

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

2013/CLE/gen/01879 and 2014/CLE/gen/02004

BETWEEN

PRATAP K. ROUT

Plaintiff

-AND-

THOMPSON THAYALARAJ SUNDERARJ

Defendant

-AND-

PRATAP K. ROUT

First Plaintiff

-AND-

DEBASMITA ROUT

Second Plaintiff

-AND-

THOMPSON THAYALARAJ SUNDERARJ

First Defendant

-AND-

JAYASHREE THOMPSON

Second Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Dellarese Taylor-Russell of Clement Maynard & Company for the Plaintiffs
Mr. Keith Major Jr of Higgs & Johnson (on 21 September 2021 and withdrawing on 22 September 2021 and Mr. Phillip Lundy appearing to make oral submissions for the Defendants

Hearing Dates: 21, September 2021, 19 January 2022, 17 March 2022

Breach of mortgage agreement – Whether the mortgage is valid – Breach of contract – Whether loans were given to the Defendants

Two actions were consolidated. The Plaintiffs seek judgment for the sums due and owing under a mortgage between the parties and sums due and owing under further loans.

The Defendants deny the existence of the mortgage and assert that the mortgage relied on by the Plaintiffs is invalid, as they did not sign it. They also deny any further loans given to them. The Defendants counterclaimed for money that they allege is due and owing under a lease agreement by which the Plaintiffs were obligated to pay a monthly rent of \$2,500.00.

The Plaintiffs deny the existence of the lease agreement relied on by the Defendants, alleging that it is invalid as they never signed it.

HELD: Finding that the mortgage is valid, that the Plaintiffs gave further loans to the Defendants and that the lease agreement is invalid, the Plaintiffs are entitled to judgment on the sum owed under the mortgage with interest and the sums for the further loans. The Plaintiffs, being the successful parties are entitled to their costs.

1. There is an overwhelming amount of evidence in favour of the valid execution of the mortgage.
2. Unless there is some question as to the validity of the mortgage itself, fraud or irregularity in exercising the power of sale, the courts will not intervene to prevent the mortgagee from exercising his legal right under the mortgage: **Citibank NA v Paul Major** [2001] BHS J No 6 and **Finance Corporation of the Bahamas Ltd. v Roberts and another** [2016] 2 BHS J. No. 221 applied.

JUDGMENT

Charles Snr. J:

Introduction

[1] By Writ of Summons filed on 18 November 2013, the First Plaintiff (“Mr. Rout”) commenced this action against the First Defendant (“Mr. Sunderaj”) for breach of contract, alleging that he failed to repay sums of money that are due and owing pursuant to loan agreements made between them.

[2] By Writ of Summons filed on 2 December 2014, the Plaintiffs (“the Routs”) commenced an action against the Defendants (“the Sunderajes”) seeking

judgment for the sum owed under a mortgage that he said existed between the parties.

- [3] The facts surrounding both actions are related, arose from the same set of circumstances and concern the same parties. Therefore, by an order of the court dated 21 June 2018, the actions were consolidated.

Background facts

- [4] The Routs, who are a married couple were associates of the Sunderajes who are also a married couple. The closeness of the couples' relationship is, however, disputed.
- [5] In or about 2006, Mr. Sunderaj purchased two (2) adjacent lots on Tuckaway Road. On one lot, he constructed a four (4) bedroom home. The second lot was vacant.
- [6] In or about 2005, Mr. Sunderaj left The Bahamas to take up employment in Miami, Florida, USA and sometime in 2007, he commenced construction of three (3) townhouses on the vacant lot.
- [7] The Routs leased one of the townhouses from the Sunderajes; the terms of which are disputed between the parties. The Routs assert that the agreement was that they could live rent free in the townhouse in exchange for the interest free loan that they say they gave to the Sunderajes. The Sunderajes, however, deny that arrangement and assert that the Routs were obligated to pay a monthly rent of \$2,500.00.

The pleadings

The Plaintiffs' case

- [8] In the 2014 action, the Routs claim for sums that they alleged are due and owing to them by the Sunderajes under a mortgage dated 2 October 2006 for \$100,000.00. The Routs were the mortgagee and the Sunderajes the mortgagor. The purpose of the loan was the construction of the townhouses, which were mortgaged to the Routs in that deed. In turn, Mr. Rout could live rent free in one of

the townhouses when completed until the repayment of the loan. Also part of the agreement was the arrangement that Mr. Rout would supervise the construction of the townhouses without payment until the construction was completed.

- [9] In the 2013 action, Mr. Rout alleged breach of contract against Mr. Sunderaj. He alleged that, further to the mortgage, he gave five (5) loans to Mr. Sunderaj which were not repaid.
- [10] In or about the first week of October of 2006, Mr. Rout agreed to lend to Mr. Sunderaj \$30,000.00 for the purchase of materials with interest of 5.5% per annum from October 2006. He therefore claims \$33,300.00; \$3,300.00 being the interest of 5.5%.
- [11] In or about the first week in April 2007, Mr. Sunderaj asked for another loan of \$35,000.00 for the construction. Mr. Rout gave the loan to be repaid on 9 December 2007 at an interest rate of 12% per annum. He claims \$37,800.00; \$2,800.00 being the interest from 10 April 2007 to 9 December 2007. With respect to this loan, Mr. Sunderaj repaid \$11,000.00 in December 2007. The balance of \$26,800.00 remains outstanding.
- [12] In or about 15 April 2007, Mr. Sunderaj sought another loan of \$20,000.00. Mr. Rout agreed to lend the sum on 15 October 2007 with interest at the rate of 12% per annum. Mr. Rout therefore claims \$21,200.00; \$1,200.00 being the interest accumulated.
- [13] On or about 20 May 2007, Mr. Sunderaj requested and Mr. Rout gave a loan of \$10,000.00 to be paid 20 November 2007 with interest at the rate of 12% per annum. He claims \$10,600.00; \$600.00 being the interest.
- [14] During the period May 2007 to August 2007, Mr. Rout incurred expenditure of \$23,213.81 at the request of Mr. Sunderaj for matters related to the construction. This sum was reduced to \$5,547.81 as a result of payments made by Mr. Sunderaj

and applied to this loan. As a result of payments made to Mr. Rout and applied to this loan, the outstanding sum is \$7.97.

