

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

Common Law and Equity Division

2020/CLE/GEN/00356

IN THE MATTER OF Property comprised in a Mortgage dated the 24th day of June A.D., 2008 between **CUBE W. ENTERPRISES** and **SCOTIABANK (BAHAMAS) LIMITED** and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 11850 at pages 336 to 354.

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

B E T W E E N

SCOTIABANK (BAHAMAS) LIMITED

Plaintiff

AND

CUBE W. ENTERPRISES LTD.

First Defendant

AND

**THE ESTATE OF WARREN WOODROW WILSON
(Guarantor)**

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Eugeina Butler for the Plaintiff

Rionda Deleveaux-Godet for the Defendants

24 June 2021 and 16 July 2021

JUDGMENT

WINDER J

This is a mortgage action brought by the plaintiff (the Bank) for the recovery of sums due under the mortgage entered into between the Bank and the first defendant (Cube). The obligations of Cube under the mortgage was guaranteed by Warren Woodrow Wilson (Wilson).

Background

[1.] By a mortgage made between the Bank and Cube dated the 24 June 2008 and recorded in the Registry of Records in Volume 11850 at pages 336 to 354 Cube, as beneficial owner, granted and conveyed to the Bank certain property subject to the mortgage. The Borrower in the Mortgage Deed is described as Cube W Enterprises Ltd. C/O Mr Warren Woodrow Wilson.

[2.] Wilson was the beneficial owner and President of Cube. Wilson guaranteed the mortgage by separate Guarantee dated 23 June 2008 made between himself and the Bank and recorded in the Registry of Records in Volume 11850 at pages 322 to 325.

[3.] A facility/commitment letter, dated 5 May 2008, which was issued by the Bank to Wilson (as Borrower) provided as follows:

Mr. Warren W. Wilson
P.O. Box N 9932
Nassau, Bahamas.

Dear Mr. Wilson,

We are pleased to confirm that subject to your acceptance, Scotiabank (Bahamas) Limited ("The Bank") will make available to you ("The Borrower"), a mortgage facility on the following terms and conditions:

BORROWER (S): Warren W. Wilson
TYPE OF CREDIT: First Demand Legal Mortgage
AMOUNT: \$224,000.00
PURPOSE: Purchase – Owner Occupied Triplex

AVAILMENT: By way of direct advances evidenced by Promissory Notes after all security is in place.

CURRENCY: Bahamian Dollars

INTEREST RATE: The Bank's Bahamian Dollar Base Lending Rate as determined from time to time (presently 5.5%) plus 3.5% per annum, present effective rate – 9.0% per annum with interest payable monthly. This interest rate is variable and subject to change as the bank may from time to time determine.

COMMITMENT FEE: 2% Non-refundable fee of the amount borrowed or \$4,480.00 is payable upon acceptance of this letter along with a \$75.00 application fee.

LATE FEES: \$20.00 on all payments of five days or more in arrears.

REPAYMENT: Repayment in 360 monthly installments at \$1,802.35 per month commencing one month following date of loan processing.

GENERAL SECURITY: The following is to be held in support of the mortgage and evidenced in documents of which, form and content are acceptable to the Bank.

1. First Demand Legal Mortgage over Lot # 60-B, Miller's Pond Subdivision, stamped and registered to secure advances up to 224,000.00.
2. Assignment of Comprehensive Homeowners Insurance.
3. Assignment of Life Insurance to secure advances up to \$224,000.00.

TERMS & CONDITIONS:

1. Draw down may not be allowed until written confirmation is in place from the Bank's attorneys confirming documents have been prepared in accordance with the Bank's mortgage policy and it is safe to advance funds.
2. The mortgage is to be in the mortgagor's name and any other name if the property is so registered.
3. All costs in connection with the processing of the loan, including but not limited to, mortgage registration fees, legal fees inspection fees, stamp duties and other disbursements of a like nature will be borne by the mortgagor.
4. A current property tax receipt will be provided by the mortgagor on an annual basis evidencing taxes are up-to-date.
5. The Bank will have the right at any time to inspect the property, including the building thereon, held as security for the mortgage.
6. The mortgage deed should contain the usual form of covenant against transfer of the mortgaged property during the term of the mortgage which includes any sale, parting with possession, leasing, letting or mortgaging without first obtaining the Bank's approval in writing.
7. The Bank reserves the right to withdraw the offer of the loan if at any time before the loan is drawn down, any of the information submitted in connection with application is found in the Bank's opinion to be incorrect

or misleading or if any changes in the borrower's circumstances take place which the Bank in its sole discretion determines to be unacceptable.

