

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA 2010/2002

BETWEEN

BARBADOS MUTUAL LIFE

Plaintiff

AND-

HERMAN PERSAD

First Defendant

SHIRLEY SHARIFFA PERSAD

Second Defendant

Before: The Hon. Mr. Justice Bereaux

**Appearances: Mr. A. des Vignes for Plaintiff
Ms. Y. Koorn for Defendants, R. Bissessar subsequently**

REASONS

[1] On 16th April, 2009, I dismissed the defendants' counterclaim and made the following order in respect of the plaintiff's summons and statement of claim:

- (1) judgment for the plaintiff in the sum of three hundred and forty-two thousand, two hundred and fifty-six dollars and sixty-seven cents (\$342,256.67), together with the sum of thirteen thousand, four hundred and forty-four dollars and thirty-four cents (\$13,444.34) being accrued interest at the daily rate of seventy-three dollars and eighty-seven cents (\$73.87) from 10th October, 2008 to 9th April, 2008;
- (2) in default of payment of the judgment debt, together with interest thereon at the rate of 12% per annum from the 10th April, 2009 to the date of payment within the forty-two days of judgment, the defendants shall deliver up possession of mortgaged premises situated at No. 2698 Saltmine Road, Thick Village, Siparia to the plaintiff;
- (3) the defendants to pay to the plaintiff the costs of the trial certified fit for a counsel, to be taxed in default of agreement;
- (4) there shall be a stay of execution of 8 weeks.

[2] The proceedings started as a mortgagee action brought under Order 85 of the Rules of the Supreme Court of Trinidad 1975, and by consent, was ordered to proceed as if begun by writ. By its statement of claim, filed on 6th November, 2003, the plaintiff alleged that the defendants defaulted in the payment of the principal sum of one hundred and seventy-five thousand dollars (\$175,000.00), including interest thereon, as well as the payment of the insurance premium on the policies of insurance taken out on the mortgaged premises and that the defendants remained indebted to it in the amount of one hundred and sixty-one thousand, seven hundred and eighteen dollars and forty-one cents (\$161,718.41), together

with interest on the principal balance of one hundred and thirty-five thousand, three hundred and fifty-three dollars and thirty-nine cents (\$135,353.39) from 6th November, 2003 to the date of payment or judgment.

[3] The principal sum was advanced under a deed of mortgage dated 18th March, 1986 made between the defendants as mortgagors and the plaintiff as mortgagee by which the defendants covenanted, *inter alia*, as follows:

(i) *to pay to the plaintiff on the last day of March, 1986 (hereinafter referred to as “the repayment date”) the principal sum of one hundred and seventy-five thousand dollars (\$175,000.00) with interest thereon at the rate of 13-1/2% per annum (hereinafter referred to as “the original rate”) from the date of the deed of mortgage and, so long as any principal money remained unpaid after the repayment date, to pay to the plaintiff interest on the principal sum or so much thereof as shall for the time being be unpaid by equal monthly payments on the last day of each and every month in every year at the original rate or any variation thereof as provided for in the deed of mortgage, each instalment of interest on any principal money for the time being secured by the said deed of mortgage, including capitalized interest, shall, as from seven (7) days after the date on which it ought to be paid, be deemed to be added for all purposes to such principal money thereby secured and shall thenceforth bear interest and be secured and payable accordingly. (Clause 1 of the first part of the third schedule)*

(ii) *to keep all houses and buildings for the time being comprised in or subject to the security in good and substantial repair and condition and insured to the full insurable value thereof in the name of the plaintiff against loss or damage and if default at any time should be made in keeping the houses and buildings or any part thereof in good and substantial repair and condition or effecting or keeping up*

any such policy or policies or delivering up such receipt to the plaintiff on demand, it shall be lawful for but not obligatory upon the plaintiff to repair and keep the same insured to the amount aforesaid and all moneys expended by the plaintiff for all or any such purposes and all costs and expenses incurred by the plaintiff in connection therewith shall be deemed to be properly paid by the plaintiff on behalf of the defendants. (Clause 3 of the first part of the third schedule)

(iii) to cause the owner of all policies of assurance mentioned in the fourth schedule to the said deed of mortgage to pay all premiums on any such policy and not to do, omit or knowingly suffer anything whereby any such policy of assurance may become void or voidable and further that, if any such policy of assurance shall for any cause become void or voidable, to forthwith, at such owner's cost, do all such things as may be necessary for keeping any such policy of assurance on foot if only voidable or for effecting a new policy on the same life assured, if it shall become void, for the same amount as is assured to be paid thereunder which new policy shall be charged with payment of the moneys thereby secured. (Clause 6 of the first part of the third schedule)

[4] By the terms of the mortgage, it was expressly agreed and declared that:

(i) The statutory power of sale conferred upon mortgagees by the Conveyancing and Law of Property Ordinance, Chap. 27 No. 12 shall apply to the security but without the restrictions therein contained as to giving notice or otherwise so that for the purpose of a sale of the premises thereby mortgaged under such statutory power the whole of the principal moneys thereby secured shall be deemed to become due and payable immediately on default being made in the observance or performance of any covenant or agreement expressly or impliedly contained in those present and on the part of the defendants to be

observed and performed. (Clause 8 of the second part of the third schedule)

