and Ms. Darville, and the Defendant's own admission under cross-examination of being late with payments, when weighed upon a balance of probabilities moves the Court to agree with the Plaintiff's position that the Defendant did not make payments as agreed in the December 2016 commitment letter and promissory note.

*Issue 2 Is the Plaintiff entitled to an order requiring the Defendant to deliver up possession of the mortgaged property to the Plaintiff?*

[34.] The Court is minded to agree with the Plaintiff's submission that it can order the Defendant to deliver up possession of the mortgaged property to the Plaintiff. Since neither party alleges that execution of The Mortgage was subject to any irregularity and or fraud, the sentiments of Charles JA in **DLC Investments Ltd [2024]** will be adopted. That the Court is loathed to stymie the Plaintiff's motion to exercise its legal right to take possession of the mortgaged property as expressed in clause 15 of The Mortgage:

“the borrower hereby attorns and becomes tenant at will to the Bank of the said heridatemnts at a peppercorn rent during the continuance of this security but nothing in this clause contained shall prevent the Bank from at any time entering on and taking possession of the said heridatemnts and so determining the tenancy created.”

[35.] In contemplation of the above and that the Defendant forwarded no law to the contrary, the dicta from **Harman J in Fourmaids Ltd [1957]** substantiates the mortgagee's legal right to take possession of the mortgaged property:

“The law is clear: in the absence of any contractual or statutory constraints, the mortgagee (the lender) is entitled to possession of the mortgaged property ‘before the ink is dry on the mortgage’”

[36.] Which is also mirrored by **Ganpatsingh JA in Citibank [2001]** :

“**The position at law is that where under a legal mortgage, being an installment mortgage, the whole money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order ....; but this does not exclude a power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so.**”

[37.] Furthermore, the Defendant in his conduct from 2011 to 2022, does not provide the Court any confidence that it should grant an adjournment as stated to be an option by Ganpatsingh JA.

[38.] The Defendant has not made an application to the Court for an adjournment and the history of multiple debt restructuring and habitual late payments forms the foundation of the Court's decision to not provide the Defendant an adjournment.

[39.] In all, the Plaintiff provided ample authority to seek the relief sought of vacant possession of the mortgaged property. Mr. Gibson has failed to provide the Court with any reason to depart from the classic position which states that a mortgagee is entitled to possession of the mortgage property "before the ink is dry."

*Issue 3 Is the Plaintiff entitled to judgment in the sums sought?*

[40.] The Court is in agreement with the Plaintiff's submission that a term of The Mortgage Loan, found in the 7<sup>th</sup> December 2016 commitment letter, sets out that the Defendant would be liable for all the sums due and owing if he defaults.

[41.] The Court in paragraphs 31 to 33 of this judgment has come to the conclusion that the Defendant was in default of his obligations. The bank records, the testimony of Ms. Albury state as such while the Defendant's rebuttal expert report by Mr. Lockhart does the Defendant no favors due to the inadequacies within Mr. Lockhart's report.

[42.] Therefore, the Court grants the Plaintiff judgment in sum of \$ 314,133.48 set out in the following: The Principal Sum \$182,175.92; Add on Charges \$39,121.19; Interest on the principal sum to the 19<sup>th</sup> October 2021 \$31,713.77; and further interest on the principal sum from 19<sup>th</sup> October 2021 to 1<sup>st</sup> April 2025 at the rate of \$48.51 per diem \$61,122.60.

## **CONCLUSION**

[43.] I therefore make the following orders –

[44.] The Plaintiff is entitled to vacant possession of the mortgaged property.

[45.] The Plaintiff is awarded judgment in the sum of \$314,133.48.

[46.] Interest pursuant to the Civil Procedure (Award of Interest) Act.

[47.] The Defendant shall pay the Plaintiff's costs to be taxed if not agreed.

**Senior Justice Deborah E. Fraser**

**Dated this 4<sup>th</sup> day of April 2025**