8. On the third anniversary date of the final Promissory Note, and each succeeding third anniversary, the Bank may, BY NOTICE IN WRITING, change the rate of interest to be applied to the principal then outstanding and further charge the amount of the monthly installments of principal and interest, adjusted to reflect such change in the rate of interest. Prepayments/payouts at this time are permitted without penalties.

9. Prepayment of the balance outstanding prior to maturity date attract a prepayment charge equal to 90 days interest calculated on the full amount of the prepayment.

10. Prepayments/Lump-sum (minimum \$500.00) of up to 15% of the original mortgage amount in any calendar year are not subject to penalties. However, prepayments that are in excess of 15% of the original mortgage amount in any calendar year are subject to a 90-day interest penalty on the prepaid amount in excess of the 15% threshold.

If the terms and conditions set above are acceptable to you, please indicate your acceptance of this offer by signing the enclosed copy of this letter and returning it to the attention of the undersigned. If this offer is not accepted within fourteen (14) days of the date of this letter the offer will lapse.

Yours sincerely,

Brenda Bethel (Mrs.)
Manager

Warren W. Wilson

[4.] Clause 5 (g) of the Mortgage provides:

The Borrowers hereby covenant with the Bank as follows:-

(g) (i) That during the continuance of this security the Borrowers will at their own expense keep in effect with such insurers as the Bank may select a Mortgage Redemption Policy on their life for an amount equal to the reducing balance of the principal during the mortgage period and will assign the benefit of the said policy to the Bank AND ALSO will deliver to the Bank the said policy and the receipt for any premium payable in respect thereof.

(ii) If any such life policy as aforesaid shall become voidable or void the Borrowers will forthwith do all things necessary for keeping the same on foot if voidable or if the same shall become void for effecting a new policy for a like sum to that assured by such void policy and for assigning the new policy to the Bank.

(iii) If default shall be made to the Borrowers in regard to their obligation in respect of life insurance hereunder it shall be lawful for the Bank to fulfill such obligation whether by effecting a policy or paying a premium or otherwise and all money expended by the Bank in relation to any such fulfillment shall be deemed to be added to the Principal and shall bear interest and be secured and payable accordingly.

(iv) That every life policy effected hereunder and all monies to be received by the Bank thereunder shall be held by the Bank by way of collateral security for the payment of the Principal and subject thereto in trust for the Borrowers.

[5.] Clause 12 (c) of the Mortgage provides that the statutory power of sale shall be exercisable at any time after the money owing on the Security shall have become payable after 21 days. The agreed monthly mortgage payment was \$1,802.35. The last payment on the mortgage was the 30 January, 2017 in the sum of \$1,689.49.

[6.] Wilson died on 17 January 2017. On 27 November 2017, Letters of Administration was issued by the Supreme Court to Laverne Wilson, Wilson's lawful widow.

[7.] By letter dated 4 May 2017 the Bank's Branch Manager wrote to the attorneys for Wilson's estate in the following terms:

We refer to the subject of your letter dated 27 March 2017. Please note that the subject mortgage does not have an insurance policy attached. Life insurance is an optional feature which is solely the responsibility of the customer.

[8.] By letter dated 11 June 2018 the Bank's Legal Director wrote to the attorneys for Wilson's estate in the following terms:

Our Branch, in the review of Mr Wilson's (the deceased) file, has determined that the insurance was not taken out.

Additionally, on review of the monthly statement it has been determined that no payments were taken out for insurance.

The total balance on the loan to date is \$225,360.33 with a per diem of \$43.27.

