COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 141 of 2023

IN THE MATTER of the property comprised in a Mortgage dated 15th day of January, A.D., 2005 made between Harrison Williams and Joann Buchanan as Borrows and National Workers Co-operative Credit Union Ltd. as Lender.

B E T W E E N

HARRISON WILLIAMS

AND

JOANN BUCHANAN

APPELLANTS

AND

NATIONAL WORKERS CO-OPERATIVE CREDIT UNION LTD.

RESPONDENT

BEFORE: **The Honourable Mr. Justice Evans, JA**
The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Smith, JA

APPEARANCES: **Mr. Geoffrey Farquharson, Counsel for the Appellants**

Ms. Shannelle Smith-Bethell, with Ms. Lashanda Bain, Counsel for the Respondent

DATES: **10 October 2023; 29 February 2024; 23 April 2024; 22 May 2024**

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Civil appeal – Mortgage action – Money lender's action - Judge's duty to give reasons — Default on mortgage – Effect of non-compliance with Order 77 rule 4 – Amount due under the mortgage - Rules of the Supreme Court Order 73 and Order 77

The Respondent brought an action by way of Originating Summons against the Appellants pursuant to a mortgage dated 15 January 2005. The court below found in favour of the Respondent and firstly, ordered the Appellants to deliver the mortgaged premises to the Respondent by 12 October 2023, secondly, granted judgment against the Appellants in the sum of $361,828.53 with interest and thirdly, ordered the Appellants to pay the Respondents costs of the action in the sum

of $5,000. The Appellants now appeal that decision and call on this Court to make a determination on four issues: whether the orders of the trial judge ought to be set aside for his alleged failure to give reasons, whether the orders of the trial judge ought to be set aside for following a wrong procedure, whether the Originating Summons should have been dismissed for non-compliance with the Rules of the Supreme Court and whether the Originating Summons should have been dismissed for lack of evidence of default on the mortgage.

Held: appeal allowed. Matter remitted to the Supreme Court for the taking of an account upon the directions of the trial judge. The order for possession is stayed pending the taking of account. Upon the completion of the said account, the Respondent shall be at liberty to enter judgment against the Appellants for any sum found or certified as due to the Respondent together with interest and costs and the Appellants are to deliver vacant possession of the property comprised in the mortgage between the parties dated 15 January 2005, within a period of time after the taking of the account as determined by the trial judge. The issue of costs is reserved and will be decided on the papers. Counsel for the Appellants is to provide written submissions on costs by 19 June 2024. Counsel for the Respondent is to provide written submissions by 26 June 2024.

A trial judge is not bound to identify every argument put forward nor give reasons as to why he accepted some arguments and rejected others. However, he is bound to indicate the reasons why he came to his conclusions. Such reasons need not be elaborate, and will vary with the nature of the matter before him. The notes of the learned judge sufficiently explain the reasons why he came to his decision.

Relative to the complaint that the incorrect procedure was utilized, the trial judge found as a fact that he was dealing with an action on a mortgage. It was a finding he was entitled to arrive at. In the circumstances, Order 77 of the Rules of the Supreme Court is applicable.

The failure to detail the interest charged, or the installments in arrears (see RSC Order 77 Rule (4) (3) (c)) and the amount of a day's interest (see RSC Order 77 Rule (4) (7))) do not vitiate the Originating Summons herein since there has been substantial compliance with Order 77 in spite of these failings.

The Respondent accepts that there are some discrepancies as to the actual state of the loan account. The Respondent conceded that a proper account of the state of the loan should be provided and voiced no opposition to a stay of the possession order pending a proper accounting exercise.

Bahamasair Holdings Ltd v Messier Dowty Inc. [2018] UKPC 25 mentioned
Citibank N.A. v Hutchinson [1996] BHS J No 127 mentioned
English v Emery Reinbold and Ors (CA) [2002] 3 All ER 385 considered
James Morley v Family Guardian Insurance Co. Ltd. SCCivApp No. 205 of 2012 followed
Philip A. Mitchell and Anor v Finance Corporation of The Bahamas SCCivApp. No. 109 of 2014 considered

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Smith, JA:

INTRODUCTION

1. The Respondent/Mortgagee brought an action against the Appellants/Mortgagors pursuant to a Mortgage dated 15 January 2005 claiming, inter alia, delivery of the mortgaged premises and the payment of sums due under the mortgage.

