

COMMONWEALTH OF THE BAHAMAS

2021/CLE/gen/00353

IN THE SUPREME COURT

Common law & Equity Division

IN THE MATTER OF property comprised in an Indenture of Mortgage dated the 20th July A.D. 2005 between Renee Ferguson and Edcil Ferguson (as surety) of the one part and the Bank of The Bahamas 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 9503 at pages 269 to 280.

B E T W E E N:

RENEE FERGUSON

EDCIL FERGUSON

Claimants

AND

BANK OF THE BAHAMAS LIMITED

Defendant

Before: Her Ladyship The Honourable Madam Senior Justice Deborah Fraser

Appearances: Mr. Brian Dorsett of Olander & Co for the Claimants

Mr. Jamal G. Davis for the Defendant

Hearing Date: 16th October 2023, 17th October 2023

**Civil – Breach of Contract – Indenture of Mortgage – All Risk Contractors Insurance -
Negligence – Duty of Care – Estoppel by Conduct – Reliance – Detriment – Parole
Evidence**

DECISION

Fraser Snr J.

[1.] This is a trial of an action brought on behalf of the Claimants, Renee and Edcil Ferguson (“**The Fergusons**”), alleging breach of contract by negligence against the Defendant, Bank of The Bahamas Limited.

BACKGROUND

[2.] The Claimants are citizens of the Commonwealth of The Bahamas.

[3.] The Defendant is a firm, duly incorporated under the laws of the Commonwealth of The Bahamas, and is engaged in the business of banking.

[4.] By mortgage dated 20th July 2005, The Claimants as borrower and surety secured a loan in the amount of \$210,000.00 from the Defendant.

[5.] The mortgage was restructured multiple times with the latest on or about the 3rd September 2012, with the loan repayable in monthly installments of \$1,948.18 per month.

[6.] The subject property of the mortgage is a building on Lot 15, Block 8, Unit 2, Greening Glade Subdivision, Freeport, on the Island of Grand Bahama.

[7.] The property remained uninsured as of 3rd December 2016.

[8.] In September 2019, the property sustained severe damage due to Hurricane Dorian.

[9.] The insurer, Bahamas First Insurance, denied coverage for the damage.

[10.] On 8th April 2021, the Claimants commenced legal proceedings against the Defendant by way of Specially Indorsed Writ of Summons, seeking relief for breach of contract by negligence arising from the Defendant’s failure to ensure that the mortgaged property was properly insured.

ISSUES

[11.] The central issues:

- a) Did the Defendant breach its mortgage obligations to the Claimants?
- b) Was the Defendant estopped by its conduct when it did not insure the mortgage property from 2016 to 2020?
- c) Is the Defendant liable for losses incurred by the Claimants as a consequence of the property not being insured?

EVIDENCE

The Evidence of The Fergusons

[12.] On 19th April 2022, the Claimants filed the witness statement of Mrs. Renee Ferguson. On 16th October 2023, the Claimants filed the second witness statement of Mrs. Renee Ferguson and on 4th July 2022, the Claimants filed the witness statement of Mr. Renio Ferguson.

[13.] In her first witness statement, Mrs. Renee Ferguson states: that she is a self-employed vendor at Port Lucaya Market; that she and her husband took out a mortgage on the subject property on 20th July, 2005, with her husband acting as surety and making the monthly payments; that upon completion of construction, the insurance policy would be upgraded; that she was required to make annual insurance payments of \$2,355.31 into an escrow account; that following damage from Hurricane Matthew, she and her husband filed a claim with Bahamas First Insurance but were unable to meet the \$9,000 deductible; that she believed the property was insured by the Defendant against fire, hurricanes, and flooding; that she relocated to Nassau in September 2019 after Hurricane Dorian caused further damage to the property; that during a conversation with Ms. Saunders, she and her son were informed that the Defendant was not responsible for insuring the property; that the Defendant's agents denied her access to the mortgage documents; that she later received insurance records from Bahamas First Insurance and was informed that the policy had lapsed in 2016; and that the Defendant had paid the insurance premiums for the first 11 years of the mortgage.

