OPINION

Background/Basis of advice

1. This opinion is written in relation to the commission of inquiry concerning land grabs in Bermuda and in relation to bank practices in regards to recovery of monies owed under mortgages in the possession of land thereunder. It is intended in general terms to include banking practices to enforce mortgages or other forms of security to secure a debt when the debt becomes delinquent and in particular what if any court order is required for sale, and whether on sale any remaining equity is returned to the borrower.

2. Classically, banks loan monies on the security of first legal mortgages, memorandum of deposit of deeds [mods], loans, and rarely promissory notes. Oftentimes a combination of these securities are associated with a single loan.

3. The first legal mortgage is the most secure collateralized loan that the banks offer. It is a conveyance of title in a particular property or properties to the bank in return for the monies borrowed. The bank re-conveys the property to the borrower once the principle loan along with interest are repaid.

4. A memorandum of deposit of deeds is an equitable charge over property in exchange for monies loaned. This does not transfer legal title in the collateral property to the bank but the documents

widely used by the relevant banks in Bermuda contain provision that the borrower will execute a first legal mortgage over the collateralized property on demand. Loans supported by promissory note or unsecured loans involve enforcement of the debt owing by judgment against the debtor and thereafter the issuing of a writ of execution against the property to enable its sale by auction or private treaty to recover the debt.

5. Proceedings to recover debt are akin to a summary judgment hearing. I say this only in reference to the usually undisputed fact that monies are owed by the debtor to the bank and in that respect only, it is undisputed. In defense of most claims by the bank, if appropriate on the evidence, it is left for the defendant is to show that there is a viable defence such that further evidence can be directed and a hearing listed

6. I should make it clear that loan relationships are a commercial banking-related matter and Bermudian law is based on English common law - I therefore anticipate views as to the position in English law should prove of considerable assistance in determining the overall Bermudian position.

a claim against a debtor

7. Mortgage recovery actions are usually commenced by an originating summons supported by an affidavit claiming possession and judgment for a specified sum. Defaults under Memorandum of Deposits of Deeds, Loans and promissory notes can be commenced

similarly but are often commenced by specially or generally endorsed writ of summons claiming judgment and possession.

8. The mortgage recovery actions the Bank will usually depose that an amount of money was lent to the borrowers pursuant to the terms of a facility letter. As part of the security for the loan obligation, the borrowers would provide real property as collateral and perhaps an unconditional guarantee in favour of the Bank in the amount borrowed supported by a mortgage in respect of property owned.

9. The usual scenario involves the Bank making a demand in respect of the mortgage which a borrower has failed to repay together with accrued and unpaid interest and is therefore in default.

10. The usual remedies sought are an order for sale as well as for the appointment of independent joint receivers pursuant to section 35 of the Conveyancing Act 1983.

Defending The claim

11. Most often borrowers that find themselves the parties of record lack sufficient resources to instruct counsel to assist them properly. It is usual for their lack of knowledge and understanding of the legal process to heavily disadvantage them in response to or defending claims made against them.

12. In my experience there are a few usual categories to which defences to bank claims lie.

a. The bank provided an inaccurate and misleading picture of events in their affidavit, including the banks have not provided particulars of the alleged debt. Defendants most often do not agree with the value of the sums claimed by the bank which often times include legal fees, delinquent taxes the cost of repair of the premises.

b. That agreements were made as to writing off interest and the non-charging of penalty fees. Defendants will admit that they are in arrears of mortgage payments but that they had met with the bank who agreed to accept lesser payments (most often for a specified time period) and so long as they are consistent with that other agreement the banks should be prevented from pursuing actions against the defendants who assert that these agreements should continue.

c. The banks exercised undue influence, duress, coercion or threats to seize or attempt to seize the borrowers' property.

d. The banks have intermeddled in the sale of the borrower's property and/or the appointment of receivers would imperil efforts to sell the borrowers properties.

e. There is a relationship of trust and confidence that the banks have breached.

General View

13. Most defendants to mortgage recovery actions have an emotional connection with defending what is usually their family home and defences to the actions whilst in some instances are persuasive or are compelling. As a general proposition it has to be borne in mind that proceeding with litigation which is unmeritorious is far from

sensible. In particular, it will lead to the borrowers having to incur legal costs and exposes the borrowers to further costs from the bank.

14. I have known a number of mortgage recovery cases over the years where clients have been exposed to dealings with banking institutions and have felt that the stance taken by the institutions is unfair or even dishonest. However, any litigation with a bank has three principal problems. Firstly, banks have extremely professional legal departments and produce high quality documentation (such as mortgage documents and guarantees) - the terms of these are normally highly in favour of the bank. It is extremely difficult to suggest that these terms have been departed from or otherwise cannot be relied upon by arguing that there has been an oral variation or some form of estoppel. Secondly, very much a corollary of the first point, banks usually record matters in writing and the "paper trail" is usually highly supportive of the position of the bank. Thirdly, banks are well-financed and have deep pockets - they often take a hard-line in their attitude to litigation.

15. With those preliminary points and what I have categorised as general defences there is usually no realistic defence to the Bank's claims and that the focus, in my view, of almost all litigation involving mortgage recovery should be settlement on the best possible terms.

