**A COMMISSION OF INQUIRY**

**INTO HISTORIC LAND LOSSES**

**IN BERMUDA**

**CHAIRMAN**

**MR. WAYNE PERINCHIEF, JP**

**COUNSEL**

**MR. DIRK HARRISON**

**COMMISSIONERS**

**MS. MAXINE BINNS (via Zoom)**

**MS. FREDERICA FORTH**

**MS. LYNDA MILLIGAN-WHYTE, JP**

**MR. JONATHAN STARLING**

**MR. QUINTON STOVELL**

**TRANSCRIPT OF PROCEEDINGS**

**LOCATION: WARWICK CAMP**

**FRIDAY, JANUARY 22, 2021**

**AFTERNOON SESSION (a)**

**Mr. Perinchief (Chairman)** 0:12 Good afternoon all. We are resuming the afternoon session of the Commission of Inquiry and it's my understanding that we have a prominent attorney who is going to enlighten us as to some banking practices and I will leave it to you, Counsel, to make a formal introduction.

**Mr. Dirk Harrison (Counsel)** 0:41 Thank you, Chairman, Commissioners. I'd like to call the next witness to give evidence, Mr. Christopher Swan. He will give evidence in relation to bank practices regards to recovery of monies owed under mortgages, possession of land thereunder and he has a wealth of experience, but I won't speak on his behalf. He is more than capable to speak. I just ask that the witness is either sworn or he is allowed to affirm depending on his conviction, religious or otherwise, if the Bible could be given to him, or he may affirm.

**Christopher Swan** 1:27 I swear.

**Mr. Dirk Harrison (Counsel)**  1:32 Yes.

**Christopher Swan**  2:01 I, Christopher Swan, swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

**Mr. Dirk Harrison (Counsel)** 2:38 Good afternoon, sir.

**Christopher Swan** 2:40 Good afternoon and good afternoon to the Commissioners and the Chair and Counsel.

**Mr. Dirk Harrison (Counsel)** 2:48 Now sir, you are Barrister and an Attorney at Law.

**Christopher Swan** 2:52 Yes.

**Mr. Dirk Harrison (Counsel)** 2:53 How long have you been practicing?

**Christopher Swan** 2:56 Twenty years this year.

**Mr. Dirk Harrison (Counsel)** 3:02 Where do you practise presently?

**Christopher Swan** 3:04 I'm the proprietor of Christopher E. Swan & Co., 26 Church Street, Hamilton.

**Mr. Dirk Harrison (Counsel)** 3:13 Now, are you licensed to practice anywhere else?

**Christopher Swan** 3:17 No.

**Mr. Dirk Harrison (Counsel)** 3:22 Now, I'd like to speak a little about your twenty years at the Bar and even before prior to being called to the Bar. Do you have an expertise as regards debt collection?

**Christopher Swan** 3:36 I have quite a, many years of expertise in debt collection. Before I even went to law school I was working with Julian Hall who, Members of the Commission will recognize the name, in his law offices, Hall Associates, and under that umbrella, a collection company called JS Management was doing debt collection. I worked closely with them and their practices probably for, I think, five or six years before even going to law school.

**Mr. Dirk Harrison (Counsel)** 4:09 Thank you and those were debt collection in relation to what type of matters?

**Christopher Swan** 4:18 Contractual debts for the most part. They involved everything from enforcement of promissory notes, there were one or two mortgage recoveries during that time period, other contractual debts for service providers, telephone companies and the like including landlord and tenant matters as well.

**Mr. Dirk Harrison (Counsel)** 4:41 Thank you. Now since being called to the Bar, you have dealt with debt collection matters and property law related matters.

**Christopher Swan** 4:55 Yes, in fact, since being called to the Bar, in some respects during a period of pupilage and maybe for a year or so before that, I had conduct, or involvement is a better word, in conveyancing matters representing vendors and purchasers, from sale purchase agreements to the drafting of conveyances, the drafting of security documents, mortgages, further charges, MODDS were a new phenomenon, so back then we weren't doing as many of those, financing for corporate entities. We also incorporated limited liability companies, general other areas of law, but the debt collection involvement, debt collections practice became more involved, if you put it that way, in that there was more time, particularly once being called, in court, usually in the lower courts every Wednesday and Friday. In fact, those are the new dates. They used to be, I want to say, Tuesdays and Fridays in the old court building for collection and enforcement debts and after being called, the Supreme Court Chambers characteristically on Thursday for the same debt collection matters. As the practice grew, we were involved with, I'll say every bank that loaned money, every lending bank on the Island, in terms of assisting with the drafting of mortgages. Our recovery work, mortgages and finance documents, our recovery work was more limited to two of the, I'll call the three banks but we probably did over the course of the years anywhere from dozens of cases representing either of the banks trying to collect monies that were defaulted on, regards to loans and mortgages and, conversely, the same amount of clients, perhaps defending those particular claims, not including just general advice which would be on both sides to the banks and to clients.

