**A COMMISSION OF INQUIRY**

**INTO HISTORIC LAND LOSSES**

**IN BERMUDA**

**COMMISSIONER:**

**MR. WAYNE PERINCHIEF, JP**

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**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**

**THURSDAY, JANUARY 22, 2021**

**AFTERNOON SESSION (c)**

**Christopher Swan** 0:00 Sorry, the bank's actual cash assets in terms of monies that they have on deposit, which all flow into scenarios that it doesn't seem, it seems more unlikely than likely in today's climate where a bank would basically pay out any large amount of money, hundreds of thousands of dollars or millions of dollars on the hope that they would then gain property.

**Frederica Forth** 0:29 Can I just say something after that? For the payday loans they never have been popular in Bermuda and they are usually very short term with a high, high interest rate.

**Christopher Swan** 0:37 Yes, I mean, that was, I'm sorry, thought, thank you very much.

**Mr. Starling** 0:41 And these are terms I remember from the generational trauma of 2008, so bear with me, would predatory mortgage servicing be similar to predatory loans?

**Christopher Swan** 0:50 In principle, yes.

**Mr. Starling** 0:56 Would, has there existed in Bermuda unjustified risk based pricing where different demographics may have different interest rates attached to their loans, for various reasons?

**Christopher Swan** 1:08 Yes, and I think that requires an explanation. Simply, simply put, the higher risk you are will determine in some instances what the interest rate is. If you are a favoured or valued client, let's put it that way, if you are a person with large holdings at the bank or have a great credit history at the bank and they want to encourage your business, of course they'll offer you lower interest rates to secure that sort of business. So, by no stretch of the imagination would it be accurate to say that every single person that walks into the bank to get a mortgage, for the sake of the argument, has the same interest rate. Interest rates also vary by the term of the loan and also the amount of money they borrow. So it's any person walking into the bank, again I think I'll flip it this way, it is to be expected that different people will have different interest rates at the bank depending on not only their personal circumstances or perhaps demographic, if you put it on that level, but also based on the amount of money that they earn and then I'm saying that the demographic also leads into the money that they earn.We're not condescending into unnecessarily race or ethnic background. I think the demographic encompasses wealth as well, so…

**Mr. Starling** 2:32 You touched on terms and conditions may not have always been known back in the day, to the casual nature of things. Would it be fair to say that not every borrower knew that the terms, the loan price were negotiable, they could have negotiated, they just took what the bank said at face value?

**Christopher Swan** 2:53 In borrowing scenarios, I think it would be irresponsible to assume that a person that's borrowing money didn't realize they had to pay money back. That's the general premise of a loan. I'll give you the money, you pay it back. I think I'm saying, I think that in terms of whether the terms and conditions of that loan were set in stone or not, I think it would be eminently reasonable to assume that not everybody would understand that perhaps you could go in to your lender and try to negotiate a difference in either your interest, your payment rate, the length of your loan. So I would accept that not everybody would understand that you could probably go and apply to vary your loan because there are, in fact, there are legal documents, there are variations of loans that get executed and you generally, excuse me, generally don't see as many of those as you see other documents, which might lend itself to the belief that it isn't widely, isn’t widely known, people just accept what was given to them in the first instance and just, you know, soldier through it, so to speak.

**Mr. Starling** 4:03 Thank you.

**Christopher Swan** 4:04 I did not know if Ms. Forth had something…

**Frederica Forth** 4:06 Not so much to the loan, but with regard to appraisals. For everyone's knowledge, an appraisal is not an exact science, it's just an estimate of value. That's what I wanted to know.

**Christopher Swan** 4:19 It is not unusual to have more than one valuation. I mean, generally you stick with one but it is not unusual for someone to say, wait a minute, I think that this property is worth more than that, you over valued it, and ask a request for a second valuation. I's not uncommon

**Mr. Starling** 4:37 Thank you. In paragraph twelve, section C, you talk about banks exercising undue influence. One thing that came to me from that was that banks, especially in Bermuda, might have a monopolistic power in terms of their close connections with law firms and politicians. I think you alluded to that elsewhere. I was wondering, do they have power or did they historically have power to the degree that they may have used such power to disempower or seek illegal challenges to certain actions?