[9.] The Bank says that it was the responsibility of Wilson to complete and provide to the Bank a copy of his personal life insurance policy naming the Bank as beneficiary. This assignment of Wilson's personal life insurance, the Bank says, was not a requirement for the loan to be finalized and funds disbursed. Wilson, they say, failed to assign his personal life insurance policy to the Bank.

[10.] By letters dated 12 July 2019 and 20 January 2020 the Bank demanded payment of the outstanding amounts. The Bank also gave 30 days' notice to the Defendants of its default and the Bank's intent to proceed by way of court action and in accordance with the Home Owners' Protection Act, 2017.

[11.] The Defendants say that while it was the responsibility of Wilson to complete and provide the Bank with a copy of his personal life insurance policy naming the Bank as beneficiary, he completed the relevant Bank form for insurance coverage as he was instructed to do, with the understanding that the Bank's representative would have referred his application to its internal ally for such coverage. The Defendant says that the Bank, contrary to its own provisions failed to do so.

[12.] The Defendants also say that because the Bank did not remit the duly executed Insurance Form, as it had indicated it would have, and because the Bank failed to facilitate its own documented checks and balances, it evolved that the Second Defendant's personal life insurance policy was never taken out, nor was the Bank named as a beneficiary thereto.

[13.] The Defendants further say that having the Bank's personal life insurance assigned was a clearly documented requirement for the loan to be finalized and funds disbursed, as per the Bank's facility letter which required the Bank's attorneys to verify in writing that all documents were duly prepared in accordance with the bank's mortgage policy and it was indeed safe to advance funds.

[14.] The Bank says that the primary security for the mortgage was not the personal life insurance policy but is in fact the mortgaged premises. As such, once the mortgage deed was fully executed by the parties, the loan was materialized.

[15.] The action was commenced by Originating Summons seeking relief as follows:

BY THIS SUMMONS the Plaintiff claims against the Defendants pursuant to Order 77 of the Rules of the Supreme Court 1978:-

1. Payment of monies secured by the Mortgage.
2. Delivery of possession to Scotiabank (Bahamas) Limited of all that piece or parcel of land referred to in the said Mortgage.
3. The said Mortgage is enforced by sale.
4. Further and other relief.
5. Costs.

[16.] As a result of the factual disputes it was agreed that the evidence would be accepted by affidavit with the deponents subject to cross examination on their evidence. The Bank called Richard Desmangles as a witness in its case. The Defendants relied on the evidence of Demario Duncombe and Laverne Wilson.

[17.] The evidence of Desmangles, in his witness statement, provided:

...

2. That the insurance assignment form ... attached to the Affidavit of Lavern Wilson filed on the 3rd December, 2020 is indeed a form that is completed in the beginning stage of the mortgage application. This form is usually completed in triplicate. One copy is kept in branch and two copies given to the customer for completion by his insurance company, which the Plaintiff would be noted as Loss Payee. Once completed, the form will accompany the customer's Life Insurance Policy Contract to be held along with the Plaintiff's collateral.
3. It is to my knowledge that once the Plaintiff is noted as Loss Payee it is now referred to as the beneficiary or the assured. With the Plaintiff being the beneficiary, any and all claims made on the policy must be paid directly to the Plaintiff.
4. Upon reviewing the insurance assignment form, as noted in paragraph 3 herein, I can determine that the form was partially completed and did not include any Life Insurance information, nor was a Loss Payee identified on the form. The form also does not speak to any premiums to be deducted from the Borrower's account.

...

7. I can also speak to the Borrower's commitment letter (facility letter) ..., which speaks to the general securities being 1. First Demand Legal Mortgage over Lot 60-B, Miller's Pond Subdivision stamped and registered to secure \$224,000.00. 2. Assignment of Comprehensive House

Insurance and 3. Assignment of Life Insurance to cover \$224,000.00. The above conditions are part in parcel of the normal practice of the Plaintiff; however, the life insurance is an optional security and the real estate is the Plaintiff's primary security.

8. ..[T]he Plaintiff will take all measures to secure its asset by applying an add on charge to the mortgage for the house insurance premiums. However, the Plaintiff does not take any measures to secure premiums for life insurance policies that may lapse, as the life of the Borrower is not the Plaintiff's primary security.