**Mr. Dirk Harrison (Counsel)** 7:12 Now specific to the debt collection and your appearance in the Magistrates’ Court, you mentioned, probably twice per week in the days of old, probably Mondays and Wednesdays, how long did you do that for?

**Christopher Swan** 7:26 Since I've been called, that's every week, that's easily twenty years. Prior to that, when I was, just prior to my leaving Bermuda to go to law school, I started going to court. I would be sent just on the collection matters so I would add another five years to that.

**Mr. Dirk Harrison (Counsel)** 7:48 And in respect of, at the Supreme Court?

**Christopher Swan** 7:50 Supreme Court was definitely after call, so that would be limited to twenty years.

**Mr. Dirk Harrison (Counsel)** 7:57 Now, with regard to the expertise regarding mortgages and loans, is that a practice that has evolved with the Supreme Court practice or there was that at the Magistrates’ level?

**Christopher Swan** 8:18 Enforcement of mortgage loans is a Supreme Court matter, so in terms of experience, that would be limited appearances would be limited to the twenty years. I had involvement on files prior to that, but not in terms of advocacy in the Supreme Court.

**Mr. Dirk Harrison (Counsel)** 8:40 Now, finally, as regards the banking practices and especially enforcement of mortgages, you would consider that you, consider yourself to have a wealth of experience?

**Christopher Swan** 9:04 I would say that I do have a wealth of experience.

**Mr. Dirk Harrison (Counsel)** 9:09 Chairman, in respect of the evidence of the witness, Mr. Swan, he has outlined over the last twenty years his experience since being called to the Bar, appearing in the Magistrates’ Court, the Supreme Court. He also gave evidence in respect of, prior to being called to the Bar, experience he had for some five to six years as it relates to debt collection and specifically, with regard to the expertise regarding loans and mortgages, generally for the, I would say for twenty-five to twenty-six years. It is my submission and application that he be considered an expert to speak on the matter of banking practices, the enforcement of mortgages or other forms of security to secure debt and to be allowed to give evidence to the Commission of Inquiry.

**Mr. Perinchief (Chairman)** 10:16 Yes, Counsel, as you were speaking to the witness, it came to mind that for the purposes of this Commission of Inquiry, that Mr. Christopher Swan be considered and deemed to be an expert and that will be placed on the record.

**Mr. Dirk Harrison (Counsel)** 10:37 Thank, thank you very much. Now, Mr. Swan, a request was made by the Commission of Inquiry to you to provide an opinion and to appear before the Commission of Inquiry.

**Christopher Swan** 11:00 Yes.

**Mr. Dirk Harrison (Counsel)** 11:02 And the opinion that you have prepared and that which was requested of you, could you share with us what exactly was the subject area that you were asked to provide this opinion on.

**Christopher Swan** 11:15 I will read you the first paragraph that sets out…

**Mr. Dirk Harrison (Counsel)** 11:20 And just before you read it, are you able to tell us what is in the paragraph without referencing the document?

**Christopher Swan** 11:27 It's an opinion on banking practices in regards to delinquencies on loans, the enforcement procedures and practice that are used, what court orders are made, required in terms of the sale and particularly whether after sale, there is equity, that it would be returned to the borrower. The opinion touches on practices and procedures as I have experienced, for the most part the process of initiating the action, what I have perceived as the usual defences that are raised by borrowers or defendants, I had to change that word throughout the opinions, and I give an overview of what, from my perspective, the realities on the ground for most of these matters.

**Mr. Dirk Harrison (Counsel)** 12:25 Thank you. Would you wish to refresh your memory from the document?

**Christopher Swan** 12:29 I may from time to time I think in terms of your question, it says: “(This opinion) 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.” So I think I’ve, in broader terms, explained that was the purpose of, with your leave, of course, there may be times when I would like to refer to what I have said.

**Mr. Dirk Harrison (Counsel)** 13:01 And certainly, it's easier for you to refer to it than to try to recall it through memory. The opinion that you have prepared for us is, It's eleven pages and forty-two paragraphs?