2. The trial judge who heard the action ordered that:

(i) The Appellants deliver the mortgaged premises to the Respondent mortgagee within 120 days of the date of the Judgment, specifically, by 12 October 2023.

(ii) The Respondent was granted judgment against the Appellants in the sum of $361,828.53 with statutory interest from the date of the Judgment until paid in full.

(iii) The Appellants were to pay the Respondent's costs of the action in the sum of $5,000.00.

3. The Appellants now appeal the orders of the trial judge on the many grounds that will be dealt with in this judgment.

4. I would allow this appeal and order that this matter be referred back to the Supreme Court for the taking of an account upon the directions of the trial judge. Further, the order for possession would be stayed pending the taking of the account. I would also make consequential orders for the entry of judgment by the Respondent, and the delivery of vacant possession of the property secured by the mortgage by the Appellants upon the taking of the said account.

BACKGROUND FACTS

5. The Respondent brought this action by way of an Originating Summons against the Appellants pursuant to a mortgage dated 15 January 2005. This Originating Summons was filed on 25 February 2002 and supported by an Affidavit of Alfred Poitier filed on 25 February 2022 and

also by Supplemental Affidavits of one Hagah Strachan. The Appellants filed Affidavits in response to the Originating Summons.

6. The Summons came on for hearing before the trial judge on four occasions, namely 26 April, 25 May, 12 June, and 13 June 2023. On 13 June 2023 the trial judge gave a short ex tempore judgment for the very brief reasons that are reflected in his notes. Since those reasons are very short, I cite them out hereunder:

> **"CT - notes that mortgage entered into breached and reconfigured in 2008 – when defendants had been in breach-promissory note therefore issued-but secured by the initial mortgage pursuant to the all moneys clause.**
>
> **CT - also notes the contention that the mortgage should have been concluded in 2020, but notes that the defendants acknowledge changed business circumstances which resulted in payments of less than half the agreed amount, which would have effect of extending mortgage. Court also notes change in October 2008 when promissory note signed. Notwithstanding suggestions by Counsel that no promissory note was signed, nothing in Affidavit of Defendants to substantiate this, no evidence given of any perjury.**
>
> **CT-satisfied of the facts and the law that Defendants in breach, Plaintiff entitled to relief sought – (Citibank v Paul Major).**
>
> **Judgment for Plaintiff for $361,828.53 as at 25.4.23, interest at contractual rate to date of judgment, statutory rate thereafter…".**

7. The Appellants have advanced 9 grounds of appeal, 8 of which can be described as specific grounds and the 9th of which can be described as a "sweep all" ground which purports to appeal **"any other matters as may become apparent when the learned judge condescends to render a written ruling."**

8. To date we have not received a formal written ruling from the trial judge and the appeal has proceeded upon the short notes of the trial judge as stated at paragraph 6 above.

9. In addition to the 9 grounds of appeal referred to above, the Appellants advanced 4 written issues and expanded upon them in oral submissions at the Court of Appeal.

10. There has been much repetition, cross referencing and expansion upon the written grounds of appeal, the stated issues and the oral submissions and with the greatest of respect to all attorneys

and parties I have conveniently put all these together to distill 4 issues for determination. They are:

A. Whether the orders of the trial judge ought to be set aside for his alleged failure to give reasons;

B. Whether the orders of the trial judge ought to be set aside for following a wrong procedure;

C. Whether the Originating Summons should have been dismissed for non-compliance with the Rules of the Supreme Court (RSC); and

D. Whether the Originating Summons should have been dismissed for lack of evidence of default on the mortgage.

ANALYSIS

Issue A: The alleged failure of the trial judge to give reasons

11. This issue is reflected in grounds 7 and 8 of the Notice of Appeal which are as follows:

> **"Ground 7: The learned judge failed to give any reasons for his rulings; Ground 8: The learned judge failed to give any or any proper consideration to the matters relevant to the issues before him."**

12. A trial judge is not bound to identify every argument put forward nor give reasons as to why he accepted some arguments and rejected others. However, he is bound to indicate the reasons why he came to his conclusions. Such reasons need not be elaborate, and will vary with the nature of the matter before him. These principles are of general application especially for matters like these mortgage actions which are heard in chambers. These principles of law are well settled and expressed in the case **English v Emery Reinbold and Ors (CA)** [2002] 3 All ER 385 at paragraphs 17-19 where Lord Phillips MR cited:

> **"[17] As to the adequacy of reasons, as has been said many times, this depends on the nature of the case (see, for example, Flannery's case [2000] 1 All ER 373 at 378, [2000] 1 WLR 377 at 382). In Eagil Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119 at 122, Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:**
>
> > **'When dealing with an application in chambers to strike out for want of prosecution, a judge should**

> **give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he has acted… (see Sachs LJ in Knight v Clifton [1971] 2 AER 378 at 392 – 393, [1971] Ch. 700 at 721).'**
>
> **[18] In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions…**
>
> **[19] It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision…"**

13. From the notes of the trial judge on 13 June 2023 (the date of decision), cited at paragraph 6 above, it is clearly stated that:

- This was an action brought pursuant to the mortgage between the Appellants and the Respondent.
- The all moneys clause in the mortgage applied.
- The Appellants were in default because of their **"changed business circumstances."**
- The Appellants breached the terms of the mortgage.
- The Respondent is entitled to the relief sought.
- The Respondent is entitled to judgment in the sum of $361,828.53 as of 25 April 2023 plus interest at the contractual rate to judgment and thereafter to statutory interest.

14. This, in my view, is sufficient explanation of the reasons why the trial judge came to his decision. Admittedly, a more full and detailed written judgment would have been preferable but the absence of such a written judgment did not negate his reasons as stated above.

15. I therefore find that this issue and the grounds upon which it is based are without merit.

Issue B: The alleged wrong procedure

16. This issue is reflected in grounds 1, 2 and 5 of the Notice of Appeal which are stated below:

> **"Ground 1: The Learned Judge failed to apprehend that, contrary to law, the Respondent made application in the Court below under both Orders 73 and 77 when each rule gives exclusive jurisdiction to either actions for foreclosure under a mortgage or alternatively, other moneylending actions; Ground 2: The Learned Judge failed to apprehend that, on a true construction, the Respondent had commenced a mortgage foreclosure action pursuant to Order 77 and that the Application failed to comply with the mandatory requirements of that Order; Ground 5: The Learned Judge erred when after years of proceedings as a mortgage action, he allowed the matter to conclude as a moneylending action under a purported promissory note which had not been proved and which, in any event, failed to comply with the mandatory provisions of Order 73."**

17. The Appellants' argument is that this action should have been dismissed because of the uncertainty around the relevant order of the RSC which permits an application. They contend that a Money lender's Action (as they say this action is) should comply with Order 73 of the RSC whereas a mortgage action should comply with Order 77 of the RSC.

18. They go on erroneously to allege that this confusion is caused because the Originating Summons upon which this action is founded stated at paragraph 3 that the Respondent **"sets out the Particulars pursuant to Order 77 Rule 1 and/or Order 73 of the Rules of the Supreme Court."**

19. The short answer to this purported confusion is found in the trial judge's notes where he records that this was a mortgage entered into and breached and which breach entitled the Respondent to relief.

20. This is a finding of fact that the trial judge was entitled to arrive at namely, that he was dealing with an action on a mortgage. Further, I am of the view that this finding of fact is not plainly wrong so as to be revised on appeal. (see generally **Bahamasair Holdings Ltd v Messier Dowty Inc.** [2018] UKPC 25.

21. That being the case, the provisions of Order 77 of the RSC are applicable and not Order 73. As Allen J (as she then was) authoritatively stated in **Citibank N.A. v Hutchinson** [1996] BHS J No 127 and has been accepted as correct by the Court of Appeal in many cases e.g. **Philip A. Mitchell and Anor v Finance Corporation of The Bahamas** SCCivApp. No. 109 of 2014 at paragraphs 32 and 33:

> **"32. In dealing with the interpretation of Order 73 of the RSC and Order 77 of the RSC, Allen J. said:**
>
> > **'There is no provision in the Rules which require that mortgage actions to which Order 77 applies are subject also to Order 73. But Order 77 does not include actions to which section 3 of the Money Lending Act applies as does Order 73. In construing the two orders and applying the aforesaid rule of construction as laid down by Romilly M.R., I find that Order 77 applies to all mortgage actions as therein defined other than mortgage actions to which section 3 of the Money Lending Act applies. Order 73 applies to all money lending actions other than those to which Order 77 applies.'**
>
> **33. I accept the above statements to be an authoritative statement of the law applicable here. The particulars required to be set out in Order 73 of the RSC are not essential in an Originating Summons commencing a mortgagee action under Order 77 of the RSC."**