16. However, I wish to add one major caveat to this. Often times the borrowers real stance is one of delay in the hope that a favourable

sale of property or refinancing will settle the bank's claims. In this regard defending litigation is often strategically done with an intention to delay possession and receivership orders by attempting to demonstrate that there is a defence to the action and thus to induce the Court to adjourn matters and to set future hearing dates.

17. In summary, therefore:

1) On the material usually before the courts there is most often no obvious and realistic defence to the claims that are made by the banks. The Defendants inability to pay is not a defence to the Bank's position that monies are owed. Nor do claims of dropping property values engender support to lessening the quantum of monies owed. Again, based usually on the strength of the Banks' cases they easily acquire judgment I terms of their summons.

The Defences

Agreement

18. I feel it necessary to make comment on what I have characterised as the common defences starting with "agreements". In Mortgage recovery cases extensive negotiations between the Bank and the borrowers regarding their loan facilities regularly takes place. This is often referred to by Defendants in proceedings who complain that the banks don't set these negotiations out for the courts. First, my understanding is that the Bank is not required to set out all its negotiations with a customer when making an application to the Court for orders for possession, sale

and appointment of receivers. Second, and most importantly, the reason for the banks not setting out the negotiations is that they did not yield any agreement which was acceptable to the Defendants and/or the Bank and which the Defendants abided by, hence the need for proceedings.

19. A further scenario arises where often Defendants adhere to agreements and believe that they have reached agreements but the Banks argue that offers and agreements require "internal approval" if the borrowers were willing to accept the offers made or that "any firm agreement the bank reaches reach will need to be subject to formal approval within the bank.."; "these terms are indicative only and subject to completion of formal legal documentation in form and substance satisfactory to the Bank.

20. However, the actions of the borrower expressly illustrate that they have relied on these offers of settlement and acted to their detriment and complied to date significantly with the terms of the agreement. Whilst I understand what the borrowers are driving at here (attempts have clearly been made to resolve matters with the Bank) what usually is demonstrably missing is any clear evidence of a definite and certain offer being accepted by the borrower - and which would now bind the Bank.

Quantum

21. Often the calculations on quantum are difficult to follow.

22. It seems to be clear that borrowers accept that there are sums owed to the Bank and the fact that sums are owed has given rise to a

situation of default; and thus creates a legal right for both an order for sale and receivership.

23. However, the sums in question are usually substantial and the borrowers clearly do not want to face a money judgment for sums not properly due. Unfortunately, in default there is often penalty interest, late fees and charges and legal fees on an indemnity basis.

Interference

24. Some unlawful interference by the Bank in the property transactions of a customer could be said to constitute a tort. In OBG Limited v Allan [2007] UKHL 21, the House of Lords both confirmed the existence of a tort of "hitherto uncertain ambit" which consists of one person using unlawful means with the object and effect of causing damage to another and clarified some aspects of that liability.

25. However, the burden of demonstrating that there is a viable claim based on interference/some form of economic tort would rest upon the borrower/defendant.

26. Instances of personal animus arise in our small community. Generally speaking, the law looks at whether an action is lawful or not and not to the mind of the actor undertaking the action - if the Bank are entitled to bring proceedings by virtue of the mortgages/guarantees, as seems plain, then the mere fact that a loan officer or a bank employee charged to collect the outstanding

debt may have a personal animus/dislike for the borrower will not assist them in defending the claim, nor is the fact that the Bank have treated other customers/borrowers differently - that is a matter for them. In regards to , a legitimate threat which then induces a borrower to enter into some contract/other arrangement might give rise to a claim for the setting aside of such a transaction as being some form of economic duress[1].1

Trust and confidence

27. Often as result of or during proceedings borrowers assert that they trusted and relied on the Bank's advice not only in regards to the value of property to be used as security for the borrowing, the ability to repay the loans based on the Bank's analysis of the borrowers liquidity and debt service ratio. Based on the amount of money loaned which would (now) be in default, had they known at the time of borrowing that there was a possibility that they would be in the position they are in facing proceedings and if the Bank had advised them of the same, they would not have entered into the dealings with the Bank or at least would have taken independent legal and financial advice in regards to the matter.

[1] *Paragraph 8-015 of Chitty on Contracts 32nd ed notes that "Three English cases and one important Privy Council appeal, first recognised the possibility of the concept of economic duress. In substance, this amounts to recognising that certain threats or forms of pressure, not associated with threats to the person, nor limited to the seizure or withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or pressure". The doctrine of economic duress is therefore clearly now established and its existence was accepted by the House of Lords in Dimskal Shipping Co Limited v ITWF [1992] 2 A.C. 152.*

28. The English courts are of course familiar with these kind of assertions in the context of negligence claims brought against banks and financial advisers.

29. However, I am bound to say I cannot see a claim for negligence or on the basis of the Bank having to assume responsibility to advise the borrowers as being remotely credible. If the Bank had given specific advice (such as, in financial mis-selling cases, to take one form of hedging product over another) then it might have been possible to seek to trace through loss arising from the Bank having provided that advice negligently. However, the criticism here (mortgage recovery) of the Bank is general, rather than specific, and does not seem to me to outline any actionable wrong. There are instances that we have seen recently where the Banks have been held liable for not ensuring that borrowers and guarantors on loans take independent legal advice in regards to the borrowing. It is however usually the case that a prerequisite for the loan is the borrowers written confirmation that they have taken independent legal advice.