**Christopher Swan** 5:14 I would have thought that the…

**Mr. Dirk Harrison (Counsel)** 5:20 I'm sorry, I'm not interrupting, I just want to put it in context. I know Commissioner Starling has asked a question, but paragraph twelve C as he refers to,. I think the author of the document is about to answer. He was setting out what are some of the categories of defences that banks claim defences to which defendants’ claim. I don't think he was saying that he said so, he was setting out the examples of what persons say. I just want to put that into context.

**Mr. Starling** 5:50 So to be clear, just the undue influence inspired me to ask that question. It was separate from what he's actually talking about.

**Christopher Swan** 5:56 Undue influence is an area of law that involves taking advantage of a protected relationship and, strangely enough, the relationship of mother and child, I'm sorry, parents and child is a protected relationship. One of the areas that case law has determined that is a protected relationship is actually banker and client and because of that, undue influence involves a relationship of trust whereby you rely on the relationship, because of the relationship of trust, excuse me, actions that would have taken place otherwise, other than that having had that relationship would not have taken place and something detrimental has happened as a result.

**Mr. Starling** 6:42 With respect, I mean more the layman term of, like this legal law firm won’t represent me because they don't want to lose the bank’s…

**Christopher Swan** 6:50 Well, that's a different question. There are, I know of anecdote level, I will not mention the name, but I do know a particular person that was involved in extensive litigation with a particular bank and there were a series of law firms that were conflicted because they did work for the bank and were a little reticent or reluctant to defend the individual for fear that they would lose the work that they get from the bank. So the answer to that in at least in this one instance was a categorical yes but I can, I can see scenarios that if they, say scenarios that would apply to that particular scenario going forward because there are, particularly firms that do specific works for banks, mortgages and loans and the like, it's a very lucrative business for conveyancing practice and you really don't want to interfere with that if you don't have to. I think, I don't have to speak necessarily, generally on that and that's just you know, business sort of 101 but there are law firms that will not act because of their relationship with the bank. Yes.

**Mr. Starling** 8:01 I can feel the Chair getting prepared to kick me under the table, so I will wrap up with a final question. In paragraph twenty-six, you were, this may not be directly related to what you're saying, it's just inspired by it. You were talking about, the exact quote would be “nor is the fact that the bank have treated other customers/borrowers differently – that is matter for them.” That has inspired me thinking about the Human Rights Act of 1981 prevents discrimination now, but back in the day, I believe you mentioned that there may have been discriminatory practice regarding access to capital and I think you did touch upon it and I just wanted to clarify. Did you also suggest it may have been discriminatory practices in terms of pulling mortgages and interest rates for loans and so forth?

**Christopher Swan** 8:48 No, I don't think that they're discriminatory. Again, every, if everybody in this room walked into the same bank over the period of a week and applied for exactly the same, well no, applied for a loan of exactly the same amount, based on the relationship that person has with the bank, I would hazard a guess that saying that the interest rates charged would not be uniform across the board. That's one. Two, if everybody in this room walked into the bank and we did it starting with Counsel and said, right, go and ask for $500,000 and went around the room and got to me and it was, well ask for $1.2 million at $100,000 increments, different amounts, I would guarantee that there would be different interest rates. If there are different terms of the loans, there'd be different interest rates and so I'm not saying that it was discriminatory. I'm saying that the interest rates and the fees and charges and everything else are just necessarily different depending on the transaction. For example, value. When you go into a bank, I always find this funny because they used to have on the mortgage documents a fee called a ‘finder's fee’ and I used to joke, well the bank went into this room, found this money that they're going to loan to you. It's, it's now called ‘negotiation fee’ but you'll have valued customers at the bank that in some instances the bank will waive the fee and in some instances they won’t. If you're, if you have an existing mortgage with the bank, for the sake of argument, and you are selling the property that that mortgage is attached to but you're upgrading, and you're buying another property and you're also getting another mortgage, chances are they won't charge you a finder's fee or a negotiation fee. To me, that's not discriminatory. However and no, not however, also I think it's important to note that some people are treated differently from others. This was in the context of enforcing delinquencies. It is a well recognized principle in law that, for the sake of the argument, if people are jointly and severally liable, if five people sign a mortgage and the mortgage is in default, but one of those five has the deep pockets, you can go after that one to the exclusion of the others or go after all of them and only enforce any order against that one and not the others. And that's just a principle at law. So the fact that the bank might sue John Smith and not Joe Thompson is really a matter for them.