22. In addition to the factual finding of the trial judge on this issue which I accept as correct, one only has to look to the heading of the Originating Summons and Affidavits filed in this matter which recite that this is:

> **"IN THE MATTER of the <u>property comprised in a mortgage</u> dated the 15th day of January, A.D., 2005, made between Harrison Williams and Joann Buchanan as borrowers and National Workers Co-operative Credit Union as Lender" [Emphasis added]**

23. Further, the Affidavit of Alfred Poitier which was filed in support of the Originating Summons set out the particulars of the terms in the mortgage relied on, and some of the material particulars as specified by Order 77 Rule 4 of the RSC.

24. I therefore find that this issue and the grounds upon which it is based are without merit.

Issue C: Compliance with the Rules of Court

25. This issue is reflected in grounds 6 and 3 of the Notice of Appeal which are stated as follows.

> **"Ground 6: The Learned Judge erred when he admitted into the proceedings an affidavit sworn by counsel to the Respondent when that affidavit had not been served on the Appellants as required by law; Ground 3: The Learned Judge failed to apprehend that whether application was made under O.73 or 77, the Respondent's Application failed to comply with the relevant law.**

26. Ground 6 is wholly unfounded. Counsel for the Respondent did not swear to any Affidavit in these proceedings. One Hagah Strachan, an employee of the attorney for the Respondent, swore to two supplemental Affidavits in support of the Originating Summons but there is no prohibition against this.

27. As for ground 3 above, Order 77 Rule 4 of the RSC provides that certain facts must be contained in the Affidavits, in support of an Originating Summons brought under Order 77. The relevant provisions are as follows:

> **"4. (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule. This rule applies to a mortgage action begun by originating summons in which the plaintiff is the mortgagee and claims delivery of possession or payment of moneys secured by the mortgage or both.**
>
> **(2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.**
>
> **(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises, and, except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of:**
>
> **(a) the amount of the advance;**

(b) the amount of the repayments;

(c) the amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit;

(d) the amount remaining due under the mortgage

(4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the mortgage property.

(5) …

(6) Where the plaintiff claims payment of moneys secured by the mortgage, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest."

28. At issue on this appeal are the provisions of Order 77 Rule 4 (3), (4), (6) and (7).

29. With respect to the requirement at Rule 4 (3) (a), Counsel for the Appellants in oral submissions sought to raise an issue with respect to the amount of the advance under the mortgage. Namely, he alleged that this amount has not been stated; for whereas the mortgage is dated 15 January 2005, the Affidavits in support speak to an advance on 23 October 2008. Counsel suggests that there is no mortgage in 2008, hence this action is not properly a mortgage action.

30. This submission is unfounded. Only one mortgage was granted to the Appellants by the Respondent, that is the mortgage of 15 January 2005 as mentioned in the Originating Summons and the supporting Affidavits. However, the Affidavits of Hagah Strachan show clearly that after persistent defaults by the Appellants, and pursuant to the "all moneys clause" in the mortgage, the original loan was refinanced on 23 October 2008 and further secured by a promissory note. No further mortgage was made. This was all permissible and legal pursuant to the all moneys clause in the mortgage which states at clause 5 (2):

"5(2) Notwithstanding anything herein contained it is agreed that the Lender shall be at liberty without thereby affecting its rights hereunder at any time (i) to determine or vary any credit to the Borrower (iii) to renew bills and promissory notes in any manner and to compound with or give time for payment or to accept compositions from and make any other arrangements with Borrower or any persons liable on bills notes or other securities held or to be held by the Lender for on behalf of the Borrower."

