**A COMMISSION OF INQUIRY**

**INTO HISTORIC LAND LOSSES**

**IN BERMUDA**

**COMMISSIONER:**

**MR. WAYNE PERINCHIEF, JP**

**COUNSEL**

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**TRANSCRIPT OF PROCEEDINGS**

**LOCATION: WARWICK CAMP**

**THURSDAY, JANUARY 22, 2021**

**AFTERNOON SESSION (b)**

**Christopher Swan** 0:00 …normal interest which is Y, so you do see that, but the reason that is enforceable is just basic contract law in terms of damages and the fact that the person borrowing the money has agreed to it. So that doesn't take away from exception that is unfair by any stretch of imagination, but there is a legal rationale, I think, that the banks will quite happily employ to explain that and that is the basis of that explanation.

**Mr. Dirk Harrison (Counsel)** 0:28 Thank you and I certainly will ensure that my next example speaks about David and not Samson when you refer to Goliath. Now, I’d just like you to take us to some of the, based on your experience, what are some of the defences that are advanced by borrowers in respect of a bank who seeks now, the bank or financial institutions, seek to demand…

**Christopher Swan** 0:58 I set these out, I touched on the first one that is particularized and that is that the banks provide an inaccurate or misleading picture of events and by that, I mean that events leading up to the actual claim, and most oftentimes it deals with the quantum of what is owed and sometimes it's not necessarily the lack of provision of the quantum; It's the details of how that quantum is arrived at, because, and I think the reason and I, this is just my view, the reason is that when you are in default of a mortgage, the bank has the spreadsheet and the computer program that says, you know, Mr. Smith will pay $3,012.50 every month and he doesn't pay that $3,012 and when that doesn't happen, protocol, debt protocol kicks in and then it'll add whatever the penalty interest is on top of the regular interest which accrues every month, and then it'll add the late fee and all that. So, instead of after month one where it's $3012.50, a month two turns out to be $3240, but there's no particularization of that when it comes to, there isn't sufficient all the time, particularly when it comes to the court proceedings. That's the first thing.

 Secondly, we found a lot of people complaining that, well I sat down with the bank and we negotiated that I couldn't make the monthly payment the way it was so I could pay interest only. They allowed me to do this for a particular period of time and and the like, but the general defence was that discussions took place and we've entered into an agreement and now the bank are breaching that agreement. The problem is that oftentimes, oftentimes there are agreements and concessions that are made, and they're usually time limited and once that time period is up, it's almost like a respite, instead of paying the $3,000, you can pay the interest which is, you know, $1000 or whatever the interest is, for six months or a year and you pay it and then after that, it goes back to what it was. And there's sometimes misunderstanding of the actual agreement that's in place and that it may be subject to the higher ups, meaning some greater authority than the loan officer who's just simply speaking to you and there tends to be a lot of, I’d say, confusion in that regard.

 Thirdly, the banks exercise some form of coercion, undue influence, in regard to received…

**Mr. Dirk Harrison (Counsel)** 3:40 Perceived.

**Christopher Swan** 3:42 Perceived, forgive me, yes, alleged or perceived, or threats in an attempt to have the property sold or to take the person's property that's mortgaged. We see it not as often but sort of as a first cousin of that, that the banks have ??? with the borrower's property, the appointment of receivers, efforts to sell. We do see on many occasions where the person is in default and they, you know, throw their arms up and say, right, I will, I will sell this property and they will go off and make private efforts to do so, in some instances even engaging real estate agents to sell it. And then you'll have someone from the bank indicate that they've found a purchaser and it may not be the same value and the like, because sometimes they are, I think what's misunderstood is that there are occasions where the banks are being proactive in the sense that the loan officers know of people that buy properties and the like and if something comes across their table, that's in default, people have conversations. Well, you know No. 1 Pleasant Street, the owners are in trouble, or No. 1 Pleasant Street might be foreclosed on, well see what's the price. Well, and this is where it gets a bit murky and I'm not saying this is what takes place, but there's a perception that this takes place,

**Mr. Dirk Harrison (Counsel)** 5:13 Ethics and ethics become involved.

**Christopher Swan** 5:14 And ethics become involved. In fact, I'll leave it on at that level. Conversations take place and all of a sudden there's a buyer who miraculously made an offer that's dangerously close to the amount that's owing on the mortgage as opposed to, arguably, what might be the value of the property which might exceed the amount owed. So there's, we've had that come across our desk a few times and that, sometimes relationships of trust and confidence have been breached by the bank. So I've characterized those as broadly, the sort of areas that we tend to see in terms of defending the bank's claims.