[14.] Mr. Renio Ferguson, son of the Claimants, states: that he possesses intimate knowledge of the relationship between the parties to the mortgage; that he contributed \$35,000 toward the construction of the subject property and helped with utility expenses; that the Defendant was responsible for insuring the property; that the property sustained damage from Hurricane Matthew, which was repaired in 2017; that the subject property was severely damaged by Hurricane Dorian in September 2019; that during a conversation with Ms. Saunders, an agent of the Defendant, he and his mother were informed that the Defendant had not insured the property and bore no responsibility to do so; and that the Defendant refused to provide him and his father with the full set of insurance documents.

The Evidence of the Bank of The Bahamas Ltd

[15.] The Defendant files the following in support of its counterclaim and defence: the Affidavit of Brittany McKenzie, filed 30th March 2022; the witness statement of Paulette Butterfield, filed 22nd April 2022; and the witness statement of Estena N. Saunders filed 22nd April 2022.

[16.] The witness statement of Estena N. Saunders states: that she is an agent of the Defendant and that the mortgage and commitment letters require the Claimants to provide annual proof of insurance premium payments; that the Defendant paid the insurance premiums from 2005 to 2016 to protect its interest in the property and sent reminder letters to the Claimants on 14 June 2013 and 25 November 2015; that the Claimants' mortgage account lacked a collateral escrow account for insurance premium payments; that the Defendant's insurance premium payments extended the maturity of the mortgage; that in 2017, the Claimants failed to insure the property; that the insurer refused coverage owing to the Claimants' failure to complete repairs at the subject property; that the Claimants were aware of the property's poor and uninsurable condition; and that the Defendant never accepted responsibility for insuring the property.

[17.] The witness statement of Paulette Butterfield states: that she is an agent of the Defendant; that the Claimants' mortgage was restructured multiple times, and under its terms, they were required to annually notify the Defendant of insurance premium payments; that the mortgage did

not provide for an escrow account facility, and the Claimants made no contributions to the annual insurance premium; that from 2005 to 2016, the Claimants failed to provide evidence of their contribution to the annual insurance premium; that the Defendant tendered a final premium payment in November 2015, but was unable to secure continued coverage beyond that year due to the property's compromised condition following Hurricane Matthew in 2016; that the Defendant issued demand letters on 14 June 2013 and 25 November 2015, reminding the Claimants of their duty to insure the property; that the mortgage allowed the Defendant to insure the property without incurring liability if the Claimants defaulted on their obligation to insure the property; and that the Defendant did not assume responsibility for insuring the property.

FINDINGS OF FACT

[18.] 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. The only witnesses called were the Claimants' and the Defendant's.

Witness Mrs. Renee Ferguson

[19.] In her oral testimony during examination-in-chief and cross-examination, Mrs. Ferguson stated that the property was incomplete when Hurricane Dorian struck and that it had been under construction for 14 years. Mrs. Ferguson noted the property was damaged and repaired after Hurricane Matthew in 2016, but no insurance was sought between 2016 and 2020 by her or her husband. Mrs. Ferguson acknowledged that she and her husband were obligated to provide proof of insurance payment but avers that they were not in default of the mortgage when they did not pay the insurance premiums. Mrs. Ferguson also confirmed that no escrow account was ever established for insurance payments, only for principal and interest.

[20.] Mrs. Ferguson relied on the verbal agreement her husband had with an unidentified female loan officer in 2006 to support her position that the bank had an obligation to pay the all risk insurance. Averting that the verbal communication adjusted the terms in the mortgage. However, the Court is minded to dispense with such evidence and its written counterpart in paragraph 13 of Mrs. Ferguson's first witness statement on the ground that it is hearsay and that the Claimant's counsel did not raise any exception for why it should be admitted.