...

10. Further to reviewing the letter from former Branch Manager, Sandevar Sandi dated May 4th, 2017 ... in the Affidavit of Lavern Wilson filed on the 3rd December, 2020, I must agree with the statement that Life Insurance is an optional feature and is solely the responsibility of the Borrower.

...

[18.] The evidence of Duncombe in his witness statement provided:

...

3. [R]eferred to in the Affidavit of Laverne Wilson, a copy of the Assignment of Life Insurance Policy Form provided by Scotiabank, which was duly signed by the [Wilson] on the 26th June 2008 and thereafter witnessed and stamped by me. At that requisite time, I would have been reviewing original documents as the Application process was still a work in progress. At that stage, all that was required was for the Bank to be named as the Loss Payee on the Assignment of Life Insurance Policy Form.

4. As part of its due diligence, I am aware that the Plaintiff would have individuals in its Securities Department vet each document so as to protect the bank's security and thereby, ensure that no mortgage funds would be released without the terms of the facility letter being fully satisfied. To the best of my knowledge, and as was our practice, I would have printed and executed three copies of the Assignment Letters and retained one on our files, and given the [Wilson] the remaining two copies to take to his insurance company. He was expected to return to the bank with one of them stamped by the Insurance Company. The customer would have to sign to accept the facility letter which would outline all the terms of the credit.

...

8. While I cannot speak specifically to what final arrangements were made concerning insurance assignment, I can say unequivocally that it was normal practice for the Plaintiff to have its security team vet each facility letter to ensure all requisite documents were in place before any payments were disbursed. No monies are paid out unless and until the Plaintiff is satisfied that appropriate arrangements have been made ab initio, to protect its interest. Moreover, it is

unusual that such a situation would ensue for almost ten years and the bank not call its Client in to address the same.

9. I am also shown the Plaintiff's Facility Letter dated 5th May 2008 and referred to in the Affidavit of Laverne Wilson, ... which I would have had sight of (being an earlier document) and which required the following; i) a First Demand Legal Mortgage over the subject property; ii) the assignment of Comprehensive Home owners Insurance and iii) the assignment of life insurance to secure up to the \$224,000.00 borrowed by the Defendants. The same relates to the Mortgage Agreement entered into and made between the Plaintiff and the First Defendant on the 24th day of June 2008 for the sum of \$224,000.00, for which Mr. Warren Woodrow Wilson, the Second Defendant, stood as guarantor.

...

11. [I]n the Affidavit of Laverne Wilson, a copy of the letter dated June 11th 2018 from the Plaintiff's Legal & Corporate Secretary's Office letter, which spoke to the absence of life insurance on the Deceased's file. It might be suggested that perhaps the matter may have been missed by the Security Team of the Bank, and the Plaintiff was in its right at any time during the mortgage period to request particulars of proof of coverage or assignment, given the loan extended from the year 2008 to 2017 when [Wilson] met his demise. It would have been prudent for them to exercise due diligence by confirming that the insurance policy was in place at the very least.

12. I am now shown the Plaintiff's letter dated May 4th 2017 from Branch Manager Sandevar Sandi, referred to in the Affidavit of Laverne Wilson ... wherein is stated that Life insurance is an optional feature which is solely the responsibility of the customer. That this statement would surprise me, given that terms of the Facility Letter were quite clear and unambiguous and required that insurance coverage be in place for funds to be disbursed. That in all the premises, the Plaintiff failed to exercise due diligence in protecting its own interest, as well as that of its borrower, by ensuring that the duly signed Insurance Assignment Form was properly submitted and applied for its benefit.