**Mr. Starling** 11:16 And I get that for 2021, but what about 1951?

**Christopher Swan** 11:21 Back when the earth was really hot. I would, I think there is enough history in this very room to recognize and understand that some people couldn't even go into the bank back then and expect realistically to be entertained on an application for a loan. I think that's just the way it was. With that in mind, I don't think it's any stretch of the imagination to follow that through by saying that different people or certain people were treated differently from others.

**Mr. Starling** 11:57 Thank you. Having made my ignorance explained to everyone watching I rest my questions for now. Thank you very much.

**Mr. Perinchief (Chairman)** 12:04 Counsel, I got a request from Commissioner who is on Zoom. I want to know if Ms. Binns wishes to have a question put to the witness.

**Ms. Binns** 12:26 Can you hear me? Hello.

**Mr. Perinchief (Chairman)** 12:26 Yes, Ms. Binns, would you put your question?

**Ms. Binns** 12:31 One. I know that we talked about the banking practices as they are today, but are you aware of the banking practice where it was embedded in the mortgage document that the bank had the discretion to call in the mortgage of a borrower at anytime

**Christopher Swan** 12:52 Ah, historic, sorry.

**Ms. Binns** 12:54 Sorry, at their discretion?

**Christopher Swan** 12:55 I think I alluded to earlier, I think I was talking about one of my professors at law school and at one stage mortgage documents, a mortgage or a bank could call mortgage before the ink was even dry on the documents. I did allude to that. I am not able to answer the question in regards to what stage that practice was eliminated or done away with but, in theory, my understanding is that at one point in time that did exist.

**Ms. Binns** 13:29 Okay. Thank you, because there was a period of time where there were as case law, backed up by case law, where the banks would call in mortgages at the discretion and then only call in the mortgage for the amount outstanding. Are you aware of that?

**Christopher Swan** 14:00 Well, if you're calling a mortgage, it's the amount due under the mortgage. If, using your example, if you borrowed, you know, $100,000 and you are outstanding, I'm sorry, you've made payments such that that's paid down to $90,000, that's what they're calling.

**Ms. Binns** 14:21 Okay.

**Christopher Swan** 14:21 So it is the balance, whatever is owing. If you call the mortgage whatever is owed under that particular mortgage document that the bank is asking to be repaid. If you're, sorry, that's the answer to that question.

**Ms. Binns** 14:34 Okay, but this is leading into the next question. Because borrowers had been paying on the mortgage for however long before defaulting, it appeared that the practice of just calling in the mortgage that was outstanding was unfair. And I raise this because in a practice directive of August 8 2013, it was necessary for Chief Justice Ian Kawaley to actually put in a practice directive about matters on conducting sales of real property in execution of judgment. And it was necessary at that time to actually state that where private sales are conducted by mortgagees in possession, regardless still of course, we had for the duty to obtain the best possible price at the time of the sale and the case that's quoted is Edness versus Bank of Bermuda Limited. So I agree that back in the day the relationship would have been different and the banks were less inclined to be following practices other than local practices. Now, they're bound by international standards, so I only raised that because there are, a certain period of time where people were actually losing their property because of they defaulted for whatever reason and the bank would only take what they owe. That falls squarely within our remit because it's a loss of property falling under a category, a category, that people were losing through banking practices property that they owed mortgages on. Yes it's contractual, but they were going, losing not just the property, but the equity in the property. Are you aware of any cases that have come before you in your practice where that has happened?