31. These facts were expressly referred to and accepted by the trial judge in his short note where he stated:

> **"CT - …mortgage entered into, breached and reconfigured in 2008 - when defendants had been in breach – promissory note therefore issued – but secured by the initial mortgage pursuant to the all moneys clause."**

32. With respect to compliance with the provisions of Order 77 of the RSC, the Affidavits of Mr. Poitier and Ms. Strachan which were filed in support of the Originating Summons gave most of the information as required by Order 77 Rule 4 namely:

- They exhibited a true copy of the mortgage (Rule 4 (2))
- They stated the amount of the advance (Rule 4 (3) (a))
- The amount of the repayments (Rule 4 (3) (b))
- The amount remaining due under the mortgage (Rule 4 (3) (d))
- The particulars of the persons in possession, namely the Appellants (Rule 4 (4))
- That the mortgage money is due and payable (Rule 4 (6))

33. However, the Affidavits did not give particulars of the interest or installments in arrears as required by Rule 4 (3) (c); nor did it state the amount of a day's interest as required by Rule 4 (7).

34. Nevertheless, these shortcomings in the Affidavit do not necessarily vitiate the mortgagee's Originating Summons. Once the major terms of the mortgage are set out, the Summons can still proceed. This was well stated by Allen, P. in the case **James Morley v Family Guardian Insurance Co. Ltd.** SCCivApp. No. 205 of 2012, where at paragraphs 10 through 13, similar omissions as occurred here were held not to vitiate the Originating Summons. Because of its direct relevance to this appeal, I repeat those paragraphs below:

> **"10. The affidavit exhibits a copy of the mortgage, shows the circumstances under which the right to possession arises, indicates the amount of the advance, the amount of the repayments, both the amount of interest due at the date of the affidavit and the amount of installments due at the date of the originating summons and affidavit, and it also states the principal amount due. Further, exhibited to the affidavit is the appellant's statement of account, as at the date of the affidavit, detailing the amount owed by the appellant and the corresponding date and interest rates.**
>
> **11. In light of the above, we fail to understand and cannot agree with the appellant's assertion that the affidavit did**

not comply, at all, with the requirements of Order 77 r. 4. While it is noted that the affidavit does not describe, as required by sub rule 4, every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property; and while it is also true that the affidavit does not state the amount of a day's interest. It is by no means possible to say or to infer that the affidavit is so deficient that the court is unable to consider the application of equitable principles to the claim, as alluded to by Lyons J, in Citibank N.A. v Hutchinson [2004] BHS J. No.442.

12. In any event Order 2 of the Rules of the Supreme Court clearly states, that

> **'1. (1) Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.**
>
> **(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.'**

It was well within the jurisdiction of the trial judge to continue these proceedings despite an irregularity in the pleadings. In the present case the learned trial judge must have considered the information provided in the affidavit as sufficient.

13. <u>In the premises, although the affidavit filed on behalf of the respondent failed to comply with the provisions of</u>

> **Order 77 of the Rules of the Supreme Court in that it did not include every particular prescribed by the Order; we nevertheless find that the affidavit complies in all material particulars. As such ground 2 of the appeal must fail." [Emphasis added]**

35. Similarly, I am of the view that this failure to detail the interest charged, or the installments in arrears (see RSC Order 77 Rule (4) (3) (c)) and the amount of a day's interest (see RSC Order 77 Rule (4) (7)) do not vitiate the Originating Summons herein since there has been substantial compliance with Order 77 in spite of these failings.

36. However, as will appear in my decision of issue (D) below, these failings could have an effect on the outcome of the Originating Summons as happened in the **Morley** case.

Issue D: Evidence of Default

37. This issue is reflected in Ground 4 of the Notice of Appeal which is stated as follows:

> **"Ground 4: The Learned Judge failed to apprehend that the affidavit sworn in support of the Respondent's Application contained manifest falsehoods including but not limited to the assertion contained at paragraph 8 that the Deponent was not aware that the Appellants had made any payments to any third party for onward credit to the Respondent when in fact the Deponent was intimately aware that years of the mortgage payments had been made to the Bahamas Hotel 'Workers' Union by salary deduction for onward payment to the Respondents but had been larcenously appropriated by the Union's employees."**

38. The Originating Summons was at first supported by the Affidavit of Mr. Alfred Poitier. In that Affidavit, Mr. Poitier set out, inter alia, the state of the loan granted to the Appellants pursuant to the mortgage.