**Christopher Swan** 13:33 I have printed out a copy for myself which seems to differ from that slightly. It is forty-two paragraphs, but my pages are thirteen or fourteen, but I'm assuming that's just based on the size of the print, but I'm quite sure it's the same.

**Mr. Dirk Harrison (Counsel)** 13:50 It's forty-two paragraphs?

**Christopher Swan** 13:52 Yes.

**Mr. Dirk Harrison (Counsel)** 13:52 I'd ask that, Mr. Chairman, I'd ask that the opinion of witness expert, Mr. Christopher Swan, forty-two paragraphs and I just ask him to sign his copy now, so I could say of today's date. I crave your indulgence. Could I just ask you to sign the copy you have. I just ask, Mr. Chairman, that the opinion of the witness expert, Mr. Christopher Swan, comprising of forty-two paragraphs, be tended and admitted as Exhibit CS 1.

**Mr. Perinchief (Chairman)** 14:45 Yes, the opinion of the witness Christopher Swan, Barrister, on banking practices in Bermuda composes of forty-two paragraphs, the index as Exhibit ES 1.

**Mr. Dirk Harrison (Counsel)** 15:03 C, C, CS, C. C as in Christopher, S as in Swan. CS

**Mr. Perinchief (Chairman)** 15:09 CS, yes C, my correction.

**Mr. Perinchief (Chairman)** 15:15 And just as a further comment, this opinion. as you know will certainly be used, considering your expressed opinion, as criteria for assessing certain banking matters that will come before the Commission going forward.

**Mr. Dirk Harrison (Counsel)** 15:39 Now, Mr. Swan, could you just indicate to us the background and the basis of the advice?

**Christopher Swan** 15:46 The background, quite frankly, is my personal experience, again from dealings with the banks in regards to recovering monies on their behalf, also defending persons who find themselves defendants to the banks’ actions. And that was not only from an advocacy point of view from appearing in court or dealing with claims that have been filed, but also from advising both parties in regards to scenarios that had arisen over twenty years of practice. That's the background and the basis quite simply was the instruction or request that was put to me by former Counsel.

**Mr. Dirk Harrison (Counsel)** 16:32 Thank you very much. Now, could you, could I take you to paragraph two of your opinion, just to get some context of the…

**Christopher Swan** 16:46 Let me indicate that I believe, embarrassingly so, you have just been sent the incomplete or former version. I'm just looking at it. One of the, paragraph two should say “Classically, banks loan...” This says “Classically…”, it says something else.

**Mr. Dirk Harrison (Counsel)** 17:07 I think what appears on the screen is accurate.

**Christopher Swan** 17:11 What I've been given and signed is not, so I will ask if I could be provided with that copy. Yes, I'm back where I need to be, “Classically, banks loan monies on the security... “ Yes.

**Mr. Dirk Harrison (Counsel)** 17:26 Thank you. I crave your indulgence. What I'm being advised is…

**Christopher Swan** 17:35 What I can do if assists is, quite simply, when this is concluded I'll be happy to sign this document or any of the other documents that are correct.

**Mr. Dirk Harrison (Counsel)** 17:43 So,

**Christopher Swan** 17:45 But I can proceed on the basis of what is in front of me.

**Mr. Dirk Harrison (Counsel)** 17:46 Please, because what you have in front of you is what has been projected on the screen.

**Christopher Swan** 17:51 Yes.

**Mr. Dirk Harrison (Counsel)** 17:54 Please proceed.

**Christopher Swan** 17:56 So,

**Mr. Dirk Harrison (Counsel)** 17:57 I want to take it to paragraph two and to give some context within which the security of First Legal Mortgages or any other type of agreement is established.

**Christopher Swan** 18:15 The highest form of security that the banks have or that is in place is a first legal mortgage. It is a conveyance of title and property to the bank in exchange for money. It's really that simple. I think everyone, anyone that's ever been in that position knows that the bank gives the money, they agree to pay the money off and once the money is paid off, the property is transferred back or reconveyed to them. So that would be the highest security that the bank has.

Second to that would be a memorandum of deposit of deeds which was known as *mods*. Now these were, in my view, documents, they've always existed, but they had some prominence, I would say in the 80s and 90s where they were used in my view by the banks as a means of securing loans for existing customers of good standing, so instead of taking someone who had the resources and monies to easily pay off a mortgage and what not, and already had a banking relationship with the particular banks, instead of having them execute a full legal mortgage you would have them execute a mods. The difference is that a memorandum of deposit of deeds does not affect a transfer of title in the property to the bank. What it creates is an equitable charge, it creates a lien or ‘liean’, depending on how you want to pronounce it, on the property in exchange for the money.