**Mr. Dirk Harrison (Counsel)** 5:51 Now, in terms of that run up of short length (???), what's your general view regarding the indebtedness which arises, the actions which may be initiated, the defence which are oftentimes advanced by borrowers? Have you arrived at a general view and I'll take you to it at paragraph thirteen.

**Christopher Swan** 6:26 Yes, in reference to your first comment, generally short pitch deliveries go on the back foot if you dispatch them properly to the boundary but, from my Evening league experience. I, facts probably are good to read. “Most defendants to mortgage recovery actions have an emotional connection with defending what is usually the family home and defences to the actions whilst in some instances are persuasive or 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 expenses that the borrowers have to pay in terms of the bank’s expenses, the bank’s costs. I say that to say the inability to pay your monthly mortgage payment is not a defence that can be employed in court. Life happens so…

**Mr. Dirk Harrison (Counsel)** 7:25 It can be employed, it just may be summarily dismissed.

**Christopher Swan** 7:32 There you go. We tend to find, I mean, there are, let me be clear, there are defences that have been successful in regards to bank actions. I'm not saying that well, you know what, the bank sues you, that's it, just make plans to move and get on with something else in life. What I'm saying is that, I think that people need to be very careful, because there is an emotional attachment in most instances to their properties, that going down the road of simply wanting because of emotional reasons to save the property is not a wise course of action. And in all fairness, because of some of the things that I have mentioned earlier on, the fact that the banks have very, have very good legal departments, their documents have been time tested, they're good documents, they keep accurate and very good records usually of matters that take place and they have deep pockets. If you find yourself on the wrong end, if a person finds themselves on, defending a mortgage recovery action and the reality is that they just don't have the ability to make their payments, the advice is to see if you can settle the matter on the best possible terms you can with the bank. And that encourages, hopefully the result, those actions will result in a few things, namely, you won't be going to court and incurring the bank’s fees in terms of their legal expenses, because as soon as they go to court, even if you're trying to, if they go to court, there’s going to be expenses, you’ll end up paying for it in most circumstances, and secondly, if you can settle the matter amicably and I mean by settlement, if refinance in some instances is an option, go from, we've seen people go from one bank to another successfully. And refinancing might not only be moving banks, it might also be changing a ten year facility to a twenty year facility which may necessitate, particularly if the borrower is older in age, if they're agreeable to it, adding children and the like to the title to help make the payments and what not. The general thrust of that is if you can resolve the matter in most of the circumstances based on from my experience, the fact that at the end of the day the bank is going to have a judgment of some sort, then the advice usually is to see if you can settle it and that also adds to the ‘this is unfair’, perception that matters are unfair.

**Mr. Dirk Harrison (Counsel)** 10:11 Now, I know, especially today, you hold no brief for any financial institution or any bank, but there is this perception or view that whether it is a settlement, whether a borrower says to a financial institution, I have a third party who is willing to purchase, let's speak a little bit about the bank or financial institution’s obligation to accede to the requests of a borrower, to go in a path or direction or the bank's obligation to do as their banking rules and regulations stipulate.

**Christopher Swan** 10:54 Let me be very, very clear. I am speaking from my experience and there may be, of late in particular, banking policies and procedures which have taken effect, but particularly nowadays, do with COVID and the financial problems that a lot of people have incurred. Now, so what I don't want to do is sit here and advocate that the banks have these particular policies that they must follow because those policies in a lot of instances are moving targets and those aren't necessarily things that are divulged in terms of, the bank is now doing A, B, C, D and E. I can say it's a matter of law, if you deal with contract, there is a principle in law that a person claiming damages must mitigate their damages. They must do things that do not cause them to suffer more damages if they can particularly prevent that from happening. That's just a general proposition. If you put that into the context of your question, there is no obligation at all on a bank to invite, for the sake of the argument, Mr. Smith to come in and inquire, do you have younger members of your family that you can add to this title, who can take on part of the responsibility of paying this mortgage because you are in arrears. I think that what takes place is that the banks will put various scenarios to persons to qualify persons, to see if they can be of assistance. Now, remember to be sure, banks are in the business of making money and I tell clients, almost every time I have a client in front of me to execute a mortgage, I will say to them, “I'd like you to remember, banks are in this to make money. The bank does not want your property, they really don't, they're not real estate agents or real estate brokers, they want your money.” And I think the incentive would be in situations where they can fix a scenario, very wide term I'm using, not very eloquent, eloquent, but if they can fix a scenario, they will do that, because ultimately that means that they will continue to receive their money and not only the principle that they have loaned, but interest which anyone that's ever had a mortgage knows, at the end of a twenty year mortgage, for a million dollars for the sake of the number, you have paid an astronomical amount of interest, doesn't matter what bank you're at, it's a big number. And if the bank can maintain that, that's in their best interest. So we have had, to my experience, many scenarios where the person that's had the mortgage, who's paid on it a ten year mortgage, ten years into it, I'm sorry, a twenty year mortgage, ten years into it they find themselves in difficulty, the children are now out of school employed and they're like right. I can extend this by another ten years, the bank has said so as long as I put someone younger on because my working life for as far as the bank is concerned, they're 60 years old, and the bank will cut off the or not extend under the unusual circumstances beyond 65 a person's working life. So those are usually the, I think, those are the most common fixes that we tend to see.