- [15] A further interest free loan of \$5,000.00 was granted on 12 May 2007 which Mr. Sunderaj agreed to pay immediately which was never repaid.

Defence and Counterclaim

- [16] In his Defence and Counterclaim filed on 13 July 2013, Mr. Sunderaj denied the existence of a mortgage and asserted that any mortgage between the parties bearing his signature is fraudulent. He asserted that his mortgage with Bank of The Bahamas (“the bank”) prohibits the issuances of a second mortgage without the bank’s approval since they are non-nationals. He also denied the loans and states that the claims in respect of same are statute-barred.
- [17] Mr. Sunderaj denied that Mr. Rout oversaw the construction and the agreement asserted by him. Instead, he asserted that Mr. Rout breached the terms of an enforceable lease between them and counterclaimed for the accumulated rental payments (\$342,500.00) and maintenance fees (\$13,700.00). By the lease, which commenced 1 February 2007, Mr. Rout was to pay to Mr. Sunderaj the total rent of \$150,000.00 in equal monthly installments of \$2,500.00 in advance on or before the first day of each month. He also sought an injunction ordering the Routs to give up possession of the leased townhouse.

Plaintiffs’ Amended Reply and Defence to Counterclaim

- [18] By its Amended Reply and Defence to Counterclaim filed on 28 May 2021, the Routs re-asserted the existence of the mortgage and stated that the mortgage asserted by them refers to the mortgage with the bank and that whether the Sunderajes breached their mortgage is not for them to determine. The Routs further contended that although they were not able to obtain retroactive approval from the Central Bank for the transaction, they obtained Central Bank approval for the repayment of the mortgage sums pursuant to the mortgage and the mortgage has been stamped and recorded.

- [19] With respect to the further loans, the Routs denied that they are statute-barred.
- [20] They also denied the existence of a lease dated 1 February 2007 asserted by the Sunderajes and, instead, asserted that the only lease to which they were a party was emailed to Mr. Sunderaj on or about 23 September 2006. While it was not executed, the Routs' occupation of the premises was consistent with that lease. They were legally entitled to occupy the premises at a rent of \$1 per year until 30 June 2012 and as a result of the failure to repay the mortgage, they occupied the premises past that date because of the Sunderajes' failure to pay the mortgage which is consistent with the terms of the mortgage. By that lease, they were to pay \$1.00 per year. The leasehold period was to coincide with the period of the mortgage, five (5) years up to 31 January 2012.
- [21] The Routs denied the lease commencing 1 February 2007 and asserted that they took possession on 1 July 2007 and the occupancy certificate was obtained on 26 July 2007.
- [22] Mr. Rout admitted to signing a document in early 2007 and again in 2008, but that it was not a lease, but was signed by Mr. Rout as a friend of Mr. Sunderaj to assist him in obtaining a further loan from the bank. If what he signed was a lease, it cannot be enforceable because there was no intention to enter legal relations and no consideration was given.
- [23] Further and in any event, the Routs contended that the rent for 137 months is statute-barred.

The evidence

- [24] Mr. Rout, Srikanta Sarangi and Udaya Geddam gave evidence of fact on behalf of the Routs. Mr. Sunderaj was the sole witness of fact for the Sunderajes. Both parties called as witnesses, their respective experts in forensic document examination. The Routs called E'lyn Bryan and the Sunderajes, Thomas Vastrick.

[25] Since the credibility of the witnesses of fact is critical in this action, I shall set out their respective evidence in some detail.

Pratap Rout

[26] Mr. Rout's evidence in chief is contained in his Witness Statement filed on 30 June 2021.

[27] He stated that he and his wife, Mrs. Rout, were very close friends with the Sunderajes. The Routs and the Sunderajes were all born in India but met in Nassau. After their initial meeting, they met from time to time and eventually became close friends. The Routs were married in 2002 and the Sunderajes were married in 2003. Thereafter, the families including the wives and children developed a close family relationship. The children often played together.

[28] Mr. Rout stated that after Mr. Sunderaj moved to Miami, he and his wife maintained that close relationship continued with Mrs. Sunderaj who frequently sought and received their assistance whenever the need arose. When he and his family visited Miami, they would stay with Mr. Sunderaj. Later on, Mrs. Sunderaj joined Mr. Sunderaj in Miami and when they visited Nassau, they would stay with the Routs in the townhouse. According to Mr. Rout, the wives are still very good friends notwithstanding the issues between the husbands.

[29] Mr. Rout also stated that his financial relationship with Mr. Sunderaj began in early 2005, a month after Mr. Sunderaj purchased his home on Tuckaway Road. He lent him \$6,000.00 interest free. This loan was repaid approximately one (1) year later.

[30] Sometime in or about April 2006, Mr. Sunderaj offered and Mr. Rout accepted an arrangement to facilitate Mr. Sunderaj's plan to build three (3) townhouses on the vacant lot next to his home: Mr. Sunderaj would borrow \$100,000.00 and it would be repaid over five (5) years. The townhouses would be mortgaged to Mr. Rout for five (5) years until the loan was repaid. The mortgage would be interest free and Mr. Rout's family would live rent free in one (1) of the townhouses when it was completed. Mr. Rout's family would vacate the townhouse upon full repayment of

the loan. Also by the agreement, Mr. Rout was to keep accounts for all payments to buy materials and pay the contractor.

- [31] Pursuant to the agreement, Mr. Rout paid the mortgage proceeds of \$100,000.00 in three (3) installments. Mr. Rout asserted that after the initial agreement and before the mortgage proceeds were paid, they agreed that, in the event that the loan was not repaid by the end of the five (5) year period, interest would be payable at a rate of 18%. Mr. Sunderaj assured him that he would repay the loan within the stipulated time and thanked him for his help.
- [32] Mr. Rout further stated that although he and his wife were unable to obtain retroactive approval from the Central Bank for the approval of the mortgage, they obtained approval from the Bank for repayment of the mortgage funds to them.
- [33] Mr. Rout also stated that Mr. Sunderaj entered a labour-only contract for the construction of the townhouses to save a substantial amount of money on hiring a construction supervisor. As such, Mr. Sunderaj asked him to supervise the construction and he agreed. In supervising the construction, Mr. Rout asserted that, among other things, he purchased materials and liaised with the contractor and construction workers.
- [34] Initially, the construction proceeded smoothly but it was stalled in December 2006 and again in March 2007 because Mr. Sunderaj did not have the funds. Mr. Rout said that he and Mr. Sunderaj both unsuccessfully approached friends for loans to fund the construction. Eventually, Mr. Rout agreed to lend further sums of money to Mr. Sunderaj for the construction. The money was used to purchase construction materials and payment of labour costs at Mr. Sunderaj's request. Mr. Rout further stated that they agreed that the rate of interest for the further loans would be higher and the loans would be for a short term.

