

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY DIVISION  
2017/CLE/gen/00240**

**IN THE MATTER of an Indenture of First Demand Legal Mortgage dated the 16<sup>th</sup> day of March A.D., 2005 and made between Christison Deleveaux and Marilyn Deleveaux (as Borrowers) of the one part and Bank of the Bahamas Limited (as Lender) of the other part to secure advances to the said Christison Deleveaux and Marilyn Deleveaux by the said Bank of the Bahamas Limited**

**AND**

**IN THE MATTER of All That piece parcel or lot of land Being Lot number 15 in Block number 16 of section 2 of Sea Breeze Estates Subdivision situate in the Eastern District of the Island of New Providence, the Bahamas**

**AND**

**IN THE MATTER of Rules of the Supreme Court Order 77**

**BETWEEN**

**BANK OF THE BAHAMAS LIMITED**

**Plaintiff**

**AND**

**CHRISTISON DELEVEAUX**

**1<sup>st</sup> Defendant**

**AND**

**MARILYN DELEVEAUX**

**2<sup>nd</sup> Defendant**

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances: Jamal Davis for the Plaintiff**

**Arthur Minns for the Defendants**

**9 November 2020**

**DECISION**

## **WINDER J.**

This is the defendants' application seeking the dismissal of the plaintiff's claim for vacant possession of property under a First Demand Mortgage.

1. On 16 March 2005 the defendants granted to the plaintiff a first demand legal mortgage over its property situated at Lot number 15 in Block number 16 of section 2 of Sea Breeze Estates Subdivision (the Property).
2. On 27 February 2017 the plaintiff filed an Originating Summons against the defendants, seeking:
  - (1) Payment of the sum of \$258,485.37 being \$227,540.06 as to the principal sum outstanding, \$30,245.31 as to the interest sum outstanding up to the 16<sup>th</sup> day of August, A.D., 2016, calculated at the rate of 7.25% per annum and continuing thereon at the said rate of 7.25% per annum or \$44.96 per diem down to the date or dates of payment and \$700.00 as to late fees.
  - (2) Delivery of the Defendants to the Plaintiff of possession of ALL THAT piece parcel or lot of land situate in Section Two (2) of the subdivision called and known as Sea Breeze Estates situate in the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas and being Lot number Fifteen (15) in Block number Sixteen (16) as charged by the Defendants to the Plaintiff by First Demand Legal Mortgage dated the 16<sup>th</sup> day of March, A.D., 2005 to secure the money therein mentioned.
3. On 14 March 2018 Hilton J., following the hearing of the Originating Summons, ordered the defendants to give vacant possession of the Property to the plaintiff and gave judgment as prayed with interest and costs. The defendants appealed the judgment and on 29 November 2018 the Court of Appeal allowed the appeal remitting the matter to the Supreme Court.
4. On 6 February 2020 the defendants, by Summons, applied under the Inherent Jurisdiction of the Supreme Court, for the dismissal of this action. The defendants' Summons was supported by the affidavit of Christison Deleveaux filed 22 November 2019. The plaintiff relies on the affidavits dated 8 Mar 2017 of Kelvin Briggs, Manager Special Credit Services Unit, the affidavit dated 19 October 2017 of Silbert Clarke Assistant Manager, Retail Recoveries and Collections

Department and the affidavit dated 8 August 2019 of Anton Higgs, Manager, Special Activities Department.

5. The plaintiff acknowledges the fact that the judgment of the Court of Appeal caused this matter to be remitted to the Supreme Court for re-hearing. The Court determined that the plaintiff must provide verification of the judgment amount and that until a proper accounting was provided the Writ of Possession which was ordered by Hilton J., to enforce the judgment, would be stayed. In the ex tempore judgment of the Court, Evans JA stated as follows:

“This is an appeal by the Appellants by Notice of Appeal filed on 20<sup>th</sup> April, 2018 in which they have raised a number of grounds of appeal. However, during the course of submissions and in review of the documents, it has become clear to us that in seeking to comply with Order 77 of the Rules of the Supreme Court, the Bank has provided information which was intended to verify the amount that was due and owing and would be the sum of the judgment.

Having reviewed the documentation supplied, is quite clear to us that there is some discrepancy that they have not been able to explain sufficiently to us, and we think that it is in the interest of justice that we allow the appeal and remit the matter back to the Supreme Court for a proper accounting to be undertaken so that the judgment amount can be verified.

In the circumstances, we would order that the execution of the Writ of Possession be stayed pending such accounting. If on the completion of the said accounting, the information indicates that the powers of the court under section 3 of the Money Laundering Act should be invoked, an application should be made thereunder.”