[21.] An inconsistency arose in Mrs. Ferguson's oral testimony when she stated that she had no obligation to insure the property, as this contradicts her earlier position set out in the Statement of Agreed and Non-Agreed Facts and Issues filed on 4th August 2022.

Witness Mr. Renio Ferguson

[22.] In his oral testimony during examination-in-chief and cross-examination, Mr. Renio Ferguson stated that his parents made monthly payments of \$1,948 but did not insure the property after 2016 or provide an appraisal report to any insurance company. He acknowledged that they were obligated to insure the property. He claimed that Mr. Anton Gray, a bank agent, represented that the Defendant would satisfy the annual insurance premiums, though this was not included in his witness statement. He also stated that if his parents failed to pay the premiums, the Defendant could do so under Clause 4(1) of the Indenture of Mortgage. He then said that he spoke with Ms.

Estena Saunders, who did not confirm the Defendant's obligation to pay premiums in said conversation. Mr. Ferguson mentioned a 2015 appraisal by Mr. Ashton Jones but was unaware of his parents' expenditures on the property from 2015 to 2019 and noted that he himself was not a certified property appraiser.

[23.] Also the Court is minded to not accept that a Mr. Anton Gray, alleged former agent of the Defendant in the Defendant's Freeport office, made representations to Mrs. Renee Ferguson and her husband that the Defendant would cover the insurance premiums because such evidence was not presented in any of the witness statements until Mr. Renio Ferguson took the stand.

[24.] Overall, Mr. Renio Ferguson's evidence is not entirely disregarded, but it is given limited weight, as he was merely an observer to the key interactions between his parents and the Defendant's agents.

Witness Ms. Paulette Butterfield

[25.] In her oral testimony, Ms. Butterfield stated that she became familiar with the Claimants in 2021–2022 and was unaware of any policy under which the Defendant covered clients' annual insurance premiums. Ms. Butterfield explained that unpaid premiums would be added to a client's principal. She also did not know the identity of the loan officer who allegedly made representations in 2006. She referenced a 25th November 2015 letter from the Defendant advising the Claimants to open an escrow account for insurance payments however affirmed that no escrow account was facilitated by the Defendant for the Claimants. Ms. Butterfield did aver that the property was insured in 2016 and that the commitment letters did not alter the Defendant's responsibility regarding the satisfaction of annual insurance premium fees. She also states that on 5th September 2005, the Claimants owed \$210,000, and under the loan terms, that amount would decrease with compliance from the Claimants. She avers to her knowledge that the Claimants never made monthly payments toward insurance, and it would have been reasonable for the bank to notify them of its intent to stop covering the insurance premiums.

[26.] No inconsistencies can be discerned from her oral testimony however it is noted that some of the questions put to Ms. Butterfield during cross-examination by counsel only invited speculation and hypotheticals of which was of no use to this Court in its fact finding capacity.

Witness Ms. Estena N. Saunders

[27.] During her oral testimony, Ms. Saunders indicated that she assumed responsibility for managing the Defendant's Freeport clients as of early 2016. After contacting the insurer in 2016, she was informed that the subject property could not be insured due to its incomplete state of repair. She conceded that insurance premium payments were made directly by the Defendant to the insurer from the inception of the mortgage. Ms. Saunders confirmed that if the bank covered the annual insurance premium on behalf of the Claimants, it would notify them, but no notice was sent to the Claimants to inform them that the Defendant has ceased covering the annual insurance premium. She stated that the Defendant has no policy of automatically covering clients' insurance.