The first loan

- [35] With respect to the first loan, Mr. Rout asserted that, in or about the first week of October 2006, he agreed to Mr. Sunderaj's request for \$30,000.00 for the

construction. They agreed that he would repay at an interest rate of 5.5% per annum for two (2) years commencing from 15 October 2006 and ending 15 October 2008.

- [36] According to Mr. Rout, this loan was used by him to purchase materials pursuant to Mr. Sunderaj's instruction. The total cost of the materials purchased using money from this loan exceeded the \$30,000.00 by \$3,295.12 but he satisfied the overage with other money that he held for Mr. Sunderaj. Mr. Rout said that he emailed Mr. Sunderaj with respect to the purchases which he made. The loan was never repaid.

The Second loan

- [37] Mr. Rout testified that, in or about the first week of April 2007, Mr. Sunderaj approached him for another loan of \$35,000.00. At this time, construction had stopped because of Mr. Sunderaj's lack of funds. The contractor was chasing him for payment. As it was an emergency loan, he lent Mr. Sunderaj the \$35,000.00 at an interest rate of 12% per annum for an agreed period of eight (8) months to be paid on 9 December 2007.

- [38] At the request of Mr. Sunderaj, Mr. Rout stated that he used the money to buy materials and pay labour costs which amounted to \$35,012.72. Mr. Rout agreed not to pursue the \$12.72 overage. He stated that he regularly sent emails to Mr. Sunderaj explaining how the proceeds of this loan was spent. \$11,000.00 was repaid by Mr. Sunderaj in December 2007 but the remaining \$26,800 is still outstanding.

The Third loan

- [39] Mr. Rout stated that because the construction was still not completed, on or about 15 April 2007, Mr. Sunderaj orally requested from him a further loan of \$20,000.00 for the construction. He said that Mr. Sunderaj agreed to repay the loan on 15 October 2007. This loan was subject to a rate of interest of 12% per annum.

[40] Mr. Rout lent the money and again, at the request of Mr. Sunderaj, Mr. Rout used the money for materials and labour costs, which amounted to \$20,047.72. This loan was never repaid.

The Fourth loan

[41] On or about 20 May 2007, Mr. Sunderaj orally requested from Mr. Rout a loan of \$10,000.00 for the completion of the construction. Mr. Sunderaj agreed to repay the loan on 20 November 2007 at an interest rate of 12% per annum. This loan was never repaid.

Other loans

[42] Mr. Rout said that, from May 2007 to August 2007, at the request of Mr. Sunderaj, he incurred expenditure of \$23,213.81 with respect to the construction. However, as a result of payments made and applied to this expenditure, the amount was reduced to \$5,547.81.

[43] On 12 May 2007, Mr. Rout gave Mr. Sunderaj a \$5,000.00 interest free loan which he agreed to repay immediately. Mr. Sunderaj repaid \$2,566.00 on 12 May 2007 and he requested one of his tenants to pay to Mr. Rout \$100.00 on 13 July 2007. On 13 June 2007, at the request of Mr. Sunderaj, Mr. Rout paid one (1) installment of his mortgage in the sum of \$2,938.00, which Mr. Sunderaj agreed to repay. As such, the sum due under these other loans was \$13,485.81. In 2010, at the request of Mr. Sunderaj, one of his tenants paid to Mr. Rout the sum of \$8,477.84 which was applied to the \$13,485.81. As such, he said the further sum of \$5,007.97 remains outstanding.

[44] Mr. Rout testified that after the construction was completed, upon the request of Mr. Sunderaj, he gave to him all of the original vouchers and receipts which he promised to return but did not. He said that he did not keep copies of same because there were many receipts and as they were friends, he had no reason to believe that they would not be returned.

- [45] Mr. Rout said that he prepared a lease in accordance with the parties' agreement which was delivered to Mr. Sunderaj by email on 27 September 2006. He and his family began moving into the townhouse on or about 1 July 2007. They received the Occupancy Certificate on 26 July 2007 and the Electricity Installation Approval on 27 July 2007. They could not move in before those dates since the apartment did not have the necessary approvals and utilities.
- [46] Although the leasehold period was to coincide with the period of the mortgage (five years), Mr. Rout and his family continued to occupy the townhouse past that date due to the non-payment of the mortgage by the Sunderajes, which Mr. Rout said that he is entitled to do pursuant to the mortgage.
- [47] Despite the non-payment, because the Sunderajes were friends, Mr. Rout said he and his wife extended the mortgage repayment date to 31 January 2013, a year from the initial date of repayment. The date was extended by letter dated 19 December 2012 from their Counsel.
- [48] Mr. Rout recalled that, in early 2007 and again in early 2008, Mr. Sunderaj assured him that he was making all efforts to repay the loans and, as part of that effort, he wished to approach the Bank for a further loan. As a friend, Mr. Sunderaj asked him to assist him by signing a document for that purpose and he recalled doing so. However, Mr. Rout said that he is certain that he did not sign the lease being relied on by Mr. Sunderaj. He insisted that they never again discussed the document. He said the Counterclaim filed by the Sunderajes was the first reference to the purported lease and the first expression of a claim for rent being due and owing.
- [49] Mr. Rout said that he kept accounts of expenditure and the Sunderajes' indebtedness with respect to the construction and although they failed to satisfy the debt, they never denied their indebtedness until the litigation. They always assured the Routs that the money would be repaid. Further, on several occasions, they assured Mr. Rout that they would not let him down. Mr. Sunderaj

acknowledged his indebtedness and expressed his desire to repay in various telephone conversations and emails.