 The secondary sort of fixes we tend to see in banks will suggest this, I think quite readily, is if there is other collateral that can be used to collateralize the loan, so you’re in arrears, you're not making the payments, but if you can offer the bank the assurance that there's other collateral around, it might seem like a bit of a, it may raise questions, well if you're not making the payment, what's the use of all the collateral, you can still stretch the loan out, you can extend the term. and that also may involve other people. So the answer to the question is that I don't think the banks are necessarily obligated by any stretch of the imagination to recreate the wheel, to assist anyone with trying to regularize their relationship, but they do have a vested interest in trying to mitigate their losses and also, because well, to try to see that the income stream from that particular transaction is maintained. Because if the alternative happens and that is, let's just say you have full foreclosure proceedings and you have to sell the property, you're, the banks will still be in a position, and we take today's present climate in terms of real estate values, for a foreclosure of a property that a mortgage was entered into, let's say ten or fifteen years ago and that property value has not, in most instances, appreciated, in fact it's depreciated and you'll have negative equity scenarios that may present themselves. So all these things are necessarily, or should be necessarily taken and I believe they are taken into consideration when decisions are made. In terms of the question that you asked.

**Mr. Dirk Harrison (Counsel)** 16:33 Thank you. I'll like to take you to paragraph sixteen and, in terms of your opinion, regarding the hope and expectation.

**Christopher Swan** 17:02 Most, I think that it is just sort of part and parcel with the emotional part that these proceedings, emotional aspect of these proceedings, that people who find themselves in a scenario where they really do not want their house sold will sometimes employ or try to employ any method they can to delay the court’s, I'm sorry, the bank's action and, quite frankly, it's with the hope that a buyer will come along or that they have made application, for example, to refinance with another bank, but that takes some considerable time these days and so they're basically buying time. I tend to find that that is more of a reality than not, because there is hope that the matter will be resolved one way or the other. Also, I was involved in a particular matter with the former Chief Justice who actually raised the issue that in a lot of, in quite a few cases, the courts take the approach that in situations where there is some issue that's raised, which may not be the best defence or a very strong or viable defence and it's shown to be that, but there's still some thrust involved in either trying to negotiate the matter or in fact, if they are trying to see if they can secure financing, the courts have taken an approach in several matters I have dealt with, of making an order, granted judgment for the amount that's claimed and making an order for possession for the banks, but delaying that order for a period of three months. So they'll make the order today and they'll say right, takes effect three months hence and that gives the parties the chance to see if there's any last ditch effort that can be used to remedy the situation, whether that's by sale or otherwise. So in terms of that comment, it's supported by, somewhat supported by some practices, court practices in some of these matters.

**Mr. Dirk Harrison (Counsel)** 19:30 I think we could summarize the, so far to say a man's homestead is his castle. I'd like to take us to paragraph seventeen, the, you have by way of summary sought to summarize what we have done so far. Could I direct you to the fourth line of paragraph seventeen?

**Christopher Swan** 20:07 “The bank’s position that monies are”, the sentence sorry, “the defendant’s inability to pay” or the next sentence.

**Mr. Dirk Harrison (Counsel)** 20:19 Sorry, I think because of the different, it’s paragraph, it's paragraph one, but the fourth, no other claims, yes, the fourth.