**Christopher Swan** 17:01 Well, let me, yes, let me answer it this way. I'm familiar, but to be fair, I don't remember the names but I'm familiar with the practice direction in this context. For years, the practice was once the property was foreclosed upon and possession was obtained and if you went the route of writs of execution and the like, and the property was being sold, it was sold in public auction. And they were, for the most part, not saying that other mechanism, other ways of sale didn't take place, but my experience was that most of, the practice was that a newspaper ad was posted and it was announced that the sale of, you know, #1 Pleasant Lane, I think the address I referred to before, was being sold by auction. And necessarily, what happened was that you had fire sales, forgive the expression, the, instead of, if it was in the hands of a real estate agent who have every degree of motivation to get as much money as they can for the property, you would find these auctions, people would turn up and they’d pay, you know, very little amounts on the dollar, so to speak, for the properties. Now there was, I shouldn't say little amounts on the dollar, they would generally sell for less than what they were worth. I think that what necessarily happened over time was that reserve prices were set for the properties. Now a reserve price would have always just been at least the amount of money that the bank or the mortgage holder had, was owed. I think that the courts and rightfully so perhaps under the direction of the former Chief Justice Mr. Kawaley recognized that this was a problem because it's always been a principle that even in default, once the property is sold, whatever monies were left over after the debt was paid belonged to the former owner of the property. The issue was whether the properties were being sold at fair market value and clearly they weren’t. What has transpired, I think for the most part since then, is that and I think anyone will notice that you don't seem to see those ads in the paper anymore for the sales. A lot of sales are being managed or conducted by what's known as private treaty and basically what would happen is that there would be valuations of the property, the property would be foreclosed, there'd be an order for sale, the property would be valued and an application would be made to the courts for the property to be sold by private treaty.

A complete application would have for example, the sale and purchase agreement which would set out the value of the property, the person buying it and also, annexed to the affidavit which would be the form of presenting the evidence, would be a valuation showing what the market value of the property was. Now, it's not a, it's a much better scenario than sales by auction but it's not infallible. I mean, for the sake of the argument, if there are certain properties and I could rely on Ms. Forth with her experience to either confirm or deny this, but there are certain properties that we all know, sat on the market for a long time, an inordinate amount of time. And one has to consider the balance between settling the debt, particularly if and I use the word ‘if’ purposefully, the interest clock is still ticking because any judgment as a matter of law attracts interest at the statutory rate, whether the bank has, forgive the vernacular, turned off the tap, so to speak, of what’s owing. So the longer that property sits on the market, arguably, the less equity the person that owned it will have if the clock is still ticking.

So, private, sales by private treaty do have an obligation to also try and get the best market price for the property. But I would be mischievous if I said that they were, they guaranteed that the property is sold at fair market value. People still realize they're being sold by private treaty, they realize it's a foreclosure and will always try their best to see, purchasers are purchasers, they'll try their best to see if they can buy it at the least, lowest price if they can. In situations like that, what would necessarily happen is that, we've conducted this practice on more than one occasion, we would put an ad in the paper saying that the property is being sold by private bid. So you invite anyone that's interested in the property to put a bid in on the property and you take the highest bid as long as that bid is above the reserve price. And that protects the former property owner from a situation where the property is sold at, amazingly sold at undervalue or at amazing undervalue, but also remember the danger in generalizing the terms of this sort of conversation or that we are facing now a period of time where property values have decreased. And so, you have to be cognizant of what was a $1,000,000 property ten years ago, I think I made the submission earlier on, might be worth $750,000 now and that's saying you can't displace its actual value. Now, going full circle to the question asked a few minutes ago, what's its value, its value is what it sells for, what a person is willing to buy it for. So you have to bear in mind that there is a balancing act between what it's actually valued at, what someone will pay for it and put in the back of your mind actually what it was mortgaged for years ago when, I think in most scenarios, most scenarios meaning more than 80% percent, I don't know, I don't want to put a percentage on it, but more properties are worth less now or stayed at their values as supposed to…

**Frederica Forth** 23:19 Properties have come down since…

**Christopher Swan** 23:21 Properties have come down.

**Frederica Forth** 23:22 Yeah, about 30% in some cases, in some cases a little more.

**Christopher Swan** 23:25 Oh no, I meant the percentage of properties. Were we take all properties in Bermuda, we can safely say that on average, the properties have gone down for everybody. So you have to balance that, keep that in mind when determining at the point of sale or after foreclosure what the actual fair market value of that property is, and this goes full circle back into the point that people feel that they are being treated unfairly or badly or illegally or fraudulently by the banks when you had a property that was worth significantly more years ago and whose value was dropped by 30% and that 30% isn't even achieved at a sale by private treaty because that's what the market bears.