[19.] The evidence of Laverne Wilson in her first affidavit provided:

3. That I have read the Affidavit of Joseph V Albury, Back End Adjustor Site Rep of the Plaintiff and confirm that there was a Mortgage made between the Plaintiff and the First Defendant on the 24th day of June 2008 for the sum of \$224,000.00, for which my late husband, Warren Woodrow Wilson, as the Second Defendant, stood as guarantor. I accept and agree that the granting and disbursement of the said Mortgage was subject to the terms of the Facility letter being fulfilled. The Facility letter called for my late husband to have life insurance coverage in the event of his passing, during the life of the mortgage. As far as I am aware, my husband did all that he was required to do for insurance and

mortgage payments to be taken out by way of salary deductions to his account, over which the Plaintiff had full control.

...

6. I knew that this could not possibly be true, as my late husband had told me that he completed and signed the necessary insurance documentation provided to him by the Bank for their in-house coverage ... and turned it over to them for submission to their in-house carriers. When we enquired about the in-house insurance, they said that they were not aware of the same and referred us to the Oakes Field Branch, where my husband's loan file was actually located.

...

10. Since the Plaintiff at all times controlled the Second Defendant's bank account in which his salary deposits were made, it was always open to the Plaintiff to apply insurance premiums therefrom to ensure its own protection, as per the Facility Letter and the Assignment Form. That my late husband and I always believed that proper coverage was in place because the Plaintiff was to submit the Assigned Form to its carrier. In this case, the Plaintiff had a duty to protect both my late husband's interest, as well as its own, by ensuring everything was in place, and should be estopped from claiming otherwise.

...

The evidence of Laverne Wilson in her supplemental affidavit provided:

...

8. That I cannot help but observe that at page 8, Paragraph (iv) [of the Mortgage] makes clear and specific provision that:

"That every life policy effected hereunder and all monies to be received by the Bank thereunder shall be held by the Bank by way of collateral security for the payment of the Principal and subject thereto in trust for the Borrowers.

If this is the case, then the statement of Mr. Albury that the insurance policy was not the central security for the loan is not totally accurate, but was a collateral security which the Bank would hold in trust for the stated Borrowers. The Plaintiff Bank failed in its responsibility to protect the interest of all parties by ensuring that the subject life insurance was duly assigned, as there is no question that my late husband had signed the relevant form, and expected the Bank to convey the same to its selected insurer. In this regard, the bank should be estopped, by reason of its own culpability and failure, from further action in this matter.

...

10. That I cannot help but feel that the Bank failed in its duty to protect the interest of all parties as it was bound to do, and as Mr. Armbrister had openly declared to me, the neglect was on the Bank's part because life insurance coverage should have been in place before mortgage funds were disbursed. The fact that the Bank required its own attorneys to declare in writing that everything was done that needed to have been done in accordance with the Facility Letter demonstrates the gravity of the matter. Further, the fact that there was never any lapse in payment during my late husband's lifetime gives evidence that he was in good standing with the Bank as touching this mortgage. Moreover, in the aftermath of my late husband's demise, when I attended upon the bank to pay

the subject premium pending the completion of the insurance pay out, I was specifically told that I could not pay anything until the probate on my husband's estate was completed, as I was not named on the mortgage.

11. That based on this, I did complete the probate and attended the Bank with the relevant particulars and a copy of my late husband's death certificate. Beside this, the Bank at no time ever enquired of me whether I was able to continue the payments on behalf of my late husband's estate. I verily believe that my husband's estate is entitled to restitution because of the Bank's default in protecting the mutual interests of the parties for over twelve years prior to his demise. I know that my husband truly believed that he was covered by the Bank's 'selected' insurer as he had left the duly signed paper work with the Bank and believed they would have forwarded the same for due coverage on their own behalf. In so doing, he (sic) husband named another beneficiary, Enero Cooper, who was to take after the Bank had secured due to it under the Mortgage. ...

[Emphasis added]

Issues

[20.] The issues for determination were the following:

- (1) Whether the obligation was on the Bank to ensure that personal insurance coverage was in place for Wilson in advance of the mortgage being approved and sums advanced therefrom;
- (2) Whether the absence of personal life insurance in favor of the Bank was as a result of their own default, neglect and failure.
- (3) Whether the Bank is barred by way of estoppel, from seeking and being granted an Order of Possession over the mortgaged premises on the basis that there was no personal life insurance in place.