Now the opinion does go on to talk about the language that's used in most of the memorandum of deposit of deeds for the banks and some of the languages vary slightly, but one of the things you generally see is an undertaking or a promise by the person borrowing the money that should the bank request it, they will execute a first legal mortgage over the properties in exchange for the monies that at that stage would already have been lent. There are instances where banks will loan monies strictly, loan money just by way of a loan, forgive me. Those you classically tend to see where the person has cash assets in the bank and simply wants a loan secured by those cash assets, even if they're going to use that money to purchase property for the sake of this discussion.

Promissory notes are very rare because they are what I consider the lowest form of security that the banks would give, there's no collateralization generally in them, even if the promissory note mentions the purpose of the borrowing and that land is involved. It still doesn't affect the transfer or a lien and in order to get to that stage proceedings would have to be issued and judgments obtained and the like. This paragraph goes on to talk about a combination of these securities associated with single loans. I have seen instances where banks have loaned money secured by mortgage and shored up that lending with, it wouldn't be a mods because that really wouldn’t make sense in the sense that you already have a mortgage, but with promissory notes or personal guarantees. You tended to see more of that pre 1990, say 1995, mid 90s, when you had scenarios where people borrowed money secured by mortgage, but you had persons who were not on title that guaranteed the borrowing. You also tended to see a multiplicity of different documents with company financing, so a company borrowed money to purchase land if it had the ability to do so. Under the Companies Act, you would see a mortgage maybe even debenture, personal guarantees and promissory notes. So sometimes you do have combinations of all of these documents but again, the highest form of security would be your first legal mortgage, if that assists.

**Mr. Dirk Harrison (Counsel)** 22:30 And you have made a distinction between what happened in the 1980's and what happened in the 1990's. What is, what is typical today?

**Christopher Swan** 22:45 Typical today, you do not see, I think I can say that with certainty, you do not see situations nowadays where people will guarantee mortgages as a, as a separate, you see separate guarantees, banks insist that persons are on title to the particular properties involved. You don't see guarantees anymore as independent documents, you don't see as many, in fact to be fair, I don't think you see memorandum of deposits of deeds, or at least I haven't seen them come across my desk, so to speak, since the turn of the century, in 2000 or thereabouts. I think the general thrust is that the banks will prefer to have the highest possible security to protect their position as opposed to the practices of the past which, by today's standards, would probably be considered loose or looser than they are now, let’s put it that way.

**Mr. Dirk Harrison (Counsel)** 23:52 Thank you. Could we go to paragraph three?

**Christopher Swan** 23:59 Yes. Is there a question or would you like me to just take you through it?

**Mr. Dirk Harrison (Counsel)** 24:05 Take me through it and I'll lead to the question afterwards. Now, in paragraph three, you spoke generally, well in your introduction, and I refer specifically to the penultimate and the final line in paragraph three, in terms of what the general idea is in simple terms of the borrower and the relation between the borrower and the bank. This is a typical scenario that is represented in paragraph three, is that correct?

**Christopher Swan** 24:47 Yes.

**Mr. Dirk Harrison (Counsel)** 24:49 That…

**Christopher Swan** 24:50 Upon repayment of a mortgage, the property is reconveyed, transferred back to the borrower. Now I will say that you do have on occasion instances where the transfer is to the borrower and others, but the bank's, the thrust of this is that the banks will transfer the property back. In fact, it’s a matter of law, they must transfer the property back once the mortgage has been repaid.

**Mr. Dirk Harrison (Counsel)** 25:20 Now, you're aware, I'm certain, especially based on your expertise, that there has been some concern, especially in Bermuda, regarding the practices of banks and the perceived, whether real or whether perceived or actual, in terms of persons losing property. You're familiar with that sentiment?