**Christopher Swan** 20:29 “Nor do claims of dropping property values engender..” What, what we've seen in the last, since the last recession, let's just say that, is that people that have been involved in these actions have said, you know, what, I just I don't have the ability to pay. And I think that there's a, in some cases, an obstinance almost that presents itself, I've paid this for the last ten years and now because of my circumstances, I just cannot pay. Surely someone must be able to understand and accept that and cut me some slack and whilst that engenders sympathy and empathy and understanding…

**Mr. Dirk Harrison (Counsel)** 21:17 Or ought to.

**Christopher Swan** 21:18 And ought to. “The defendant’s inability to pay is not a defence to the bank's position that monies are owed.” That that sentence speaks for itself. We've also heard, and we've seen this recently, since the last recession, that the property value of this, the value of this property, when I mortgaged it was X, was a million dollars, I'll keep picking on the million dollar number, and it's now worth 750,000. Surely the bank must want to recognize that and, you know, take some sort of action, accordingly. And it is, in terms of sort of critical thinking classes and the like, it's an appeal to pity, which is also understandable, but it still doesn't get around the fact that when that property was bought, the amount of monies that were borrowed were borrowed, and those, that is just a fact. And whilst, like I said, it should engender some form of sympathy and understanding it, in terms of the contract itself, it does not provide a remedy in law to say that the terms of that contract should change. Now, there are actions that the banks have taken recently, and we will all remember when the COVID-19 crisis was at its full, had its full effect in Bermuda in terms of the shutdown, the various banks, and I think they all followed one another, but there was mortgage payment relief, in that if you were a customer in good standing, you could basically communicate with the bank and say look, can you waive the mortgage payment for the next month, or I think it was three months if my memory serves me correctly. And some of the scenarios involve, waiving altogether, but the interest clock would still run and you'd, you know, you would catch up later on. But there was some forbearance, I'll use that term, in regards to banks’ behaviour or actions in that regard. But in terms of a lot of the claims that we've seen that involve people asserting that the property values had dropped, which they had, and that they couldn't make the payments, there is not a legal requirement that the banks amend or change the particulars of the contract to reflect that

**Mr. Dirk Harrison (Counsel)** 23:52 I smile because of the, you give three months, but in some other places it’s six because of COVID and interest runs, and then the, the recalculation occurs at the very end. Now, but moving on, that's not why we're here, my point. I would like to take you to, the defences that are oftentimes advanced by borrowers and, in some circles, some borrowers will speak to fine print that they never really read or didn't know existed or, in this instance, the initial agreements or the agreements, discussions, the negotiations that led to the lending of money and the securing of some, something of value which one likely will lose. Let’s speak a little about that

**Christopher Swan** 24:55 We've tend to have found that the stronger defences were, compartmentalizing them under agreement, are those defences that assert that the original agreement was not, or there were defects with the original agreement or lack of understanding or I touch on it later on, that independent legal advice wasn't required or provided in some of the scenarios. Those are much stronger arguable issues than what we were seeing a lot of, which were the negotiations, post demand, and how does it get to, the demands were made and the proceedings have been issued and then we would have, in the defendants’ affidavits, allegations that they'd spoken to the loan officer who agreed that as long as they made some payments per month, even though they weren't the prescribed payment, that the bank would exercise some degree of forbearance. And I discuss that later on, saying that the difficulties that the most often these agreements whilst acting on aren't necessarily acted on conclusively, in the sense that the payments are always made and it's always a set amount or they were always subject to some form of approval or sign off from the bank which never occurred, but the bank were happy to have them in place and this is a complaint, the bank were quite happy to have them in place and then, notwithstanding, they’ve forgive the expression, pulled the plug. Those arguments aren't, aren't as strong, as I've said, as the original, as the argument saying there was something wrong with the original entering into the contract and by the particular parties, but you don't, and that again, I use the word vintage, depends to a large extent on the vintage of the transaction, because you will find nowadays that there is a, an absolute requirement by most of the banks to have sign off indicating that the parties to a loan transaction, particularly if there are persons that are providing collateral mortgages by way of other properties and the like, that they've taken. Independent legal advice and even scenarios that involve matriarchal or patriarchal family adding of a child onto title and the child is borrowing the money based on that property to renovate it or to go buy something else that be matriarch or patriarch, I would refer to them, has taken independent legal advice. And it's not just, you know, an oral confirmation, they want something in writing signed off by the attorney. So nowadays, that whilst you have seen recently, in fact, if my memory serves me correctly, we had one case this year involving a property that's located not too far from here, and the person that guaranteed the…