[28.] Further in her oral testimony, Ms. Saunders remarks that an escrow agreement was not required when the mortgage loan was first executed. Separate from the commitment letters, the

Defendant sent letters notifying the Claimants that it had paid the insurance premiums. Ms. Saunders then asserted that the Claimants' insurance coverage expired on 2nd December 2016, and attempts to reinsure were made by the Defendant, but the house remained uninsured from 2017 to 2019, when Hurricane Dorian struck. She goes on to say that despite formal notices of the customer's responsibility, the Defendant made several insurance premium payments and avers that while nonpayment of insurance premiums doesn't usually trigger default under bank policy, the mortgage terms treat it as a default. She would then state that the bank sent letters in 2013 and 2015 advising the Claimants of their obligation.

[29.] In all, no inconsistencies can be discerned from her oral testimony.

SUBMISSIONS

The Claimants

[30.] The Claimants forward the following claims: that the Defendant was negligent in not notifying the Claimants that it would no longer be responsible for paying the insurance premiums; that the Defendant was negligent in not notifying the Claimants that their insurer terminated the insurance policy; that the Defendant assumed, by conduct, responsibility for covering the annual insurance premiums and was therefore liable for the Claimants' losses; and that the Defendant is liable to special damages in the amount of \$180,650.00 for its breach of contract.

The Defendant

[31.] The Defendant advances the following claims: that it had a discretion and not a duty under the mortgage to insure the property ; that the legal principle of parole evidence bars the Claimants from relying on the 2006 verbal representations of the unidentified agent of the Defendant; that no escrow account was established between the parties from which payments for the insurance premium would be deducted; that it made no representation to the Claimants suggesting that the latter didn't have to pay the annual insurance premium; that the Defendant never assumed the responsibility to satisfy the insurance premiums; that the Claimants defaulted on their mortgage loan with an outstanding sum of \$9,994.39; and that the Defendant did not notify the Claimants of the latter's obligation to insure the mortgage property.

LAW

[32.] Firstly, the law setting out the Claimants' evidentiary duty in these proceedings should be stated. The Claimants are subject to a burden of proof and a corresponding 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”

[33.] Moreover, with the burden of proof established squarely on the Claimants, the degree of probability that the Claimants' 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 ”

[34.] Relevant to the stated issues, the Supreme Court matter of **Scotiabank (Bahamas) Ltd v Cube Enterprises et al [2021] 1 BHS J. No.39** provided by both parties is instructive. Wherein, Winder J as he then was dealt with a situation where the bank claimed that a former client of theirs failed to assign his personal life insurance policy to the bank. While the facts are distinguishable, they are similar in that, like The Fergusons, the defendants in **Cube Enterprises Ltd [2021]** alleged that the bank had represented that it was providing insurance coverage. In reliance on those representations, the customers refrained from obtaining their own insurance, to their detriment. The law recognized by Winder J, in **Cube Enterprises Ltd [2021]**, is seminal in any discussion about estoppel by reason of conduct:

“[29] The defendants say that the Bank is estopped by reason of its own conduct. They say that the Bank ‘is estopped from securing the relief that it seeks by reason of its own conduct, which lamentably created detriment to the Defendants.’ They say that: Under this principle , when parties conclude a binding contract acknowledging that a particular state of affairs exists, they are bound by that statement. Neither party can later assert that the opposite is true. This is the principle of contractual estoppel and it applies even if the original statement was not true, and a party acted in reliance of it believing it so to be. In the case *Lowe v Lombank Ltd CA 1960*, Lord Diplock set out three criteria for an evidential estoppel, thus: It must be shown that: (a) The clause (acknowledgment) was clear and unambiguous; (b) that the representee had intended the representor to act on the statements in the clause; and (c) that the representor must have entered into the contract in the belief that they were true.”

[35.] The following Court of Appeal decision on Winder J’s decision, **Cube W. Enterprises Ltd et al v Scotiabank (Bahamas) Ltd [2022] SCCiv App No. 5 of 2022**, is instructive in analogy so far as Barnett (P) JA’s treatment of the appellants’ averment that the bank had a duty of care towards the respondents:

“[40] It is an unrealistic position for a borrower to say ‘I did not do what I was supposed to do, but you cant enforce your security or require me to repay the loan because you did not do for me what I did not do because you have done what I did not do.”