6. The defendants submit that the plaintiff has refused and continues to refuse and/or are unable to present a proper accounting of the mortgage account. They say the plaintiff continues to present the same arguments that were presented and rejected at the Court of Appeal, notwithstanding the fact that the Court of Appeal found that there was some discrepancy in the plaintiff's accounting. The defendants go on to list a number of the alleged discrepancies.
7. The first in the list of discrepancies the defendants say, is what they calculated to be a \$30,327.39 difference in the mortgage amount the plaintiff alleges is owed by them. The second discrepancy they say is that there is a difference in the account

numbers for the mortgage. The third discrepancy the defendants identify is that the plaintiff did not provide any loan statements from the inception of the loan in 2005 to 2007. They say that the plaintiff has failed to show during the period between the inception of the loan in 2005 thru 2007 what was credited and/or debited to the loan account. The defendants say the fourth discrepancy is that the plaintiff claims that they are 53,156.05 installment payments in arrears which is an impossibility. In what is labeled the fifth discrepancy, the defendants say the plaintiff has failed to comply with the Court of Appeals judgment to provide an accounting. The sixth discrepancy is that the other loan statement provided by the plaintiff commences on 1 October 2007 with a credit balance of \$2.29. They say there is nothing showing a transaction on the account on 15 October 2007, when the account statement begins with the aforementioned late fee of \$35.00. The defendants say that none of the dates on the account statements are reconcilable on the loan statements provided, by the plaintiff. More specifically the defendants contend, 'a fraud is being perpetrated' on them by the plaintiff.

8. The defendants say that it is appropriate that there be an 'accurate and proper accounting' performed. They rely on the Privy Council case of ***John Wallingford v The Mutual Society et al 1880 PC*** and dicta of Lord Selborne LC where he stated:

"My Lords, it appears to me that even upon the face of the mortgage bonds, there were strong reasons against summarily assuming, without going into an account between the parties, that any such sum was due."

9. The plaintiff concedes that the Court of Appeal saw a discrepancy between the balances on the mortgage loan account. They explain that they used two separate accounting systems within the bank to keep track of mortgage accounts - (i) the Business Objects Statement (BOS) and (ii) Flex Cube Statement (FCS). They admit that on 15 October 2007 the BOS stated that the defendants' mortgage balance was \$290,120.89, while the FCS stated a balance of \$259,793.50 for the mortgage.

10. On 17 December 2018, subsequent to the Court of Appeal decision, the defendants wrote to the plaintiff seeking an accounting from the inception of the loan to that date.

11. The plaintiff says the discrepancy into which the defendants inquired was explained in the Higgs affidavit of 8 August 2019. This affidavit they say explains the discrepancy "at length". Indeed, the Higgs affidavit says the following with reference to the BOS and FCS:

5. The Business Objects Statement is generated under the Plaintiff's former Business Objects account processing system (hereinafter called "the Business Objects processing system"). It was solely used by the Plaintiff internally as a support database storage record of debtors' loan accounts with the Plaintiff. The Business Objects processing system was calculated and updated with adjustments for payments, fees, interest and/or principal increases less frequently than its counterpart, the Flex Cube processing system (hereinafter called "the Flex Cube operating system"). The Business Objects processing system produced statements of a debtor's loan account showing an adjustable or varied beginning balance that adjusted from time to time based in part on the amount of a customer's ending loan balance and postings to the debtor's loan account payments, fees, interest and/or principal increases from the 1<sup>st</sup> day of October, A.D., 2007 to the date of the ending loan balance specified.

6. Conversely, the Flex Cube Statement is generated under the Plaintiff's Flex Cube processing system that serves as its main processing system. Its opening balance is static and represents the actual amount due under a debtor's loan account at that date. Postings of adjustments for payments, fees, interest and/or principal increases are made instantly under the Flex Cube processing system. As a result of the time gap in posting under both the former Business Objects processing system and the Flex Cube processing system, statements produced under the latter represent an up to date record of a debtor's loan account with the Plaintiff.

7. The difference between the amount recorded as the opening balance of the Mortgage Loan account on the Flex Cube Statement and on the Business Objects Statement as of the 15<sup>th</sup> day of October, A.D., 2007, namely \$30,327.70 arises in consequence of the difference in the processing of postings under both the former Business Objects processing system and the Flex Cube processing system.

...

9. ... The Plaintiff converted its banking processing system for loan accounts in or about October A.D., 2007 to the Flex Cube processing system for loan accounts in or about October A.D., 2007 to the Flex Cube processing system and the former Business Objects processing system. Loan account number 1010005061593 was assigned to the Defendants' Mortgage Loan

under the Plaintiff pre-2007 processing system and was reassigned as loan account number 166M325072740002, the Mortgage Loan account under its processing system.