**Mr. Dirk Harrison (Counsel)** 28:00 This year 2021?

**Christopher Swan** 28:01 2020, No, I'm sorry, I beg your pardon, 2020.

**Mr. Dirk Harrison (Counsel)** 28:04 Okay.

**Christopher Swan** 28:05 In a property that's located not too far from the Regiment where the Supreme Court or the Court ruled that there were, I’ll just very widely, badly paraphrase this, there were problems with the initial agreement and that there was a requirement, there should have been a requirement for independent legal advice and the like and as a result, there were people that were, use of an acronym, on the hook for this particular borrowing that had some remedy, some reprieve. So it's not as if it doesn't exist but, I think, quite frankly, it was based on the vintage of that particular matter, because nowadays, after quite a few cases, quite a few, some cases is a better way of putting it, in Bermuda on this particular point, I think the banks have amended their practices such that these scenarios are much more difficult to find themselves appearing nowadays and in the future, will find themselves more difficult to appear. So that sort of agreement. I can move on to…

**Mr. Dirk Harrison (Counsel)** 29:12 Please.

**Christopher Swan** 29:13 Quantum, I mentioned, this was the first of the defences, sorry, apologize, it seems to be back to front, but the complaint that's usually made is that, you know, I owe $3,000 a month, I am one year’s arrears on my mortgage payment, therefore I should owe $36,000, three times twelve. And you find out that that $36,000 isn't in fact $36,000 it's, and I'm making this number up. it is, it's the next one if you keep going to paragraph twenty-one. It's, instead of using my scenario, if the payment is $3,000 a month and you’re a year in arrears, you'd expect to receive or the person expects to be, to receive a claim for $36,000, three times twelve. But they don't, they receive a claim for, you know, $42,000 or some greater amount of money and it's the difference between what is perceived to the defendant or the borrower’s mind that they know they owe and what is being claimed which we mentioned earlier will include late fees, late penalty interest, I'll call what it is. On some occasions, you usually don't see the legal fees at that stage because, quite frankly, they're not quantified and so, it's a moving target, so to speak. But the amount that to the mind of the borrower should be easily set out isn't. And this all, more often than not, the person throws their hands up and says, well I don't owe, $32, 42,000, I knew that for a fact, but you know what I owe 36. It does not, let’s put this another way, it doesn’t help with the perception that treatment is unfair because it's not, sort of rubbing salt into an already wound based on the emotion of the, of the contextual, emotional context of this scenario. It's more a matter of well, if I, you tell me I owe 42, I know I don't owe 42 And there's a belief that on that basis it'll, it'll somehow all go away. And that compounds, the emotional part of it and the feeling that there's been some form of injustice. But again, the simple fact that, and oftentimes raising the issue will force, if there are deficiencies in the pleadings, will force the pleadings to be amended such that they are particularized, so that every penny is accounted for, just call it what it is, but it's not a defence to the action and that the action will be dismissed, because there's always, there's usually always an admission that some amount is owed. It's just that we don't agree with the amount that's presented. The next…

**Mr. Dirk Harrison (Counsel)** 32:20 Interference.

**Christopher Swan** 32:21 Topic is interference. You don't, I say in the first part of that, that there is interference by the bank in property transaction where the customer could be said to constitute a tort and I make reference, excuse me, to a case of OBG Limited and Allan. It's a 2007 case and it can see, tort consists of a person using unawful means with the object and effect of causing damage to another. The burden of establishing that is, of the interference or the existence of the tort is on the borrower or the defendant. Now, again, if we're talking about David and Goliath, you have a person in most or persons in most circumstances that find themselves in these positions that might not have the resources or means to instruct attorneys to represent them when they think that there has been some interference by the bank with the property. Not only is it in most circumstances something that would involve detailed instructions and advice in regards to the interference, which necessarily means that it's going to cost you some money with the attorney, but it's not the easiest of torts to establish bearing in mind that from the day that the mortgage is signed, that property was conveyed over to the bank. So, if the bank sees in their ultimate wisdom and I would theorize that if the bank sees in their ultimate wisdom that, you know, you're a year and a bit in arrears and some person presents themselves that can not only purchase the property and clear off the existing debt and all matter of other things, it would clearly be an avenue that I think any reasonable person, if they weren't dealing with a bank or bank dealing with this scenario, would at least investigate. And those investigations, I think, in most instances constitute the basis of claims for what I've called interference.

**Mr. Dirk Harrison (Counsel)** 34:46 I'd like to take you then to paragraph twenty-six because there are some views also in real or perception.