[50] Mr. Rout asserted that he discussed with Mr. Sunderaj the ways in which the debts could be satisfied, including him [Mr. Sunderaj] obtaining another loan to satisfy the debt and Mr. Rout obtaining a loan or mortgage from the bank. Mr. Rout said he rejected the latter offer and he stated that, as far as he was aware, the Sunderajes were unable to secure a loan.

[51] Mr. Rout stated that, in August 2012, Mr. Sunderaj promised to repay him the sum of \$5,000.00 per month from September 2012 until a loan that he was negotiating was finalized. He reneged on this promise.

[52] Sometime in October 2012, upon his follow up with Mr. Sunderaj for repayment, he assured him that he approached the bank. The bank agreed to lend him funds. Mr. Sunderaj told him that they would meet at the bank when he got to Nassau.

[53] Sometime in or about January 2013, Mr. Rout said that he and Mr. Sunderaj went to Royal Bank of Canada, Prince Charles branch together to discuss a loan to Mr. Sunderaj to repay him and his wife in full, but the bank declined the application for a loan on the basis that Mr. Sunderaj was not resident in the jurisdiction. The bank was willing to lend money to Mr. Rout using Mr. Sunderaj's properties as collateral and although Mr. Sunderaj tried to convince him to agree to the loan, he did not.

Srikanta Sarangi

[54] Mr. Sarangi's evidence in chief is contained in his Witness Statement filed on 30 July 2021. He stated that since 2009, he has resided down the street from Mr. Sunderaj on Tuck Away Road. He said that he has known Mr. Rout since 1997. In their home country, India, they lived less than ten (10) miles apart and his younger brother attended college with Mr. Rout. Mr. Sarangi said that he has known Mrs. Rout since 2002. Although he is from the same village as her in India, he did not meet her until she married Mr. Rout.

- [55] Mr. Sarangi said that he met Mr. Sunderaj in 2001 when he spent time together. Mr. Sarangi and Mr. Rout. They were all very good friends. He, along with Mr. Rout purchased a wedding gift for Mr. Sunderaj.
- [56] After Mr. Sunderaj got married, the families remained friends. Since they lived in the same area, they often enjoyed dinners and lunches together. According to him, Mr. Rout and Mr. Sunderaj were close and socialized with each other often. The wives of all three (3) men were friendly and he would often saw them speaking and socializing.
- [57] Mr. Sarangi said that Mr. Sunderaj's property consists of two (2) lots. Initially, on one lot, there was a family home with a pool at the back and gardening area in the front. Over time, it was renovated and three (3) separate families live there. Mr. Sarangi said that he is aware of multiple tenants over the years including Dr. Shivashankar Ravishankar, Dr. Amaresh Hombal and Dr. Sharat Shetty (who currently lives there). On the adjacent lot, two (2) two-storey apartments were built. He is aware that multiple tenants lived in those apartments over the years including Mr. Prakash and the Rout family. Mr. Udaya Geddam and his wife Mansha Geddam were tenants from 2008 to 2010 in unit 2.
- [58] Before the construction commenced, Mr. Sunderaj sought financing from Mr. Sarangi. His offer was that Mr. Sarangi would lend \$100,000.00 as consideration for him and his family living in one of the townhouses rent free for five (5) years and the \$100,000.00 would be repaid interest free after five (5) years. Mr. Sarangi said that he seriously considered the offer but he declined it because he was not financially able to lend the money. He stated that he was not surprised when he learned that Mr. Sunderaj made a similar offer to Mr. Rout and he was happy that Mr. Rout was able to accept the agreement since it was a fair offer.
- [59] Mr. Sarangi testified that, sometime in or about September or October 2006, Mr. Rout and Mr. Sunderaj asked him to witness the signing of a mortgage agreement between them and their spouses. He did so. A few weeks after the signing of the

mortgage at the apartment of the Sunderaj, Mr. Sarangi said that it was a mortgage agreement between Mr. and Mrs. Sunderaj/Mr. and Mrs. Rout for the amount of \$100,000.00. Mr. Sunderaj expressly thanked Mr. Rout profusely for his help. He was very apologetic about owing Mr. Rout and grateful to him for helping him to build the apartments. Mr. Sarangi said that he was unclear what other money were owing by Mr. Sunderaj or which loan he was referring to.

[60] Mr. Sarangi confirmed that his signature is on the mortgage and said that, on 3 March 2014, he swore an Affidavit as to the due execution of the mortgage.

[61] Mr. Sarangi said that he is familiar with Mr. Rout's signature. He said that he does not see his own signature or that of Mr. Rout on the 1 February 2007 lease relied on by Mr. Sunderaj. The mortgage agreement was the only document he recalled witnessing. He never heard of Mr. Rout being interested in purchasing Mr. Sunderaj's property.

[62] He stated that Mr. Rout's family moved into the newly constructed apartment in or about August 2007. There appeared to be no issues. Mr. Sunderaj's family would stay with Mr. Rout's family when they visited Nassau and the Routs would stay with the Sunderajes in Miami when they visited.

[63] Further to witnessing the mortgage, Mr. Sarangi said that Mr. Sunderaj expressed to him on several occasions that he owed Mr. Rout, particularly when observing the progress of the construction. On many occasions, Mr. Rout complained to Mr. Sarangi about having limited funds which led to him obtaining salary advances due to loaning money to Mr. Sunderaj.

[64] On one occasion, Mr. Sunderaj needed materials cleared and asked Mr. Rout for assistance with same. Mr. Sarangi said he offered the assistance of a Customs broker known to him and once the broker processed the shipment, Mr. Rout had to borrow money to pay the duty.