**Christopher Swan** 25:47 Yes.

**Mr. Dirk Harrison (Counsel)** 25:49 And certainly, I can alert you that the presentation, the questions to you may go in that direction very shortly. Now, let's talk a little bit about the memorandum of deposit of deeds because I know you mentioned, you refer to it in paragraph four, but I know you mentioned that to this day, it is not something that is utilized much, but…

**Christopher Swan** 26:21 Yes. We don't see this much, if at all. And I think, perhaps it's of note, that in my view that, and I think this may be shared by some people that had experience with seeing these documents, it was more of a convenience that the bank provided for their valued clients that were borrowing money, again, Instead of making them go through the expense and that's another point, In fact, the Stamp Duty on a first legal mortgage is calculated in bands, one quarter of 1% for amounts under $400,000 and one half of one percent for ones above and I believe memorandums of deposit of Deeds are one tenth of one percent across the board, so it was less expensive in terms of the Stamp Duty. But again, it was more of a convenience and I think that, just based on probably international practice, amongst other things, they've done away with that. We definitely see correspondence from banks nowadays indicating that the loan or whatever the facility was has been paid off that was secured by memorandum of deposit of deeds and execute the appropriate release or instructions to that effect. But we definitely don't receive instructions nowadays to draft up memorandums of deposit of deeds and I haven't done so for some years.

**Mr. Dirk Harrison** (Counsel) 27:56 And not only did you, I think importantly, based on your earlier evidence, the banks have a, call it international best practice now to seek to have the, strongest is my very unforensic word if there's such, to have the strongest type of arrangement with a borrower.

**Christopher Swan** 28:18 Yes.

**Mr. Dirk Harrison (Counsel)** 28:18 And that is the strongest to hold on to something in case there's a default.

**Christopher Swan** 28:24 The first legal mortgage definitely is the strongest security.

**Mr. Dirk Harrison (Counsel)** 28:29 Now, there is a, not just a view but a fact, that the recovery of debt after the default of a borrower has created much angst in Bermuda. There is a perception, real or a perception, that there are unfair practices that have been undertaken and there's a complaint from borrowers that financial institutions have engaged in unfair practices to the borrowers’ detriment. I would like us to speak a little before, of that, but before we get into those questions, I certainly would like us to give some context to the, just the general atmosphere, the environment and to speak a little about banking based on your expertise. Now the law as regarding mortgages, as regarding loans, it is governed by Bermuda Law and the English Common Law, Correct?

**Christopher Swan** 29:51 Correct.

**Mr. Dirk Harrison (Counsel)** 29:56 Now, I'd like to take you to page, the second page of your opinion. Crave your indulgence. I was just trying to ascertain whether or not the projection of the presentation precluded viewers from seeing the witness, but I am assured that they are not seeing the presentation, but they're hearing and seeing the witness. I was just trying to ascertain that fact, my apologies. Now let's speak a little bit about mortgage companies or financial institutions seeking to recover debt from borrowers. I'd like to speak a little about that. Could you just guide us in terms of how these matters originate, how they are commenced, initiated?

**Christopher Swan** 31:24 I touch on this somewhat in paragraph five when I say “proceedings to recover debt are akin to a summary judgment hearing”. To explain that, I'm sure you would, Counselor, appreciate this, what a summary judgment hearing is, there are provisions in our Rules of Supreme Court, lawyers often call them Order 14 proceedings, that is where a claim has been made against someone and the defence or defendant raises a defence that really is not a defence for the action, it has no weight and you can apply by summary judgment proceedings under Order 14 for judgment based on affidavit evidence, because there is not a defence or a viable defence to the claim. So when I make reference in this matter to ‘akin to a summary judgment hearing’, the reference, quite frankly, is that when banks issue proceedings they are based on usually a simple premise, that is a default on the payment of interest and principal or an amortized payment or both and there usually is, quite frankly, no defence to that payment having been made in the sense that the defendant will say yes, okay, I accept that I'm in arrears, and they may give reasons for why, but the simple fact that they are in arrears of the contractually agreed mortgage repayment is enough for a court to be moved to consider that, okay, the claim being made must be given, go back a step or go forward a step, the plaintiff that is suing should be given judgment on the basis that the defendant really has admitted that which they are complaining of.

Mortgage recovery actions are usually commenced by originating summons which is one of the four ways that you bring a matter into court, but originating summons are supported by an affidavit and that affidavit deposed on behalf of the bank will set out, amongst other things, the contractual relationship that a mortgage existed, as of whatever the date was between the bank and the defendant or defendants, the people that borrowed the money. It may also list any guarantees or guarantors if it's of that older vintage, but it will discuss the amount borrowed, what the payments were, the interest rate and then will condescend into the default for what the bank claims of the arrears. Based on that, that will be served on the defendant or defendants and then they will, usually they will have two weeks or thereabouts to, I'm sorry, originating summonses will set a date for an appearance and at that first appearance, normally what will happen is that the courts will give them an amount of time, usually two weeks or thereabouts, to reply to the, by way of affidavit to the affidavit evidence that's presented and in that reply, if there are matters that are raised which put into place a defence of that action, then the matter will be set down for hearing. That's an originating summons.