**Christopher Swan** 34:56 I think that twenty-six touches on, greatly addresses, let’s put it, addresses the emotional part of all of this and one of the issues with Bermuda is that we are a small community and to use our vernacular, everybody knows everybody’s business. And if you, if you, and it's not uncommon that, you know, you find or people find themselves in a position where they're in arrears with their mortgage and they will quite happily know that, I'm basically picking on John Smith and Joe Smith today, that John Smith is also in arrears with his mortgage. He owes more money than I do, well how come the bank aren't going after him. You tend to have scenarios of that nature that develop in small communities, they're endemic to small communities. If we were in some large city in the UK or in the United States, that sort of knowledge would be something that would be obtained by happenstance. It's a circumstance here that you tend to find people will complain because they happen to know and I will put on this level as a matter of fact, that they're being chased and someone else isn't that's in a similar position, And that, for obvious reasons, does not go down well when you're dealing with people who may believe that they are being treated unfairly.

**Mr. Dirk Harrison (Counsel)** 36:28 No, I'm sorry, nor does it take away from the fact that you actually do owe money

**Christopher Swan** 36:32 Correct,

**Christopher Swan** 36:33 Correct, it doesn't take away from that and you can, you know, pick your poison on this, the, I mean we've had scenarios that have been presented to us that I, I think are more, are easier to understand than others, that's a better way of putting it, where you have someone that's considered by other people, let's say to be wealthy, that has a variety of different assets, properties and the like who, and you see this, who may have developed a property, for the sake of the argument, and owes lots of money to the bank in terms of that development. But you have John Smith, again, who borrows,

**Mr. Dirk Harrison (Counsel)** 37:15 Tom Strokes.

**Christopher Swan** 37:16 Sorry?

**Mr. Dirk Harrison (Counsel)** 37:17 Or Tom Strokes.

**Christopher Swan** 37:18 Or Tom Strokes who owe a very small amount of money and is being pursued, whereas this other person whose financial net worth, let's put it that way, it may be significantly higher, isn't. When I say understandable, there may be scenarios involved where that person has a dozen different properties that they could sell to satisfy the debt and so, therefore, the bank might be a little patient or more patient in exercising their rights as opposed to the person with the one property who doesn't have the means to raise the money as opposed to the other. So the matter as is doesn't help. And the other thing that's touched on, the other matter that's touched on in that particular paragraph is that again, because we are so small, everybody here is related to somebody, is everybody else somewhere along the line. You know, it's your cousin that's the loan officer or I'm being pursued by Jill Smith who's, you know, who I'm not related to, but I know for a fact that she's not pursuing her cousin, Gary Smith, who I know is in the same position I'm in. We're a small community, that happens. It doesn't help, but it doesn't get away from the fact that the bank, any plaintiff, any person that's in a contract that sues, that is a plaintiff that has been aggrieved, aggrieved because that contract has been breached, can sue or not sue, that's the bank's choice. And there is nothing, there is no mechanism that can be employed by someone to say, you know, why me, and why not someone else. It is absolutely the bank's choice and I think I'll go on further in saying that, in fact, I'll go back to the end of that paragraph, that sentence:

 “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 bank employee charged to collect the outstanding debt may have a personal animus or dislike for the borrower will not assist the borrower in defending the claim, nor is the fact that the bank have treated other customers or borrowers differently – that's a matter for them.” And it does go on to talk about a legitimate threat which may spark an interest into some contract or arrangement that might give rise to a claim for setting aside of such a transaction as being a form of economic duress, but part and parcel, the interference for the most part, I don't know personally of any successful examples of economic duress being visited upon defendants in any cases. So I will say as a blanket, usually the interference arguments which are based on the bias or animus are usually not successful.

**Mr. Dirk Harrison (Counsel)** 40:13 And there, and one may reduce them to anecdotal.

**Christopher Swan** 40:17 Correct, absolutely, yes. Trust and confidence. I would say that some of the successful defences to banks’ claims have been founded in the breach of trust and confidence, more so, because there seems to be a tie in with the argument that we didn't take independent legal advice or it wasn't offered or required, I didn't understand the transaction, because I trusted the bank and I trusted the bank officer, they've never led me wrong in the fifty years I've been doing this, why did it happen on this occasion. And it does, as a corollary, flow into those cases that have been successful for the most part that deal with not giving independent advice and the like. And there's, I left that one, sort of as it is. And again, I go on to, when I said left it as it is, it deals with negligence which is a particular species of law and whilst I haven't dabbled extensively into the negligence sort of argument or tort, but negligence involves there being a duty. And arguably, in this case it would be the banks who have a duty and that duty could be to properly use the word ‘advise’ very guardedly, properly advise people that are getting into mortgages to take independent legal advice or to, because the banks’ function is to give financial advice. But there will be a duty of negligence, there must be a breach of that duty by the bank. The breach of that duty is the cause. In fact, because the bank has breached their duty, in fact, I'm now in the position I'm in, therefore it would be the reason in law that the defendants and petitioners are in, and the damages that flow from that breach must not be too remote. In our circumstance, the damages would be the inability to pay or the lack of understanding that an obligation was there to pay. So whilst I didn't condescend to that level, through these paragraphs, that's the basic snapshot of negligence and why on some occasions those claims of breach of trust and competence have some degree of success.