Analysis and Disposition

[21.] There is no dispute that Wilson died on 17 January 2017 and the last payment on the mortgage account was on 30 January, 2017 in the sum of \$1,689.49. It is also not disputed that the Bank made the required demand for payment of the outstanding amounts and gave notice to the Defendants of their default and the Bank's intent to proceed by way of court action in accordance with the Home Owners' Protection Act, 2017. Therefore, but for the Defendants' complaints relative to the provision of Wilson's personal insurance, the Bank would otherwise be entitled to judgment and an order for vacant possession. Mrs Godet, for the Defendants, identifies this as the predominant issue and describes their case as follows:

In a nutshell, the Plaintiff's case is that the onus was on the Second Defendant and Guarantor to ensure that the Plaintiff was named as a Loss Payee or Beneficiary on his personal life insurance, and that this was an optional matter, without which, the mortgage funds would have still been disbursed, notwithstanding the terms of the executed agreements aforementioned. In the absence of such Assignment of Life Insurance, the Plaintiff asserts its right to take possession of the triplex unit which was held as security for the mortgage.

Under ordinary circumstances, this may have been a plausible proposition. The facts of this case however, do not bear this out and the issues are not as narrow as the Plaintiff may suppose. On the merits of the duly executed facility letter and mortgage, The Defendants say that the onus was on the Plaintiff to protect the interest of both parties. The Defendant's case is five pronged thus:

- 1. The requirements of life insurance as a security was a requirement and not optional, and even if the Plaintiff asserts that the Assignment of Life Insurance was not the 'principal security' on which the Mortgage was secured, it was a security nonetheless, which occasioned benefit to both the Plaintiff and the Defendants, and one which was well within the parameters of the Bank to review and safeguard.*
- 2. The Plaintiff owed a measurable duty of care as the 'irrevocably appointed' attorney for the Defendants to see to it that all matters required or deemed proper to be done, were in fact done.*
- 3. Equity, by way of estoppel, would not permit the Plaintiff to benefit or be rewarded from its negligence and/or failure to protect the interest of both parties.*
- 4. The Plaintiff had Actual and Constructive Knowledge that there was further action required as touching the assignment of Life Insurance, and it failed in its duty to correct the default ab initio, i.e., during its original approval process and its annual review.*
- 5. The Plaintiff failed to ensure the Defendants secured independent legal advice, given its predisposition to put its 'policy' over the specific terms and conditions agreed between it and the Defendants, as set out in the Facility Letter and the Mortgage.*

...

Provision of the Life Insurance

[22.] I accept that it was a provision of the facility letter that an assignment of life insurance to secure advances up to \$224,000 was to be included as general security. The terms and conditions which followed in the commitment letter however, all related

to the mortgage and the real property. The Bank says that this was not a provision which was mandatory for the loan proceeds to be disbursed, while the defendants insists that it was.

[23.] Laverne Wilson, at paragraph 6 of her first affidavit, says that *the Deceased was told that the Bank would select an insurer, in this case, its 'in house provider', the premiums of which were to be deducted from his salary deposits, in the same way the mortgage payments were consistently deducted from his salary deposits, over which the Bank had control. It is not clear who told her husband this information or whether this was information told to her by her husband in the same manner as he told her that he completed and signed the necessary documentation provided by him to the Bank for their in-house carriers. This conflicts with the evidence of Duncombe (who witnessed the signing of the form), who stated that Wilson would have been given the forms to take to his insurers and return to the Bank after it had been assigned by the insurers.*

[24.] Having considered the evidence of the witnesses, I did not find as a fact that the Bank was to provide insurance or that Wilson understood that insurance was in place to secure the loan:

- a) Other than Laverne Wilson's uncorroborated evidence there is nothing to indicate any in house insurance was being offered or taken out by Wilson. The evidence of the Defendants' witness Duncombe, who witnessed the execution of the insurance assignment form, was that three copies of the forms were executed by Wilson. One copy for the Bank's file and two for Wilson to take to his private insurers to complete and return confirming that the policy had been assigned. There was no requirement to take out a new policy as Wilson may have had an existing policy which could have been assigned. Wilson did not return with an executed form. Ultimately, whilst the Bank, to its detriment, issued the loan proceeds, no assignment was made in its favor.
- b) There is no evidence that Wilson did anything relative to applying for any in-house insurance with the Bank. An incomplete assignment form is not an application for insurance. No application forms, applying for insurance, was

completed by Wilson. Wilson was a customs officer and a businessman, the principal of Cube W, an incorporated company which owned an apartment building. Wilson has to be credited with some knowledge of business affairs. He must have known that he did not apply for insurance, having not signed any insurance application forms (which are notoriously extensive with medical and lifestyle questions) other than the assignment. There is no evidence that he completed any medical forms or underwent any medical examinations (if needed).

- c) In addition to knowing that he did not apply for insurance coverage specifically for the mortgage, more importantly, Wilson would have known that he made no payment for any insurance policy over the 9 years he serviced the loan prior to his death. Wilson knew he wasn't being assessed for any insurance premium in the facility letter. Whilst the Bank may have overlooked this issue, Wilson certainly knew he wasn't covered by any insurance for which he was paying. Laverne Wilson's suggestion that the Bank had control of Wilson's account and could have taken the funds is untenable and is rejected.

[25.] The obligation was Cube's to secure the life insurance as per Clause 5(g) of the mortgage. Cube was the borrower under the Mortgage document and not Wilson. In any event, this provision was for clearly for the protection of the Bank and not Wilson or Cube as it would have been Cube' obligation to pay for this coverage. I therefore accept Duncombe's evidence at paragraph 5 of his witness statement where he says:

5. ...I can say unequivocally that it was normal practice for the [Bank] to have its security team vet each facility letter to ensure all requisite documents were in place before any payments were disbursed. No monies are paid out unless and until the [Bank] is satisfied that appropriate arrangements have been made ab initio, to protect its interest. Moreover, it is unusual that such a situation would ensue for almost ten years and the bank not call its Client in to address the same.

I also accept that during the life of the mortgage, the Bank ought to have picked up on this failure of Wilson and Cube to provide proof that the insurance was in place.

Unfortunately no flags were raised concerning the assignment of the life insurance to the Bank.

[26.] The Defendants seek to rely on Cause 14 of the Mortgage which provides:

Borrowers hereby irrevocably appoint the Manager for the time being of the Bank to be the Attorney of the Borrowers for the Borrowers and in their names and on their behalf and as their acts and deeds to execute and complete any assurance agreement act or action which may be required or deemed proper for any of the purposes of these presents.

The Defendants say “that the onus was on the bank, as the ‘irrevocably appointed’ attorney for the Defendants to see to it that all matters required or deemed proper to be done, were in fact done”. They argue that the Bank was obligated to act in the best interest of the Defendants as their attorney.

[27.] As I have found with Clause 5(g) of the Mortgage, I also did not find that Clause 14 of the mortgage was a clause for the benefit of Wilson, as the Defendants seem to suggest. Perhaps this clause is useful for the purposes of renewing a homeowner’s insurance policy or taking out a policy of insurance on a home to maintain coverage of the demised premises but could it conceivably extend to the *taking out* of life insurance on Wilson? More importantly, in a strict sense, this appointment of the Bank Manager as “attorney” is in respect of Cube and not Wilson. Whilst Wilson signed a guarantee, the Borrower under the mortgage is Cube, a company which is a separate legal entity. There is no appointment over Wilson, to “see to it that all matters required or deemed proper to be done, were in fact done”.

[28.] The Defendants also argue that the effect of this clause 14, for the irrevocable appointment of the Bank as its Attorney, required the Bank to have ensure that the Defendants secure independent legal advice. In particular they say:

The Plaintiff, in its absolute requirement that the Defendants irrevocably appointed the Bank Manager as Attorney, created for itself the obligation to do all things customary in the lawyer/Client relationship – such as the duty to ensure the best interest of the parties. Just as an attorney may be subject to suit in

event of a breach, negligence or failure to act or do a particular thing that causes damage to his Client, so to, in this case, the Bank, as the irrevocably appointed attorney, undertook to itself specific obligations based on the duty of care owed to the Defendants and as based on the particular documents. In requiring that the Bank manager be irrevocably appointed as attorney, the Borrowers were denied the opportunity of independent legal representation, advice and review.