“[48] This ground based in negligence is misconceived. The assertion is that the Bank had a duty of care to the borrower to ensure that the borrower did what the borrower was supposed to do. That is to say, the Bank had an obligation to ensure that the customer provided an assigned life insurance policy which was the obligation of the customer to provide. I do not accept that such a duty of care exists.”

[36.] Milton Evans J, as he then was, in the case of **Schardein (as Personal Representative of the Estate of the late Christopher Neil Schardein) v First Caribbean International Bank (Bahamas) Limited [2015] 3 BHS J. No. 153** shares the same sentiments as the learned Justice of Appeal Barnett:

“[66.] I do not find on the evidence that for the purpose of effecting the Insurance Policy the Defendant at anytime became the agent of the Plaintiff nor the Insurance Company. The Defendant therefore had no duty as I see it to ensure that the policy was completed nor is there any other evidence that they

assumed responsibility for effecting the same. It follows that in the absence of a duty the allegations of negligence also fall away.”

[37.] The discussion Romer LJ had in **O’Connor v Hume [1954] 1 WLR 824** on whether parole evidence as extrinsic evidence can vary or modify a written contract is most instructive despite the facts of the case being distinguished:

“I am satisfied that the court has no right to resort to correspondence and oral evidence for the purpose of striking out, for that is what it comes to, an important provision which the parties agreed upon and expressed in the agreement. The general rule with regard to extrinsic evidence is that such evidence is not admissible to add to, vary, modify or contradict a written instrument. To that rule there are, of course exceptions. The only exception which might be regarded as relevant – and I think indeed it was sought to rely upon it in effect is if the written instrument is affected by illegality. I can see nothing illegal in the object which the parties sought to attain by entering into an agreement in this form.”

[38.] Likewise, the learned authors in **Halsbury's Laws of England 4th edition** at paragraph 1478 also provide an instructive description of the parole evidence principle:

“... where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements, either to show that intention to contradict, vary or add to the terms of the document...Extrinsic evidence cannot be received in order to prove the object with which a document was executed; or that the intention of the parties was other than that appearing on the face of the instrument .”

[39.] The learned jurist Lord Morris of Borth-Y-Gest in **Hedley Byrne et al v Heller & Partners Ltd [1963] 2 ALL ER 575** expressed principles on how to treat with a situation in which a party performs a particular act while expressly disclaiming any obligation to perform that act as a matter of course or on an ongoing basis:

“ They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given . . . they cannot accept a reply given with a stipulation and then reject the stipulation.”

Discussion & Analysis

Issue (a) Did the Defendant breach its mortgage obligations to the Claimants?

[40.] There’s no dispute, at the inception of the Mortgage 20th July 2005, that the Claimant (Mrs. Renee Ferguson) had a duty to keep the mortgage property insured and would satisfy the annual insurance premium and that the Defendant had the discretion to make contributions to said annual insurance premium.

[41.] However, the Claimants’ written submissions present a question for the determination of this Court: Did the commitment letter dated 3rd September 2012 alter the obligations of the parties to the Mortgage as to who has the responsibility of paying the annual insurance premium? The Claimants’ rely on the following passage from said letter: **“The Borrowers must submit to the Bank annual evidence of the payment of Homeowners Insurance. A failure to do so will result in the loan account being charged for same.”**

[42.] The Court is minded to not consider the Claimants' interpretation of the passage from the 3rd September 2012 commitment letter because the passage does not alter any term of the mortgage, but in effect reiterates the status quo between the parties. That, if the Claimants' failed to pay the insurance premium, the Defendant would add the costs onto the mortgage loan. The effect of this is the natural extension of the maturity date of the mortgage and nothing further. As contemplated by **Winder J Cube Enterprises Ltd [2021]**, the clause must be unambiguous and clear, of which the passage is clear and unambiguous to the status quo of the relationship between the parties to the mortgage.