39. The Appellants then filed Affidavits in opposition and in their Affidavits made certain allegations which Counsel says put doubt upon the evidence of Mr. Poitier as to the state of the loan. In oral submissions, Counsel for the Appellants made special reference to the Affidavit of the Appellant Harrison Williams and stressed the following allegations to us:

- Between paragraphs 26, 30 and 32 of the Affidavit, while Mr. Williams gives the reason for defaulting on the loan, he also refers to alleged compromises with the Respondent regarding the repayment of the loan;
- At paragraph 30 Mr. Williams alleged that the Respondent received a total of $600,254.99 in loan repayment from the Appellants;

- At paragraph 31, Mr. Williams alleged that his total of repayments under the mortgage should have been $396,000.00; and
- At paragraph 34 Mr. Williams alleged that the Respondent received some $254,254.94 above what was due under the mortgage.

40. However, let me say from the outset that there is no accounting or record from the Appellants as to how their calculations were arrived at. Specifically, how it is that the overpayments amount to $254,254.94 when the total alleged payments ($600,254.99) less the alleged total payable under the mortgage ($396,000.00) would reveal a sum of $204,254.94 as the alleged overpayment.

41. In summary, the allegations of Mr. Williams were unsubstantiated and uncorroborated.

42. In any event, Hagah Strachan responded to these allegations and gave a full account of the inaccuracy of the allegations made by Counsel for the Appellants as to the state of the loan between the parties. Ms. Strachan actually annexed a full history of the loan from inception in 2005, consolidation in 2008, and ending in May 2023. (see H.S. 1 annexed to the Affidavit of Ms. Strachan sworn to on 9 June 2023).

43. In that response Ms. Strachan explained that the sum of $660,254.00 was the total value of the mortgage and promissory note, which would have to be repaid by the Appellants. Further, the total amount of repayments made by the Appellants from 2005 to 2023 were $215,457.02 while the total disbursement to the Appellants was $430,536.74. Therefore, on any calculation, the Appellants were seriously indebted to the Respondent.

44. This was the state of the loan on the evidence before the trial judge and he was entitled to act on the evidence as verified by Mr. Poitier and Ms. Strachan as opposed to the unsubstantiated and uncorroborated allegations of the Appellants.

45. However, as Counsel for the Respondent conceded in oral submission, there are some discrepancies as to the actual state of the loan account, such as:

- The amount of interest charged and/or payable under the loan. This is not stated in any of the Affidavits nor the accounts of the Respondent's witnesses. This is very relevant because the trial judge's notes indicates that he awarded "contractual interest" to the Respondents without identifying what that rate was or the date from which it would be calculated. Therefore, this sum of interest awarded could not be ascertained on the facts before the court. Also, the judgment in the sum of $361,828.53 which the trial judge awarded to the mortgagee may already have included interest and there may be a double compounding of interest as awarded.

- There are discrepancies as to the amount of money actually advanced to the Appellants; according to Mr. Poitier, this sum was $388,462.52. According to Ms. Strachan, this sum was $361,828.53. According to the annexure H.S.1, referred to above, it is $430,526.74. Yet the trial judge gave leave to the Respondent to enter judgment for the sum of $361,828.53 without any explanation as to why this sum was chosen.
- There is no calculation of the daily rate of interest accruing on the loan as is required by Order 77 Rule 4 (7).

46. Counsel for the Respondent also properly conceded that the Respondent should provide a proper account of the state of the loan and voiced no opposition to a stay of the possession order pending a proper accounting exercise.

47. In fact, this outcome is in accordance with what was done in the **Morley** case cited above where there were obvious discrepancies in the state of the loan account between the parties.

48. In the circumstances I would make the following orders:

1. The appeal is allowed.
2. The matter is referred back to the Supreme Court judge for directions to enable the taking of an account of the state of the loan between the Appellants and the Respondent.
3. The Order for possession is stayed pending the taking of the account.
4. Upon the completion of the said account, the Respondent shall be at liberty to enter judgment against the Appellants for any sum found or certified as due to the Respondent together with interest and costs and the Appellants are to deliver vacant possession of the property comprised in the mortgage between the parties dated 15 January 2005, within a period of time after the taking of the account as determined by the trial judge.
5. The issue of costs is reserved and will be decided on the papers. Counsel for the appellants is to provide written submissions on costs by 19 June 2024. Counsel for the respondent is to provide written submissions by 26 June 2024.

The Honourable Mr. Justice Smith, JA

49. I agree.

The Honourable Mr. Justice Evans, JA

50. I also agree.

The Honourable Madam Justice Charles, JA