- [65] On many occasions, Mr. Rout indicated that he needed to purchase construction materials and, as Mr. Sunderaj was not present or had not provided money for same, he would have to pay and be repaid.
- [66] In or around November 2006, during the construction and when Mr. Sunderaj purchased his home in Miami Gardens, Mr. Sunderaj indicated to Mr. Sarangi and Mr. Rout that he needed more money to complete the home project and that he would borrow it from Mr. Rout. Mr. Rout also indicated that he loaned Mr. Sunderaj the money needed.
- [67] On many occasions, said Mr. Sarangi, Mr. Rout told him that he was seeking to settle accounts with Mr. Sunderaj, who was uncooperative and gave many excuses. He continuously made arrangements for payment plans which were never followed.
- [68] He said that he has never heard Mr. Sunderaj denying that he owed money to Mr. Rout. He also has never heard him denying a friendship with Mr. Rout. Approximately two (2) years after Mr. and Mrs. Rout commenced legal proceedings, Mr. Sarangi observed a negative shift in Mr. Sunderaj's friendship and treatment toward Mr. Rout, which eventually extended to him. He opined that Mr. Sunderaj began treating him negatively because he witnessed the mortgage.
- [69] Mr. Sarangi said that it was not until 5 October 2017, when Mr. Sunderaj instructed police officers to remove Mr. Rout from the townhouse that he heard Mr. Sunderaj alleging that Mr. Rout owed him money. Over the years, he never said or implied this.
- [70] The following day, Mr. Sunderaj made another false complaint against him – that he had broken into his property, physically assaulted him and stolen items belonging to him. He was again arrested. After taking statements, the police released him and stated that they discovered that Mr. Sunderaj had made false statements and complaints to a police officer; they were not aware of his false complaint made the previous day. The police officers apologized.

[71] Thereafter, Mr. Rout shared with Mr. Sarangi his fear of Mr. Sunderaj and indicated that he would no longer live in the apartment.

Udaya Kumar Geddam

[72] Mr. Geddam filed a Witness Statement on 30 June 2021 which stood as his evidence in chief at trial. His evidence was that he was the lessee of unit 2 of Mr. Sunderaj's townhouses.

[73] Mr. Geddam stated that he rented the unit which comprised of two (2) bedrooms and two and a half (2.5) bathrooms from Mr. Sunderaj at a monthly rent of \$1,300.00.

[74] He said that the Routs lived next door to the family in unit 1. His family became friends of the Routs.

[75] Mr. Geddam asserted that he observed a close friendship between Mr. Rout and Mr. Sunderaj. They were like brothers and called each other "*Bha*", which, in Hindi, means brother. Mr. Sunderaj often stayed with the Rout family when he visited The Bahamas. Initially, he stayed in a vacant unit but once it was rented he stayed with the Rout family.

[76] Mr. Geddam stated that, for most of his family's tenancy, he paid rent directly to Mr. Sunderaj's bank account but, in early 2010, Mr. Sunderaj instructed him to pay his rent to Mr. Rout until the end of his tenancy, some five or six months away. He paid the rent to Mr. Rout until the end of the tenancy in late 2010.

[77] After his family left the unit, they often visited and socialized with the Rout family and other friends on Mr. Sunderaj's property, especially for special occasions. During the visits, he noticed that his former unit appeared empty for almost a year.

[78] Under cross-examination by Mr. Lundy, Mr. Geddam said that he was not aware of a mortgage over the property in favour of Bank of The Bahamas. He said that he overheard from Mr. Rout and Mr. Sunderaj that Mr. Rout lent more than

\$100,000.00 to Mr. Sunderaj. He stated that that was the reason why Mr. Rout stayed in the apartment.

Thompson Thayalaraj Sunderaj

- [79] Mr. Sunderaj filed a Witness Statement on 30 June 2021 which stood as his evidence in chief at trial. He said that he arrived in Nassau, Bahamas in 2001. He and his wife were actively involved in the Indian community in Nassau, serving as the treasurer of the Indian Association of The Bahamas. Through this association he met the Routs along with hundreds of other Indians.
- [80] Under cross-examination by Mrs. Taylor-Russell, Mr. Sunderaj agreed that he met the Routs in 2001 and not in 2005 as was stated in his Defence and Counterclaim.
- [81] Mr. Sunderaj stated that it was normal for members of the Indian community including the Routs to host weekend parties on Fridays but there was no personal relationship with the Routs beyond that. He admitted that he attended the Routs' wedding and stated that many Indians were invited to such functions and that he has many pictures similar to the picture with the Routs at their wedding with other Indians.
- [82] Mr. Sunderaj further stated that, after his marriage to his wife on 9 January 2003, they purchased two (2) properties situated on Tuckaway Road. He said he obtained a mortgage loan from the BOB to assist with developing the properties. The Indenture of Mortgage dated 21 March 2006 was made between BOB of the one part and Mr. and Mrs. Sunderaj. In order to purchase the properties and obtain the mortgage loan, he and his wife require approval from the Central Bank of The Bahamas, which they obtained.
- [83] Once the property transaction was complete, Mr. Sunderaj said that he and his wife moved onto the property which had a home thereon. They planned to build townhouses on the vacant property and they engaged an architect from New York to prepare the plan.

- [84] In 2005 he accepted a job in Miami, Florida, USA. Initially, he left The Bahamas alone and would visit every two (2) to three (3) weeks. Thereafter, his wife joined him in Miami.
- [85] Sometime in or about 2005 or 2006, while he was out of the jurisdiction, he received a phone call from his mother who was living with his wife at his home in The Bahamas that two (2) men (who he later learned were Mr. Rout and his brother) was at his home inquiring about the sale of his home and the adjacent vacant lot on which he intended to build townhouses. Mr. Sunderaj said that he told his mother to tell the men that neither the home and/or the vacant lot were for sale and that they should leave the premises immediately. Thereafter, Mr. Rout would incessantly insist on his offer to purchase the properties despite his clear statement that they were not for sale.
- [86] In 2007, Mr. Sunderaj said that he began construction of the townhouses on the vacant lot. He engaged James Major and agreed with Mr. Rout to oversee the building of the three (3) townhouses. He communicated with him and visited frequently to check on the progress of the construction.
- [87] Before or shortly after commencement of the construction, Mr. Rout approached Mr. Sunderaj to ask whether he could rent out one of the townhouses upon completion. He offered to remain in his home rent free while he was out of the jurisdiction for the purpose of watching over the construction site of the townhouses and to ensure that nobody stole any items from the construction site. Mr. Sunderaj said he thought that it was a good idea since he had known Mr. Rout for several years through the Indian Association so he trusted him to remain in his home until the townhouses were complete. Mr. Rout moved into the four (4) bedroom house in or about March 2007. At that time, the agreement was once the first unit in the townhouses was completed, he would be able to move into the first unit, a three (3) bedroom and three (3) bathroom unit.