[43.] Secondly, even if the Court were not to rely on its own interpretation of the passage, the Claimants' interpretation of the highlighted excerpt in the 3rd September 2012 commitment letter cannot be relied upon because they ignore the effect the first sentence has on the meaning of the passage interpreted as a whole. The legal principle espoused by Lord Morris of Borth-y-Gest in **Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963]** precludes the Claimants from disregarding their duty to provide the Defendant with annual evidence of insurance payment by choosing to ignore the first sentence, underlined below, of the passage:

"The Borrowers must submit to the Bank annual evidence of the payment of Homeowners Insurance. A failure to do so will result in the loan account being charged for same."

[44.] The passage above establishes a reasonable inference that: the Claimants have a duty to satisfy the annual insurance premium; and the Claimants must provide evidence to the Defendant of the exercise of their duty. Wherein, failing to perform their duty, the Defendant will simply charge the Claimants in the long term.

[45.] The Claimants', in order to satisfy the Court that the Defendant breached its obligation to insure the subject property must first establish that the original mortgage terms were altered so as to place said responsibility on the Defendant. Having reviewed the evidence on a balance of probabilities, the Court cannot safely attach significant weight to the alleged conversation between Mr. Edcil Ferguson and the female loan officer, as advanced by the Claimants to demonstrate such an alteration to the Indenture of Mortgage.

[46.] The Claimants do state that the conversation did take place, and the Court is not minded to deem their statements as mere contrivance or falsehood. However, deficiencies arise if the Court was minded to consider this evidence: The Claimants cannot place when this conversation occurred in 2006; The Claimants cannot identify the agent of the Defendant that spoke to Mr. Edcil Ferguson over the telephone in the presence of Mrs. Renee Ferguson; and as a consequence of the stated deficiencies, there is no opportunity to test said agent's evidence so that the Defendant would be afforded a fair trial. Furthermore, even if the conversation could be properly adduced if the above deficiencies were rectified, legal principles from **O'Connor [1954]** and **Halsbury's Laws of England 4th Edition** regarding the use of parole evidence to interpret contractual relationships with a written contract present precludes the Claimants from relying on the stated conversation.

[47.] The Claimants have not, by their advancement of the stated evidence, moved the Court to consider that the material term in the Indenture of Mortgage setting out the Claimants responsibility to insure the property was ever altered. However, the issue of whether the Defendant

owes the Claimants a duty of care to ensure that the latter insures their property is determined. As it concerns the Defendant's purported duty to the Claimants, the Court is minded to agree with Barnett (P) **JA in Cube Enterprises Ltd [2022]** that the Defendant had no duty of care towards the Claimants to ensure that the Claimants insured the mortgage property. In fact, like Milton Evans J noted in **Schardein [2015]**, the Claimants provide no evidence that the Defendant assumed responsibility to effect the payment of the insurance premiums. The Claimants' duty in that respect is shown clearly in the following:

[A] Clause 4(1) of The Indenture of Mortgage "The Borrower and the surety . . . covenant with the lender that they will . . . keep all buildings . . . insured against . . . loss or damage by hurricane storm . . . in its full insurable value thereof in some Insurance Office or offices approved of by the Bank and will punctually pay all premiums necessary for the purposes of such insurance . . . and will forthwith on demand produce to the Bank the policy or policies of such insurance and the receipt for every such payment";

[B] Approval Letter dated 5th September 2005 "The Borrowers must submit to the Lender annual evidence of the payment of Life Insurance and Property Insurance (as identified under "Security above")."

[C] The commitment letters inclusive of Commitment Letter dated 3rd September 2012 "The Borrowers must submit to the Bank annual evidence of the payment of Homeowners Insurance. A failure to do so will result in the loan account being charged for same."