12. The plaintiff contends that there was no confusion regarding the defendants' mortgage loan account. They say the bank is not confined to the use of a bank account number (of which there were two at some point). The bank has additional information at its disposal to identify a mortgage loan account, namely; residential and postal address; National Insurance number; telephone number, loan amount; loan date and payment history.

13. With regard to the different account numbers complained of by the defendants, the plaintiff relies on the English case of ***Woolwich Building Society v Plane and others [1997] Lexis Citation 2135*** to support their point that it is satisfactory for them to have substituted the account numbers of the defendants. In *Plane* the building society substituted an account number that had been used earlier in the mortgage with another account number while crediting the former account with the same balance. The Court concluded that this substitution did not prevent the mortgage debt being satisfied under the earlier account. They cite the dicta of Mummery LJ and Schiemann LJ as follows:

"The fact that, as between their son and the building society the account number has been changed, has no effect on the rights of the society as mortgagee in respect of the property. It is identified in the occupancy form and is subject to the particular mortgage which the society seeks to enforce."

14. Further, the plaintiff submits that they are in fact compliant with Order 77 Rule 4 RSC as they have provided the defendants as specified with the amount of arrears.

15. They also submit that their claim that the defendants are in arrears on the mortgage loan has gone unchallenged. They say that no evidence has been proffered to contradict their evidence of what the defendants actually paid on the mortgage loan. The plaintiff relies on the case of ***Citibank N.A. v Major [2001] BHS J. No. 6*** to make their point that, no evidence to impeach the mortgage security has been

produced by the defendants. They claim that the accounting before the Court is accurate, nonetheless they state that they are willing to concede that the lesser amount, that is, the amount reflected in the FCS of 15 October 2007 or the lesser amount of the BOS and FCS, is what is owed on the mortgage. The difference in the amounts on the mortgage loan at the material time being \$30,327.70.

16. The defendants did not address this proposition by the plaintiff. However, they do say that in addition to the discrepancies listed in their submissions, they have been saddled with “unknown and additional loans added in together with legal cost” by the plaintiff. The Court of Appeal having ordered the parties to bear their own costs of the appeal, they say that this should not be so.

17. While the defendants do not elaborate on what they deemed to be unknown and additional loans, upon examining the mortgage account statement dated 12 August 2019 exhibited by both parties to this action, there are legal fees added to the account on 6 July 2017; 8 December 2017; 12 March 2018; 17 September 2018; 13 December 2018 and 25 March 2019. Indeed, the legal fees added to the account on 13 December 2018 and 25 March 2019 are after the Order of the Court of Appeal was handed down.

18. The plaintiff does not address this complaint by the defendants in light of the Court of Appeal’s Order or for any other reason.

#### Disposal

19. The defendants have not brought or even suggested that there is evidence that they are not in arrears on their mortgage and are not responsible for any such arrears thereon. They simply contend that the plaintiff has not provided a proper accounting of the mortgage loan from its inception. Indeed the Court of Appeal did not find that the plaintiff had given a proper accounting. The entire purpose of such an accounting, as opined by Evans JA, was to allow the Court below to verify the judgment amount.

20. I do not find that the plaintiff has met the Court of Appeal's mandate to provide an accurate accounting to the defendants and the Court, in order to enable the judgment amount to be verified.

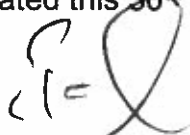
21. Even if I am able to accept the explanations provided by the plaintiff for the discrepancies in the mortgage loan account and allow them to use the lesser amount reflected by the FCS, there has been no explanation given for legal fees being added to the account, particularly those listed after the Court of Appeal judgment.

22. While the plaintiff has not in my opinion provided the necessary accounting mandated by the Court of Appeal, I am not persuaded that the defendants should be granted the dismissal of the plaintiff's Originating Summons as sought. It is an apparently undisputed fact that the defendants are in arrears on their mortgage loan, the Court of Appeal's judgment did not appear to find otherwise.

23. The Writ of Possession having been stayed by the Court of Appeal, the plaintiff has not satisfied this Court that the Stay imposed should be lifted. I will grant the plaintiff an additional 90 days to provide a satisfactory accounting to include an explanation for the legal fees that were applied to the defendants' mortgage account or to have such fees removed and the account adjusted accordingly to reflect the true balance. The Stay of the Writ of Possession to continue pending the accounting by the plaintiff.

24. There shall be no order as to costs.

Dated this 30<sup>th</sup> day of June 2021

A handwritten signature in black ink, appearing to be 'I. R. Winder', written over a horizontal line.

Ian R. Winder

Justice