- [88] In 2007, the first townhouse was completed; the second was 70% completed and the third was at the foundation stage. In 2007, Mr. Rout moved into the townhouse pursuant to the written and signed lease. Under cross-examination, he clarified that the agreement was that Mr. Rout would live in the four bedroom house rent free for the first six (6) months and once he moved into the townhouse, he had to pay a rent of \$2,500.00 monthly.
- [89] To fund the construction of the townhouses, Mr. Sunderaj said that he depleted his and his wife's saving, borrowed money in the USA and purchased supplies by credit card, except sand and steel which were bought locally. He said his goal was to sell the home when it was time for his daughter to attend college.
- [90] He stated that, by the end of 2007 and the beginning of 2008, the relationship with Mr. Rout deteriorated because he no longer gave daily reports and provided many excuses. Mr. Rout observed that the costs were increasing and volunteered to provide financing by offering to lend him money to complete the construction. Mr. Sunderaj said that he never signed a mortgage with the Routs.
- [91] Under cross-examination by Mrs. Taylor-Russell, Mr. Sunderaj maintained that the only contract he entered into with Mr. Rout was the 1 February lease. He said the parties signed the lease and the page with the signatures was used as a fraudulent signature for the mortgage being relied on by Mr. Rout. When asked about the draft lease emailed to him from Mr. Rout on 27 September 2006 for a rent of \$1.00, he said that it was based on Mr. Rout's intention to sign a mortgage. He said that he was never in the same room as Mr. Sarangi with his wife present.
- [92] Under re-examination, Mr. Sunderaj said that he could not recall whether he was in The Bahamas on 2 October 2006; the date that the mortgage with the Routs was alleged to have been executed. He said *"I can't recall because the nature of my job, we start the school in August so I am not sure. I was not there."*

- [93] Mr. Sunderaj said that he borrowed \$100,000.00. As a result of that large sum, he insisted that Mr. Rout should pay a rent of \$2,500.00 to adequately reflect the quality of the property. They agreed and executed a lease agreement to this effect.
- [94] He stated that Mr. Rout did not directly give him the loan proceeds. Instead, he paid the contractor directly and provided him with copies of the receipts of the items purchased. Mr. Sunderaj also stated that he would then provide acknowledgment and part payment. He said that he became suspicious of Mr. Rout, who reported to him that there was theft of materials for the third unit. When he asked Mr. Rout how he allowed it to happen since that was the reason he was being allowed to stay in the property rent free, Mr. Rout was nonchalant. On another occasion, Mr. Rout reported that although he paid \$2,500.00 to the painter, the painter never showed up. He wondered if Mr. Rout was playing games with him and became friendly with vendors for them to overcharge him for services.
- [95] With respect to the emails sent by Mr. Rout to Mr. Sunderaj regarding the sums owed, Mr. Sunderaj said that, at that time, he disputed the accuracy despite not having responded to the emails to that effect. He insisted that every time Mr. Rout sent a statement, he phoned him immediately to question him.
- [96] When Mr. Rout moved out of the four (4) bedroom house and into the townhouse, Mr. Sunderaj began renting the house to Ernst and Young. He directed Mr. Rout to collect the rent and to apply it to his indebtedness.
- [97] Mr. Sunderaj said that as soon as he learned that the Routs were relying on a mortgage, he accused them of fraud. Mr. Rout became aggressive and threatened to shoot him.
- [98] In 2012, the lease agreement expired and Mr. Sunderaj requested Mr. Rout to leave the premises. Mr. Rout refused to leave and stated that he owns the property. After trying to remove the Routs on his own, he engaged his Attorneys to pursue vacant possession in his absence. He said he was informed by his then attorney that a date in the Magistrate Court was obtained. His attorney later informed him

that Mr. Rout was successfully removed from the premises and he secured the keys to the premises.

[99] Sometime in 2018, while in The Bahamas, a police officer demanded that he return the keys to Mr. Rout since the eviction was not lawful. Since the Routs were put back into possession, Mr. Sunderaj has not been able to gain access to his premises. According to him, he lost a considerable amount of potential rent which he could have received since the lease expired in 2012 until present.

Expert Witnesses

E'lyn Bryan

[100] Ms. Bryan prepared a report which was exhibited to her Witness Statement filed on 23 August 2021 which stood as her evidence in chief at trial. She was deemed an expert in forensic examination and handwriting. She concluded that the signature of Mr. Sunderaj is on the mortgage dated 2 October 2006 and four (4) original loan receipts that Mr. Rout relied on to prove that Mr. Sunderaj received the loans. She used three (3) additional known signatures of Mr. Sunderaj to compare. The main observations of the signatures were as follows:

1. The line quality (the individual strokes in each letter) is heavy in presence;
2. The signature is oversimplified. There are consistencies in slant.
3. There are consistencies in the formation of the first letter "S".
4. There are consistencies in the final stroke of the last name.
5. There are consistencies in the upward trajectory of the signature.
6. There are consistencies in the curve of the first letter of the name.
7. There are consistencies in the drawn underline below the signature. There are small unique "hooks" present on the end of the underline stroke prevalent in the exemplars.
8. The signature "floats" above the typed baseline where a baseline is present and;
9. The upward curve of the first letter in the second name is consistent.

[101] According to Ms. Bryan, the methodology used was comparison using side-by-side comparison with the unaided eye, handheld magnifying loupes, microscope. Photocopy enlargements, grids, a light table, and measuring devices.

Thomas Vastrick

[102] Mr. Vastrick filed a Witness Statement on 23 August 2021 which stood as his evidence in chief at trial. He was deemed an expert in forensic document examination by the Court. He prepared a report on the authenticity of the signature of Mr. Rout on the lease dated 1 February 2007. This signature was compared to two (2) signed cheques of Mr. Rout that bore his signature.

[103] Mr. Vastrick's conclusion was that it was highly probable (or he was virtually certain) that the writer of the tenant signature on the lease was the same writer of the cheques (accepted by Mr. Rout to be his signature). The similarities noted in the signatures were as follows:

1. The position of the signature relative to the baseline
2. The slope of the initial stroke of the first letter
3. The width and height of the initial loop
4. The width and design of the crossed peak
5. The relative height of the crossed peak to the initial letter
6. The slight decline of height of the final three peaks
7. The straight vertical final stroke
8. The relative height of the crossed peaks

[104] The methodology used was as prescribed by the Scientific Working Group for Forensic Document Examination (SWGDOC).