[48.] In conclusion, the Indenture of Mortgage was not amended with respect to the material term assigning responsibility for insuring the property. Accordingly, the Court finds that the Defendant did not breach the Indenture when it ceased insuring the property. The Defendant owed no duty of care to ensure that the Claimants fulfilled their obligations under the Indenture of Mortgage. That responsibility rested squarely with the Claimants, who were repeatedly reminded of their duty to maintain insurance coverage for the property.

Issue (b) Was the Defendant estopped by its conduct when it did not insure the mortgage property from 2016 to 2020?

[49.] The Claimants advance that the Defendant was estopped by the latter's conduct through the representations it made to the Claimants, its multiple contributions to the insurance premiums from 2005 to 2016 and the Claimants non-payment of the insurance premiums during that period from not insuring the property from 2016 to 2020.

[50.] The Court, guided by the test recognized by Winder J in **Cube Enterprises Ltd [2021]**, must satisfy the following: that the Defendant represented, expressly or implicitly via its conduct to the Claimants, that it would insure the property ("**The Representation**"); that the Claimants then relied on the status quo established by the representation; and that the Claimants suffered a detriment as a consequence of their reliance. The Court is of the view that the Defendant cannot satisfy the first leg of the test provided by Winder J.

[51.] Firstly, the Court has discussed in paragraphs 41 to 46 of its decision that the evidence advanced by the Claimants to prove that the Defendant made The Representation is unsatisfactory.

[52.] Though with regard to the Defendant's multiple payments of the insurance premiums from 2005-2016, the issue that arises is whether this conduct forms by implication The Representation. The Court deems that the Claimants cannot rely on that conduct to disabuse themselves of their duty to satisfy the insurance premiums because Clause 4(1) of the Indenture of Mortgage provides the Defendant with the discretionary power to make payments to the annual insurance premium with such payments, explained by Ms. Saunders and Ms. Butterfield to be transferred indirectly to the Claimants by the extension of the maturity of the mortgage.

[53.] Lastly, and in keeping with the example by analogy from Barnett (P) JA in **Cube W. Enterprises Ltd [2022]** at paragraph 40 of that decision, the Claimants cannot interpret the Defendant's silence to their non-compliance with Clause 4(1) of the Indenture of Mortgage from 2005 to 2016 as evidence of a representation that the Defendant would take on the liability of insuring the property. If the Court considers the above a proper representation of the status quo between the parties to the mortgage it would find itself construing in its decision a hypocrisy. The Court would not be confident in producing a fair decision if it sanctions the Defendant for not doing what the Claimants purport the former should have done from 2016 to 2019 when the Claimants have also failed to do such thing from 2005 to 2019. Furthermore, if equity was specifically advanced by the Claimants in their written and oral submissions, the clean hands doctrine would be an insurmountable challenge for the Court to overcome to rule in the Claimants favor considering the Claimants' own failings.

[54.] Given that no representations were made by the Defendant to the Claimants that the former would cover the insurance premiums, the Defendant was not estopped by its conduct when it did not insure the subject property from 2016 to 2019.

Issue (c) Is the Defendant liable for losses incurred by the Claimants as a consequence of the property not being insured?

[55.] The Court shall dispense with this issue briefly because the Defendant is not deemed to be in breach of the Indenture of Mortgage and the Defendant has no duty of care towards the Claimants for it to be liable for negligence.

[56.] The Claimants had to, and failed to, have advanced to the Court that the Defendant was responsible for insuring the property from 2016 to 2019. A period of time where the property was subject to catastrophic damage from Hurricane Dorian in September of 2019.

[57.] The Court is minded of the vast capital the Claimants used to repair the property during that period but to transfer said cost to the Defendant without the furnishing of evidence that the Defendant is liable of some contractual malfeasance would be unjust.

Conclusion

[58.] I therefore make the following orders -

[59.] The Claimants' Specially Indorsed Writ of Summons filed 8th April 2021 is hereby dismissed.

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

Senior Justice Deborah E. Fraser

Dated this 25th day of April 2025