**Mr. Dirk Harrison (Counsel)** 42:44 Some persons, Mr. Swan, who are borrowers who have been taken before the courts, they, unfortunately, seek to rubbish the principle of contractual estoppel.

**Christopher Swan** 43:04 Yes.

**Mr. Dirk Harrison (Counsel)** 43:05 And they think that it is something oftentimes that has no place and ought not to be relied on, especially by plaintiff. Could you just touch on that for me please?

**Christopher Swan** 43:19 Estoppel is a principle in law, try to boil it down to its lowest common denominators. If you have relied, in essence, if you ever have relied on a promise, or this instance of certain circumstances, you can now not go back after relying on them and say that the circumstances did not exist and this is, or that you didn't rely on them. In terms of the banking relationship, contractual estoppel arises, the non-reliance on it appears because it's hard to argue that at the time of entering into the mortgage, you did not realize that you were borrowing the money, this is the property that was securing the loan, your monthly repayments were whatever they were, that the term was whatever it was, those circumstances that existed in that contract between yourself and the bank existed. And you cannot, after the fact particularly years down the road, say well, wait a minute they didn't exist. They were in writing, they existed because of the actions or simple fact that the mortgage, the property was mortgaged to register, you've made the payments. It is extraordinary two years later or sometime after the contract has been formed to go back and say well hold up. I'm not really sure what the facts were. And for that reason, contractual estoppel as it's referred to, is employed or can be employed. One of the specific references to being used by plaintiffs, estoppel is an area of law that falls under or a principle of law that falls under what's known as equity. It is law of conscience if you want to phrase it that. It may not be enshrined in statute or enshrined in basic contractual principles, but there are some instances where equity steps, in the law of conscience, it is unconscionable for this to take place and, therefore, we will prevent it. Equity is usually used by defendants with one or two exceptions. A proprietary estoppel, for example, is used by people who assert that they have rights in property and that can be used by plaintiff. It is outside of that very unusual for estoppel, which is an equitable principle to be used by a plaintiff, equity, one of the axioms of equity, is that equity is a shield, it's not a sword. So I hope that addresses the issue.

**Mr. Dirk Harrison (Counsel)** 46:03 Thank you. We certainly won't be with you much longer. We are in the middle of the end.

**Christopher Swan** 46:08 Well, I was enjoying myself.

**Mr. Dirk Harrison (Counsel)** 46:12 Can I just take you to the subtitle you have on receivers and order for sale?

**Christopher Swan** 46:20 Yes, of course, I make one, and I don't know if there's a question, I can just jump into it if you…

**Mr. Dirk Harrison (Counsel)** 46:28 Please go ahead.

**Christopher Swan** 46:29 I do make one comment. I think it’s paragraph, yes, paragraph thirty-four. “A good summary of the English position, assuming, crucially, Bermudian law mirrors English law and, quite frankly, if there were, was an Achilles heel, it was to do with receivership. I'm well versed as to what a receiver is I know when receivers can be appointed or employed but I was not as well versed on the actual legal position. So I do make that little caveat there that if the Bermuda position mirrors the English position, which it principally should, that I make my conclusions. One of the things that is normally pleaded in mortgage recovery actions is for the appointment of a receiver. It is a term that you will find in every mortgage document, you will find it also in the MODD documents, I refer to the Memorandum of Deposit of Deeds, the appointment of a receiver. It's, in essence, once the bank has received judgment and if the circumstances necessitate an order for possession and the object of the exercise is to sell the property or at least try to recover monies that are owing under the mortgage, then the appointment of receivers, a receiver is appointed. Now, receivers have a duty to act in the best interests of the mortgagee and their utility from the bank's point of view is that banks are in the business of banking and they don't want to be or aren't necessarily desirous of being involved as, call it what it is, real estate agent. If the property is going to be sold, they hire someone else to do it. Now the part about hiring receivers that