Factual findings

[105] Credibility of the witnesses is central to this action. There are stark differences in the evidence of the Plaintiffs' witnesses and the Defendants' witness. Having had the opportunity of seeing, hearing and observing their demeanour as they testified and analyzing the documentary evidence which was presented, I preferred the

evidence of the Routs' witnesses to that of the Sunderajes. Mr. Sunderaj was a particularly evasive witness.

[106] I believe that Mr. Sunderaj and Mr. Rout were close friends. This was stated by Mr. Sarangi who was a credible witness although I note his animosity toward Mr. Sunderaj. This was also confirmed by Mr. Geddam, a former tenant of one of the townhouses, who I consider to be an independent witness. Further, the photographs produced by Mr. Rout suggest that there was friendship.

[107] I also believe that, as a result of the friendship, Mr. Rout and Mr. Sunderaj agreed that Mr. Rout would give a \$100,000.00 interest free loan for five (5) years and that in exchange, Mr. Rout's family would be permitted to live there until the loan was paid off. Mr. Sarangi's evidence that this very offer was made to him by Mr. Sunderaj gives credence. Pursuant to that agreement, I am convinced that the Sunderajes willingly entered into a mortgage with the Routs.

[108] It was, as Mr. Rout stated, an agreement that was beneficial to both sides and consistent with the families being friends. Mr. Sunderaj was relieved of the trouble of having to approach a formal lending institution to obtain a loan that would not be interest free. Therefore, for that exchange, Mr. Rout would live in one of the townhouses rent free.

[109] The terms draft lease emailed to Mr. Sunderaj days before the execution of the mortgage is consistent with the terms of the agreement contended by Mr. Rout although it is less compelling since it was never signed. However the fact that there is no evidence as to Mr. Sunderaj's objection to the draft lease at that time is relevant.

[110] I am of the firm view that they agreed that Mr. Rout would supervise the construction and, in doing so, purchased all of the materials and liaised with the contractor.

- [111] With respect to the further loans, I believe that Mr. Sunderaj asked Mr. Rout to borrow these sums and Mr. Rout obliged. There is evidence such as emails in respect of some of the loans confirming that it was lent.
- [112] There was partial repayment of some of the loans which is very probative to there being a loan.
- [113] I accept Mr. Rout's evidence that Mr. Sunderaj did not allege that he owed him rent money until 5 October 2017 when Mr. Rout and Mr. Sarangi were arrested.
- [114] Mr. Sunderaj provided no evidence to support his testimony that he obtained loans in the USA which is how he testified that he initially paid for the construction of the townhouses along with his savings. His evidence was even conflicting. On the one hand, Mr. Sunderaj said that the agreement was that Mr. Rout would live rent free in the main house and subsequently, the townhouse once one was completed in exchange for overseeing the construction. On the other hand he said that the agreement was that Mr. Rout would pay \$2,500.00 rent in exchange for the \$100,000.00 loan.
- [115] The fact that Mr. Geddam paid a rent of \$1,300.00 for one of the other townhouses is not favourable to Mr. Sunderaj's case and the validity of the 1 February lease since that is less than half of the rent he alleges Mr. Rout was obligated to pay.
- [116] The dates of the payment of the mortgage proceeds as evidenced by the cheques and emails is consistent with the evidence of Mr. Rout – that it was paid before the construction started or at in the early stages of construction. It is not consistent with the evidence of Mr. Sunderaj – that he began the construction with his own money and other loans and got the \$100,000.00 loan later.

Whether the Routs can rely on the mortgage?

- [117] The Routs assert that the parties executed a mortgage by which the townhouses were mortgaged to them as security for a loan of \$100,000.00 interest free for five (5) years and at an interest rate of 18% per annum thereafter. Mrs. Taylor-Russell

submitted that having regard to the default of the Sunderajes, the effect of the mortgage is clear – the Routs are entitled to possession.

[118] The Sunderajes do not deny that Mr. Rout loaned \$100,000.00 to Mr. Sunderaj, but they said that it was not loaned by a mortgage. They assert that his signature that appears on it is fraudulent. In order to determine whether the Routs can rely on the mortgage, having regard to the Sunderajes' allegations as to its invalidity, it must be determined whether the mortgage is valid.

[119] As I stated, I preferred the evidence of the Routs' witnesses of fact to that of Mr. Sunderaj. Mr. Sarangi is somewhat of an independent witness although it is obvious that he has some animosity toward Mr. Sunderaj as a result of him being arrested twice because of Mr. Sunderaj's complaints but he still has nothing to gain from the outcome of the litigation. I believe that he witnessed the signing of the mortgage.

[120] Each expert witness made conclusions supportive of their client's case. With respect to the mortgage, Ms. Bryan testified that Mr. Sunderaj was the writer of his signature that appeared on the mortgage.

[121] Further and in any event, the evidence supports Mr. Rout's evidence that the parties executed a mortgage. Firstly, it makes sense that in exchange for the interest free mortgage, the Routs would be permitted to live in one of the townhouses rent free. Not only was Mr. Sunderaj's evidence contradictory but the agreement he posited was far less probable.

[122] As I stated before, on the one hand, Mr. Sunderaj said that the agreement was that Mr. Rout would live rent free in the main house and subsequently the townhouse once one was completed in exchange for overseeing the construction. On the other hand, he said that the agreement was that Mr. Rout would pay \$2,500.00 rent in exchange for the \$100,000.00 loan.

[123] The copies of the cheques and the statement of account sent to Mr. Sunderaj (two \$10,000.00 cheques made in July 2006, one \$20,000.00 and one \$10,000.00 cheques made in August 2006 and the statement of expenses paid to the contractor and for construction materials representing the remaining \$50,000.00) coincide with the time at which Mr. Rout claimed to have accepted Mr. Sunderaj's offer in April 2006. The payments are shown to be made a few months after the offer was accepted which gives credence to the agreement asserted by Mr. Rout and the validity of the mortgage.