30. I should also add that a claim by Borrowers that they relied on the Bank seems impossible by virtue of the principle of contractual estoppel. As Chitty on Contracts 32nd Ed makes clear at paragraph 4-116, this form of "estoppel" is said to arise when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such "contractual estoppel" is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of

affairs so specified in the contract: Peekay Intermark Limited v Australia & New Zealand Banking Group Limited [2006] EWCA Civ 386.

Receivers/an order for sale

31. I should add something about the question of an order for sale/receivership.

32. The usual originating summons in mortgage matters seeks an order for payment of sums due under the mortgage; for the sale of the collateral property and an order for the appointment of joint receivers.

33. However, I am bound to say that both an order for sale upon default and for the appointment of receivers are clearly well-hallowed remedies clearly permitted upon default.

34. A good summary of the English position (assuming, crucially, Bermudian law mirrors English law) as to receivership in the case of a legal mortgage is set out at paragraph 2-21 of Kerr and Hunter on Receivers and Administrators 19th ed:2

35. Further, in their management of the properties and indeed upon any sale of the properties, the borrowers are protected by the fact that the receivers will be under a general duty to act in good faith and to exercise their powers for proper purposes (Downsview Nominees Limited v First City Corp Limited [1993] AC 295 at 315) and are under specific duties to take reasonable care and act

with due diligence in conducting any sale of, or in managing any business on, the mortgaged property (Medforth v Blake [1999] 3 All ER 97).

36. Unfortunately, the Bank owes no duty of care to borrowers/ defendants in deciding whether to appoint a receiver and the basis of objection to the appointment would have to be bad faith. As I have indicated elsewhere in this advice, given the scale of the default, I really cannot see that the Court would conclude that the Bank's exercise of the power was an act of bad faith (and I say this even if the Bank's willingness to bring this action, and indeed not to bring actions against others in the same position as the borrowers, is partly motivated by a personal animus). See paragraph 28.6 of Fisher and Lightwood on Mortgages (14th ed): 3

3Legal mortgages.
2-21
Before the Judicature Acts, a mortgagee having the legal estate could not, except under special circumstances, obtain from the Court of Chancery the appointment of a receiver over the mortgaged property, because he could take possession under his legal title. But since the Judicature Acts, the court will appoint a receiver at the instance of a legal mortgagee, after default in payment of principal or interest. The court does this, not because the mortgagee has in fact less power than he formerly had to take possession, but because there is an obvious convenience in appointing a receiver, so as to prevent a mortgagee from taking up the unpleasant position of a mortgagee in possession. Since 1925, a mortgagor always retains a legal estate if he had one when the mortgage was created; and a mortgagee under a charge by way of legal mortgage is to be treated as in the same position as a mortgagee by demise. The appointment of a receiver at the instance of a legal mortgagee is not a matter of course, and the court has a discretion in the matter; but under the present practice, where an action for foreclosure is pending, the court will usually appoint a receiver at the instance of a legal mortgagee, and will do so, on interim application, where the mortgagor is in possession; possession is usually directed to be given to the receiver, but the mortgagor may be allowed to attorn tenant at a rent".

*3. "A mortgagee is given the power to appoint a **receiver** to protect his own interests. Thus, once the power to appoint a **receiver** is exercisable, in deciding whether to exercise that right the mortgagee owes no duty of care to the mortgagor, nor to guarantors or other creditors, and his decision to exercise it cannot be challenged except on grounds of bad faith[1]. A mortgagee who appoints a **receiver** knowing the **receiver** intends to exercise his powers for improper purposes, or who fails to revoke the **receiver's** appointment when he knows the **receiver** is acting improperly, may himself be in breach of his duty of good faith[2]. A mortgagee who appoints a **receiver** when he has no right to do so will risk being found liable for damages for breach of contract[3].*

37. In summary, I frankly cannot see any reason why a receiver could not be appointed in most cases. It is a fairly common application to make and it is clear that the various mortgage documents reserve the right for the Bank to appoint a receiver (as it is also standard). The advantage for the mortgagee of appointing a receiver, rather than taking possession, is that the mortgagee will not be liable to account on the basis of wilful default, since the receiver is not normally the agent of the mortgagee.

38. The Bank's reasons for seeking the appointment of receivers are entirely standard. They assert that the properties require management in terms of ongoing maintenance, management of the expenses and insurance. They assert that "it is not practical for the Plaintiff, a bank, to manage these issues on an ongoing basis, especially where there are issues pending a sale..".

The way forward/settlememt

39. It is my confident view that the Bank's position is usually very strong indeed.

40. It may therefore be in the Defendants' best interests to try to settle the actions on the best possible terms prior to any court hearing

41. In terms of the actual specifics of settlement, this clearly turns upon the borrowers' current financial position, the valuation of the properties and the possibility of re-financing.

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