**Mr. Dirk Harrison (Counsel)** 48:26 Or accountants.

**Christopher Swan** 48:27 Or accountants, that lends to the perception that there is a degree of unfairness is not only the fact that receivers don't work for free neither do accountants, it's the fact that some entity that the person who finds themselves as a defendant or the original borrower, has now some entity that's employed by the bank, in essence, to sell their property. And there is usually, and this isn't meant to be a criticism per se of accountants and receivers, but the banks, when you go in and you sit down and you're getting your mortgage, there's a certain amount of bedside manner. I'll use that because if anyone knows me know that I have some medical practitioners in my family. There's a certain degree of bedside manner that's employed when the banks are going through this exercise. There is not that degree of intimacy, let's use that word, that exists between accountants and receivers, so you have this entity that you don't know at a distance basically selling your property without your permission or consent. That also adds to it. Now I do talk about the duty. The borrowers are protected by the fact that receivers will be under a general duty to act in good faith and to exercise their powers for proper purposes and that's in paragraph thirty-five, but it still doesn't lend itself to remedying the feelings of unease, of isolation and perhaps unfairness that mortgagors, that person find themselves in that position, defendants or the original borrowers find themselves in.

 Now, having said that, I think that it is a normal thing that, it's definitely a normal byproduct of the whole process that receivers are appointed. Again, the banks have scores of other things to do besides try to market and sell and manage the property, particularly for those properties that don't sell right away and anyone that's been involved in a real estate transaction recently knows that sometimes, a lot of times, these things don't happen overnight. If the property is occupied and it's rented, it's to collect the rents to make sure that the bills are being paid, those bills will include land tax and any other maintenance of the property upkeep. And that's also, in fairness I should have mentioned that earlier, one of the other things that is initially not particularized, usually when the originating summons or writ is filed, but the numbers sometimes exponentially change between the time that the writ’s filed and the time that a property is sold. And that is, there are some occasions where the bank, quite frankly, repossesses properties that are in poor condition. If you can envision the, the circumstances of a person that's had the inability to service their mortgage over an extended period of time, you know, it could be anything six months, a year or even longer, there's some scenarios that are, quite frankly, hard to believe, the length of time that the person has been in default. But in any event, if you appreciate the inability to make those payments, you can also appreciate that there are probably areas of that property that have fallen into disrepair, this quite simply for the lack of money and what the banks will do on, on most occasions because it's just necessary is that they will effect certain renovations to the property just so that they become more marketable. If a property hasn't been painted for five or six years, you know one of the first things you do before you try and sell it is, you know, you put some, lick some paint on it, as we say, you make sure the roof’s done, all those things cost money. And you will find scenarios that the original debt was X and by the time the property is sold, notwithstanding the lack of monthly payments, which on some occasions do stop, but the amount being owed is Y because renovations have been effected so that the property can be sold or make it more marketable and so that it can obtain more of a beneficial price or higher price at sale. So,

**Mr. Dirk Harrison (Counsel)** 53:10 Mr. Swan, to tag onto your last point and using the principle my own eye create of the bank utilizing last resort, I call it, whether it is to appoint a receiver, whether it is to, whatever proceedings are initiated to recover what has been owed to them, there's this view, perception that especially in Bermuda financial institutions and banks, they don't utilize the last resort methodology of going through a process of default, when letters demanding payment proceedings, there's a view that there is this animus, there is this difference between the borrower and the banker and demands are made for or mortgages are called in, properties are taken away. Can you, based on your experience, comment on that matter?

**Christopher Swan** 54:42 I think that..

**Mr. Dirk Harrison (Counsel)** 54:46 I realized.

**Christopher Swan** 54:51 I'm sorry, may I be excused. I believe that we should be cognizant and in fact, I think It should go part and parcel with this inquiry, in that this inquiry is mandated to deal with historical land grabs and historical issues. If we talk about the historical relationship that banks have had with the Bermuda population, it should be, it really should be noted that not only are banks banks, but you can go back to the 60s and probably 70s from, and I'll be quite clear, in the 70s I wasn't very concerned with banks, but from the things, the experiences I've had and from the various people that I have spoken to, you know, banks weren't always open to everybody. And I have great friends in the Portuguese community who will happily tell me that back in the day as they will refer to, that people of Portuguese descent had very much difficult experiences with banks and banks wouldn't loan them money. The same argument has applied to many Black citizens in Bermuda and so historically, there was

**END OF TRANSCRIPTION AT 54:51**