[124] Having found that the parties executed the mortgage, the mortgagor breaching the mortgage agreement is conclusive. The Court of Appeal in **Citibank NA v Paul Major** [2001] BHS J No 6 crystallized the court's approach to the mortgagee's exercise of his right under a mortgage. Ganpatsingh JA expressed that, unless there is some question as to the validity of the mortgage itself, fraud or irregularity in exercising the power of sale, the courts will not intervene to prevent the mortgagee from exercising his legal right under the mortgage. At para 77, Ganpatsingh JA stated:

“17 The cases cited on the impeachment of mortgage securities, all show that unless there is a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud on or irregularity in the exercise of the power of sale, the courts will not intervene to prevent a mortgagee from exercising his lawful rights under the mortgage deed. These proceedings were in every sense irregular, for there was no pending action in the equity jurisdiction of the court claiming relief in the first instance from an unconscionable bargain, as a result of the Bank acting in a way which prevented the respondent from giving proper detached consideration to his independent interest in the mortgage transaction, and which involved substantial risk to him, making such conduct unconscionable: See Bank of Credit and Commerce v Aboody (1989) 1 QB 923. Any such claim of course would go to the root of the mortgage transaction. The deed however would not be set aside, unless it could be established that the mortgage was to the manifest disadvantage of the respondent.”

[125] That position was restated by Fraser J in **Finance Corporation of the Bahamas Ltd. v Roberts and another** [2016] 2 BHS J. No. 221. Because there were no

arguable legal grounds, the fact that the mortgagor breached the mortgage agreement was conclusive. At para 14, the learned judge stated:

“There have been no arguable legal grounds put forward by the Defendants which would affect or change the order of vacant possession. The Defendants are still in breach of the mortgage agreement and the law in that regard is clear. "Unless there is a mortgage action in which is raised a serious question to be tried, including either the validity of the mortgage transaction itself or fraud or irregularity in the exercise of the power of sale, the Court will not interfere to prevent a mortgagee from exercising his lawful rights under the mortgage deed." (Citibank v. Paul Major JA Ganpatsingh).”

[126] Having dismissed the allegations of invalidity of the mortgage, the terms of the mortgage prevail. By the terms of the mortgage, the Routs, as mortgagees, have legal title to the mortgaged property. They are therefore entitled to judgment for the sums owed under it and vacant possession of the mortgage property.

[127] Whether the Sunderajes breached their first mortgage with BOB by entering into a mortgage with the Routs is not relevant to the question as to the validity and enforceability of the mortgage by the Sunderajes.

[128] The initial period for the interest free loan was 31 January 2012 but the Routs extended it to 31 January 2013. It follows that the interest rate of 18% per year obtained as at that date. As at 31 January 2022, the interest totals \$162,887.67.

[129] The Routs are entitled to \$262,887.67, \$100,000.00 being the proceeds of the mortgage and \$162,887.67 being the interest.

Whether Mr. Sunderaj owes money pursuant to the further loans alleged by Mr. Rout?

[130] Mr. Sunderaj denies any further loans from Mr. Rout. As I stated, Mr. Rout was a credible witness and Mr. Sunderaj was not. Even if Mr. Rout did not have the loan receipts bearing Mr. Sunderaj’s signature, the fact that Mr. Rout sent a very large volume of emails detailing the expenditure on construction materials and labour gives credence to Mr. Rout’s claim that the money was loaned by him to cover

those costs. It is unlikely that Mr. Rout would sent the emails detailing the expenditure, requesting repayment and kept such detailed records of the accounts if he did not make the further loans.

[131] In their Defence and Counterclaim, the Sunderajes contended that the claims for the further loans are statute-barred. Section 5 of the Limitation Act provides that the limitation period for actions founded on simple contract is six (6) years from the date on which the action accrued:

“5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on simple contract (including quasi contract) or on tort;

(b) actions to enforce the award of an arbitrator where the submission is not by an instrument under seal;

(c) actions to recover any sum recoverable by virtue of any written law; (d) actions to enforce a recognisance.”

[132] The first loan for \$30,000.00 became due on 15 October 2008 as that agreement stipulated that the money was to be repaid on that specific date, the second loan for \$35,000.00 (\$26,880.00 of which the Routs claim is still outstanding) was to be repaid on 9 December 2007, the third loan for \$20,000.00 was to be repaid on 15 October 2007, the fourth loan for \$10,000 (\$10,600.00 with interest) was to be repaid on 20 November 2007 at an interest rate of 12% after the six months.

[133] The first date on which the limitation period began running was 15 October 2007. Therefore, the limitation period in respect of the third loan ended on 15 October 2013. The writ for the further loans was filed on 18 November 2013. As such, in respect of the third loan, the Writ was filed out of time. It was not, however, filed out of time in respect of the other three (3) loans.

[134] With respect to the \$5,000.00 loan, there is no specific date on which the loan was to be repaid as Mr. Rout said that it was given on 12 May 2007 and was to be repaid “immediately”.

[135] The Routs are therefore entitled to the balance of the loan proceeds as claimed in the sum of \$96,907.91.

Whether the Routs owe money under the 1 February lease?

[136] The Sunderajes counterclaimed for money which they say is due and owing to them pursuant to a lease agreement dated 1 February by which the Routs were to pay a monthly rent of \$2,500.00. The Routs deny the validity of the lease; Mr. Rout alleging that he never signed it.

[137] By comparing the purported signature of Mr. Rout on the lease with his known signature from two (2) cheques, Mr. Vastrick testified that it was highly probable or virtually certain that they were written by the same person.

[138] However, as I stated, I prefer the evidence of Mr. Rout and Mr. Sarangi to that of Mr. Sunderaj, who under cross-examination was unable to reconcile his claim that he did agree for Mr. Rout to stay in his four bedroom house for free in exchange for supervising the construction site with his assertion that Mr. Rout was to pay a monthly rent of \$2,500.00. Further, the fact that Mr. Geddam, who rented another one of the units, paid a monthly rent of \$1,300.00 makes it highly unlikely that the agreement was for Mr. Rout to pay a monthly rent of \$2,500.00 especially having regard to the fact that Mr. Rout took on supervising the construction in the absence of Mr. Sunderaj.

[139] In my judgment, the parties never executed the 1 February lease and I do not believe that Mr. Rout was obligated to pay rent for living in the townhouse. It follows that no money is due and owing to Mr. Sunderaj for same.

Costs

[140] As the successful parties, the Routs are entitled to their costs to be taxed if not agreed.

Dated this 14th day of December 2022

**Indra H. Charles
Senior Justice**