\

For matters that are commenced by writ of summons, now there are two types, you either have a generally endorsed writ of summons or a specially endorsed writ of summons. Generally, endorsed writs of summons have a brief summary, particulars of claim what the claim is about. It may say, this is a mortgage recovery action between whatever the bank is and wherever defendants are for X amount of money. What happens in those actions is that that is served on the defendant or defendants who would then have two weeks to file what's known as a memorandum of appearance. That is a document just indicating that they were defending the matter, well actually, a document setting out the address of the either lawyer that's defending them or their address for service and it indicates that they're taking steps to enter an appearance. They have received the writ and they acknowledge it, let’s put it that way. They will have two weeks after that to file a defence to the claim and then the matter can go in several different directions. If there's no valid claim, then again, I mentioned summary judgment proceedings could take place after that. If there are, for monies that are claimed, if there is an application for possession which can be made under various sections of the Rules of the Supreme Court, the matter can be set down for hearing in front of a judge even in the Thursday Chambers list which I mentioned at the very beginning for the matter to be adjudicated or it could go to a full-blown trial. You generally see, you usually, forgive me, see generally endorsed writs of summonses or specially endorsed writs of summonses for collection of monies that are secured under memorandum of deposit of deeds. You definitely see them as a means of initiating actions for monies that are in default or loans and promissory notes. That's generally the starting process.

**Mr. Dirk Harrison (Counsel)**  36:43 Now, also in a general sense, whether a customer of a financial institution or somebody who wants to become a customer, he identifies a property whether commercial or something that is residential and he goes to the financial institution and he asks to borrow money, so, just in simple terms for the layman, what really is that mortgage, somebody decides to acquire something, what is, le’ts speak a little bit about that.

**Christopher Swan**  37:20 Our friends, the real estate agents, are usually involved in this sort of scenario in the sense that property is for sale, a person expresses an interest, they get past the offer acceptance part of the purchase, what usually takes place is that a sale and purchase agreement is entered into between the vendor and the purchaser and that sale and purchase agreement will set out all of the salient details about the property's location, its size, by way of written legal description. Attached to the back there will be a site plan usually outlined in red for the actual property with yellow showing easements and rights of way and other colours for other things and it will have terms in it, some terms even include financing. I’m saying all that to say that, usually in that scenario, the person has gone to the bank and said right, I'm interested in buying this property, can you assist me with financing and the banks will ask for the sale and purchase agreement because it has all of the relevant details, including the purchase price, the deposit, etc.

What would then happen is that the bank will instruct a valuer to go out and value the property and that is so that clearable, I don't want to say it's obvious, that is so that the banks can be sure of the value of the property in terms of not only what they can lend based on the value of that property as security, but what the, flowing from that what the borrower can pay in terms of their liquidity. Now that doesn't all come from the property value, but you have to start at that in order to start the ball rolling in terms of what the bank’s prepared to lend and then the liquidity is more supported by the person's proof of income from their employer or from their business and the like. And the bank takes the value, they will loan. The percentages have varied over the years. You used to have scenarios, I'll go back as far as what some people might say the heyday, because it may depend on their respective ages, but banks at some stages were loaning or offering to loan or provide, excuse me, 100% financing based on the value and in those scenarios, they would oftentimes, that's actually a good example of where they would have other security documents outside of the mortgage, there would be loans and promissory notes and perhaps collateral mortgages on all the properties, but they’d give you 100% of the value of the property. In more recent times, banks usually hover anywhere from 60 to sometimes 75% of the value of the property, but it's always been an underlining theory, or practice is a better word, that usually the person buying the property had to at least come up with 10% of the value which was the deposit that was paid on the sale and purchase agreement. And beyond that, the banks would provide financing up to a percentage. That's basically how the scenario is developed.