Respectfully I did not find that such an obligation arose on these facts. The relationship was in the nature of donor/donee in respect of a power of attorney not in the nature of a lawyer/client relationship. Further, nothing in the appointment of the Bank as Wilson's Attorney, prohibited Cube/Wilson from continuing to act to do what was required under the facility. The appointment was merely to enable the Bank to protect its security. The Clause, as I see it, only provides a mechanism for the Bank to act in circumstances where Cube has failed to do something it ought to have. The Bank never called upon Cube/Wilson to take out the policy of insurance as it appears that the Bank did not appreciate that none was in place. Finally, as I have said earlier, this appointment is in respect of Cube and not Wilson. Whilst Wilson signed a guarantee, the Borrower under the mortgage is Cube, a company which is a separate legal entity.

Estoppel

[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 (acknowledgement) 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. ...*

In this case, both the Facility Letter and the Mortgage document called for action on the part of the Plaintiff Bank which was not fulfilled to confirm the security required by the Defendant to warrant release of the mortgage funds. The Plaintiff cannot now seek to say that what was 'mandatory' in the mind of the Second Defendant was merely 'optional'. Nor can it now say that it is able to waive the requirement to do what was expected and agreed between the parties that it would do, to the disadvantage and detriment of the Defendants.

[30.] The Defendants' claim of estoppel, in my view, did not satisfy the requirements which they identify as forming the elements of estoppel. Firstly, what is said to be a representation by the Bank is a fact an obligation of the Defendants. A decision not to release funds until an assignment is in place does not lend itself to a benefit to the Defendants. It was the Defendants who were to secure personal insurance coverage and not the Bank, as I have found. The Defendants, in essence, rely on their failure to perform an obligation as the basis of the estoppel. Secondly, whilst the Bank by its own internal policies ought not to have disbursed funds without ensuring that the insurance had been assigned, the Defendants (though Wilson) received the funds and made no effort to bring to the attention of the Bank their failure to assign (a failure which I have found they knew). They knew that they had not taken any out in-house insurance and that they were not paying for any, notwithstanding they received the benefit of the funds advanced.

[31.] The Defendants also allege negligence. They say that:

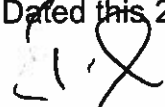
[B]y reason of [the Bank's] continued neglect and default *ab initio* and throughout the lifetime of the mortgage, the Defendants have suffered loss and damage. Had the [Bank] simply complied with its own terms of contract, there would have been no loss sustained to either party. As such, the [Bank] is estopped from claiming *damnum* from the Second Defendants. Moreover, we reiterate that it was a term of the Facility letter and the Mortgage that both life insurance and house insurance were listed as general securities upon which the mortgage was secured; that the appointment of the Bank's Manager as the irrevocable attorney for the Borrowers created for the Plaintiff a continuing duty over the course of nine years of mortgage coverage to effect proper review of the requisite file and to do what was prudent and in their power to do, prior to and subsequent to the disbursement of funds; that while the Bank drew specific attention to the matter of Home Owner's insurance, it said or did nothing as touching the absence of life insurance assignment, as was their obligation *ab initio* thereby creating a false

belief and assurance on the part of the [Bank] that there was no further action required on his part.

Having regard to what I have said above, it is clear that there was no duty of care by the Bank in favor of the Defendants concerning the obligation to assign Wilson's (new or existing) personal insurance to the Bank. The failure is that of the Defendants and the loss is to the Bank not the Defendants. Any failure of the Bank, to appreciate that no insurance policy had been assigned to it, has only caused loss to itself.

[32.] In the circumstances I give judgment for the Bank for the sums due under the mortgage and for vacant possession. The judgment is suspended for a period of six months to permit the Defendants to attempt to re-negotiate the terms of the mortgage or to find alternate funding. The Bank shall have its costs, such costs to be taxed if not agreed.

Dated this 26th day of November 2021



Ian R. Winder

Justice