**Mr. Perinchief (Chairman)** 24:10 Ms. Binns, is that a satisfactory answer?

**Ms. Binns** 24:13 I just wanted to round it off by saying that I'm so glad that we've moved away from the complete discretion being only afforded to the bank and that we're moving into more protection for the borrower, because I think there's a class of borrowers that didn't get the consideration that is being given to the borrowers of today and I think they are the ones that fall within our remit because they didn't have the protections that you see now. Would you agree to that?

**Christopher Swan** 24:58 I think necessarily that there are borrowers historically that do not have the protections that we have now, that's a fair generalization. I think it's also, I mean, there are a class of borrowers, I'm been picking my words very carefully, that have enjoyed relationships with the bank and I think that one of the areas that would, one of the scenarios that would confirm what you're saying in part, and I think it is, I think it's a situation that is unfair, I'll just leave it on that level, is that there's a whole slew of borrowers that are bank employees that have borrowed monies by way of mortgage and I'm not particularizing this to any bank or banks, it may or may not have happened at any or all of them, or some of them, where the employee discounts were employed, were applicable. And in some circumstances, those employee discounts almost overnight were removed and the fact of that was that very low interest rates on mortgages exponentially increased for those people that were still employees of those particular institutions. Now, if you are, if you took advantage of a lower rate and ceased to be an employee, I understand that, then you don't, you should not perhaps be able to enjoy the benefits that employees enjoy, but I do know of scenarios where there have been complaints about that particular occurrence taking place on not necessarily a small scale. That would, to my mind, be a class of people that have been perhaps not treated as well as they could have.

**Ms. Binns** 27:10 Okay, so there are historical cases and then there are present day cases, so at the end of the day we don't need to look at the borrower and think how we can protect them when it comes to borrowing. And thank you for your explanation. I really appreciate your clearing up, you know, some of the issues that I did have. It was very instructive in terms of the lending process.

**Christopher Swan** 27:44 My pleasure. I will say that, in reference to my last example, this is, I've said what I've said in the absence of any explanation that's been given by any of the banks in regards to why these sorts of things took place because it may be the case that going again full circle, a regulatory authority or some other body may have thought that, for example, these preferential rates given to particular people at the bank were something that wasn't acceptable in terms of perhaps bias or treating people favourably, some people favourably as opposed to others. So I don't know. So I've made this statement, but I would openly accept that there may be a very reasonable or may be an explanation that, for that, that should be set out, so that there isn't a perception that the behaviour was necessarily very bad behaviour, let’s put it that way.

**Ms. Binns** 28:49 I just wanted to close out by saying that the proposed legislative changes in regards to consumer protection when it comes to mortgages or any other sort of protection is timely. So thank you very much.

**Christopher Swan** 29:07 My pleasure, thank you.

**Mr. Perinchief (Chairman)** 29:09 Thank you very much, Commissioner Binns, and I want at this time to thank Mr. Christopher Swan, Barrister, for your very erudite information. Certainly it’ll carry this Commission forward in our deliberations of matters that you've described, especially banking matters and I just want to thank you on behalf of the Commission one more time and I hand over to you, Counsel.

**Christopher Swan** 29:41 Thank you very much, Mr. Chairman. It's been a pleasure to have been invited to participate and I'm always happy to assist if required.

**Mr. Perinchief (Chairman)** 29:52 Thank you.

**Mr. Dirk Harrison (Counsel)** 29:52 We can take an adjournment now.

**Mr. Perinchief (Chairman)** 29:56 Counsel, you’re ready to adjourn? No questions?

**Mr. Dirk Harrison (Counsel)** 30:02 I've had my field.

**Christopher Swan** 30:06 It's not T20, this is a Test Match.

**Mr. Perinchief (Chairman)** 30:10 This Commission of Inquiry is now adjourned for the weekend and we will continue on next week at a time that will be announced. And you’re now adjourned.

**END OF TRANSCRIPTION AT 30:10**