Now, in terms of the bank's internal workings, I often would tell clients, I don't speak bank. There are things sometimes that banks will, because of their own procedures and particularly nowadays with the absolute increase in regulations for AML and ATF and all sorts of other things, some of the internal procedures that the banks have to undertake are not what they used to be, I think that's the best way of expressing, but in general terms that the person pitches up to the bank and says, this is what I want, and they support it with either that sale and purchase agreement or if it's not a case of a person, buying the property for the sake of the argument, let's say you already own the property or you've had it bequeathed to you after a family member has died, and you go to the bank for money to renovate, you'd still require the valuation or the banks, forgive me, would still require the valuation so they could enable, could enable them to know what type of security or how much security they would have in terms of the loan. It's important to note that in some respects, this

**Christopher Swan** 41:47 way of dealing with mortgage relationships isn't particularly endemic to Bermuda, but it is not the norm worldwide. In the UK, for example, the mortgage, providing of a mortgage is more geared, more income based as opposed to property value based. The banks are more concerned with your longevity of employment and how much you make as opposed to the fact that the leasehold that you're buying or the freehold that you're buying is worth a particular amount of money, so that in default they can sell it, whereas in Bermuda, the opposite is I think more prevalent. The desire is to have as much security based on the value of the property as opposed to initially the income, that's the secondary consideration and even examples of that include much to the dismay, I suppose, of a lot of borrowers, they'll have a property that's worth whatever the value is, let's say it's a half million dollars, but that property will have three apartment and those apartments are easily see, let's say $10,000 a month for the sake of the argument. The banks will take that rental income and lessen, or they'll take a percentage proportion off of it for the guarded scenario that the apartments are not always rented for the sake of the argument and still base most of the decisions on the financing on the value, so I'm just making that point that it's more geared towards that as opposed to the income that it either generates in most scenarios or your income working. They're concerned about that secondarily, but I hope that addresses.

**Mr. Dirk Harrison (Counsel)** 43:37 It does and I'm not asking a question but I make a comment. I think in some instances, they also take out life insurance policies to the value of the property, so if anything happens, the security, you and your security.

**Christopher Swan** 43:54 You don't see that universally, you do see it in some scenarios. In fact, it's not in my experience, to be fair, it occurs but it may not be as prevalent as people think, it's not the, it's not the norm.

**Mr. Dirk Harrison (Counsel)** 44:09 In another place and time I'll tell you about that one. But, I’d just like to take you to paragraph nine on page two and importantly based on the context and the general framework that you have been establishing, the idea of someone who's borrowing, someone who has borrowed and you did indicate how proceedings are initiated or commenced in a court. We have a scenario that presents itself that someone defaults and having defaulted, there is a process now to recover and that process to recover, especially in an instance where there is a, some collateral, it creates much angst in terms of the perception, or whether it is in fact real, that there are, the method to recover the debt is a little unfair. I'd like to take us a little in that direction.

**Christopher Swan** 45:25 One of the things I did not mention in all fairness and it just rang to mind is that the proceedings commenced, court proceedings commenced in the methods that I have already mentioned, but the actual collection proceedings always, well should always, but to my experience always commence with letters before action and I'm using that term because a demand, I think, comes after the letter before action. Letter before action basically is a letter saying you're in arrears, please regularize your arrears to avoid further action.

Normally, by the time these matters go to collection, the banks, I would think in most circumstances, I mean high most, 90 to 95% of the time, they have written or attempted to write to the borrowers at least, for over a period of three to six months. In fact, in fairness, it's usually considerably longer than that but I have seen scenarios where six months and they're filing writs. The rationale sort of behind that, excuse me, is that there is a, banks will not usually start to pursue legal action until three months’ worth of interest or three months’ worth of the amortized payments have been missed. So in the first instance, usually you'll default and you'll get a phone call and the bank would say you’re in default please pay this, at least with the banks that I've worked more closely with, I generally tend to hear that they will make phone calls or even the people that I've advised would say, yeah the bank called us. So then they will call and they'll write and once, if that does not bear any fruit, then you'll have the demand which will say that your mortgage is so far in arrears, here's the amount, unless this is cleared up within thirty days, whatever the case may be, then we will be issuing proceedings.

In terms of the unfairness, I think it's very important to remember or to consider, let’s put it that way, that for the majority of people who find themselves at the defendants and mortgage recovery actions, they are, those actions are very emotional, I’ll touch on that later on. This is, you know the homestead or the house that was purchased years ago at a very high value and mortgage payments were made consistently and all of a sudden the job’s been lost or values gone down or something's taking place and they're unable, the mortgagors or borrowers, unable to make the payments and out of that scenario, there will always, always be emotion attached and I think for the most part, there will generally be a feeling that they're being treated unfairly. Now, in terms of particulars of that unfair treatment, the biggest complaint that I seem to have experienced is that late fees and charges, so it's not bad enough that you can't make the regular monthly payment, but as soon as you missed a monthly payment you have late fees, then you have interest, unpaid interest on the regular payment and it begs the old question that if you couldn't pay $1,000 now, how can you pay $1500 the next month and going forward. And that, of course, lends itself, strongly lends itself, to the view that the recovery actions are unfair or unjust. On the same point, one of the things that is contained in the mortgage documents, for most mortgage documents, at least the older ones, were provisions for costs to be recovered by the attorneys and basically without necessarily using the word indemnity, words like full cost or any cost incurred, so the attorneys will bill the bank for the work that they provide and that's passed back on to the person that's the borrower or the defendant and oftentimes those aren’t particularized when matters come to court. It's different from, let's say, a debt collection matter, for an unpaid phone bill which, just picking on phone companies unnecessarily, and the bill is, you know, $100. The new Debt Collection legislation from 2008 sets out that as a matter of law now you can add 20% to that bill, same argument applies, you couldn’t pay $100, how could you now pay $120, but the distinction I'm making is that at least you know, by the time you get the letter before action, that your bill is now $120, particularly you know when you go to court that's the amount. You don't see that as much, in fact, you don't see that at all, quite frankly, in mortgage recovery actions because the attorneys will bill the bank directly and after the matter is substantially settled or settled, particularly after judgments are awarded or the matters are concluded, they can file what's known as a bill of costs and that bill of costs can be taxed if it's not agreed, which is a normal language and those monies will be, money that sort of present themselves, the quantification of those monies usually present themselves somewhat after the fact. You never see them at the beginning of the action, so you may very well and I touch on this with, some of the common defences is that the monies are wrong, the amount the banks are claiming are never really reconciled at the first instance with the person that owes them because of the fees and charges and whatnot, but one of the aspects of unfairness definitely is the expenses that the banks will incur

**Mr. Dirk Harrison (Counsel)** 51:49 One of the complaints…

**Christopher Swan** 51:50 One of the complaints the banks will incur...

**Mr. Dirk Harrison (Counsel)** 51:54 And just before you go there, if I may, there's this view, real and perceived, that especially when the matters breach some proceedings before a court, we have passed the three months or any period whether six months where letters of demand have been written and there has been no answer or the answer and the payment has been insufficient, that persons believe, and I say it as simply as I can, that the reason why the approach is being taken is because the bank has a big lawyer and I am the person who is a borrower and I don't. There is a belief that we are unequally yoked and because of that there is that Samson and Goliath situation. Can you speak a little on that?

**Christopher Swan** 52:52 Well, one of the things mentioned in the opinion is that there are three or express a view that there are three important things to consider when you are involved in litigation with a bank. Number one, they have very good legal teams, this is in house, and their loan documents have been drafted by qualified experts and they have endured not only the test of time, but they evolve with new laws, legislations and practices so they're very good at making sure that the documents that set out the legal relationship are very good documents.

Secondly, and I think I express it as a corollary to the first point I've just made, is that banks are very good at keeping written records of just about everything, which means that they have very good paper trails which can be used to support their claims. And thirdly, banks have very deep pockets and with very deep pockets you can afford to hire the best of the best to represent the claims and usually when you are paying very good money to attorneys to provide for you a specific result, they are in high gear, trying to make sure that they can do that and those, do with those considerations in mind, you do have David and Goliath in most circumstances and I would say the majority of people that find themselves through unfortunate circumstances in default, don't have the business savvy to address the matters themselves and because they are, quite frankly, if they are in default of the mortgage and other things do not have the resources to hire the same calibre of attorneys or attorneys at all to represent their claim, so yes, there is from that point of view an element of unfairness.

But I should flip the coin just a little bit. I go back to my comments to the previous question. One of the principles that every attorney learns when they're doing contract law, which is mortgages are contracts and loans are contracts, is that damages in contract are assessed to put the innocent party in the position they would be in had the contract been performing, so the underlining principal argument that any bank can make is that well, we had a contract whereby I gave you certain, I loaned you certain amounts of money, you agreed that you would repay those monies by equally amortized monthly payments with interest and principal over a certain course of time. If you default on that, then I should be in law put in the position I would be in had you not defaulted and that opens up, in some instances, very wide scenarios where, well, I had to go hire an attorney and this is what the attorney costs and I could go down various different roads, but I thought it was important to at least put that out there in terms of the last answer because it is in law, the rationale, the rationale for why there may be these other fees and charges and expenses because the bank can always say you know what, in default you see this on mortgage instruction letters, there will be penalty or interest of X in default as opposed to the normal interest which is Y…

**END OF TRANSCRIPTION AT 52:52**