- (ii) *all costs, charges and expenses properly incurred thereunder by the [plaintiff] and all moneys properly paid by the [plaintiff] shall together with interest thereon at the rate of 13-1/2% per annum be charged on the property for the time being subject to the security and shall, on the same being paid, be repaid on demand to the plaintiff by the defendants with interest thereon from the time of payment at the original rate or any substitution thereof, provided that the charge thereby conferred shall be in addition and without prejudice to any and every remedy lien or security which the [plaintiff] may or, but for the charge, would have for the moneys thereby secured or any part thereof. (Clause 9 of the second part of the third schedule.)*

[5] The plaintiff, by letter of 14th December, 2001 to the defendants, demanded payment of the sum then due. It alleged that the defendants failed to pay the sum demanded, “*but have paid several sums totaling the aggregate sum of sixty thousand, seven hundred and thirty-nine dollars and sixteen cents (\$60,739.16) between 14th December, 2001 and 2nd September, 2003,*” leaving them indebted to it in the amount of one hundred and sixty-one thousand, seven hundred and eighteen dollars and forty-one cents (\$161,718.41) as at 5th November, 2003. That sum continued to accrue and when updated, amounted to the sum which was the subject of my order.

[6] The defendants, by their defence and counterclaim admitted the mortgage but alleged that;

- (i) the rate of interest stated in the deed of mortgage was expressed as 13-1/2% per annum but the actual rate of interest charged was 12-1/2% per annum;
- (ii) as at 31st October, 2004, they had effected payments on each of the monthly instalments due; except for approximately twenty-three

instalments, numbers 124 to 146 on the loan amortization schedule, in the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00);

- (iii) that sum was, by verbal agreement between the plaintiff and Mr. Persad, the first defendant, to be credited to the defendants' mortgage account in satisfaction of monies due to the first defendant from the plaintiff, for the purchase, by the plaintiff, of certain fixtures, fittings and items belonging to the first defendant;
- (iv) they have also paid the premiums due on the life insurance policies and fire insurance policies directly to the insurers and the plaintiff has duplicated the payments and thereby falsely increased the amount of the defendants' indebtedness;
- (v) the rate of interest originally charged has been varied from time to time by the plaintiff without notification to the defendants and the defendants have not been provided with the amortized repayment schedules of the mortgage loan, relevant to the several variations;

(The defendants also denied that any arrears of interest had accrued in the payment of the mortgage instalment and allege that such charges and expenses claimed in respect of the mortgage were not properly incurred.)

- (vi) they have continued to pay the monthly instalments due on the mortgage loan;
- (vii) as to the alleged verbal agreement referred to at (iii) above, the relevant particulars are that:
 - (a) Mr. Persad was a tenant of a portion of the second floor of the plaintiff's premises at #23 Independence Avenue, San Fernando. Mr. Persad expended monies in upgrading the premises but the plaintiff served a notice to quit on him;

- (b) the defendant proceeded to vacate the premises and set about dismantling and removing installed partitions and electrical wiring from the premises. He was instructed by the plaintiff's assistant manager, Ms. Lisa Rampersad, that the plaintiff wished to purchase the same from him and that he should therefore leave intact certain fixtures, fittings, items and improvements he had installed or made to the premises. He was also instructed to return certain items which he had already removed from the premises because the plaintiff wished to purchase the same from him. Mr. Persad agreed to sell the same on an installed cost basis and satisfied his part of the contract;
- (c) at or about the same time, Mr. Persad agreed with David O'Brien, the plaintiff's property manager, that the plaintiff would pay him for the items, fixtures and improvements to the premises at the installed cost and that the value would be applied to the outstanding balance of the defendants' mortgage which would have reduced the principal sum and the interest payments due;
- (d) the installed cost of the said items and improvements amounted to forty-two thousand, four hundred and seventeen dollars (\$42,417.00) amounting to approximately 23 mortgage instalments and should have been applied to satisfy the instalments numbered 124 to 146 inclusive, within 30 days of the date of invoice;

- (e) prior to reaching agreement, the plaintiff by its officers, inspected and selected the items the plaintiff, *inter alia*, wished the first defendant to leave installed in the premises he was vacating and inspected the first defendant's "*building file*" in respect thereof;
- (f) the plaintiff failed and/or neglected to credit the defendants' mortgage account as agreed and has recorded its own failure so to do as a breach by the defendants of the covenant to pay the mortgage instalments with attendant consequences to the defendants' mortgage account. The lump sum payment of forty-two thousand, four hundred and seventeen dollars (\$42,417.00) would have accelerated repayment of the principal monies owing under the mortgage and benefitted the defendants;
- (g) the plaintiff had duplicated the defendants' payments and charged the defendants' mortgage account with the life and property insurance premiums by way of automatic premium loans thereby reducing the bonus value credited to the life insurance policies which forms part of the mortgage security and the monies due under the mortgage account and applied additional interest thereto;
- (h) the plaintiff from time to time had failed to credit the defendants' mortgage account with payments made but instead placed the monies received into a "*suspense account*" although the mortgage deed made no provision therefor. The plaintiff did demand of the defendants, payment of money

allegedly due under the terms of the deed of mortgage by letter dated 14th December, 2001 but the defendants have at all material times paid in respect of the principal money borrowed, the instalments due under the deed of mortgage save for the stated sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00);

- (i) any alleged deficit accruing to the defendants' mortgage loan account has been brought about by the plaintiff's failure to credit the payment of the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00) to the defendants' account, the erroneous charges of life and property insurance premiums and the defective accounting methodology used by the plaintiff;
- (viii) save for the filing of the mortgagee action for possession on the 12th June, 2002, no demands for possession of the property were made of the defendants by the plaintiff. The plaintiff was not entitled to the sums claimed or any sum from the defendants because it, *inter alia*, did not credit the defendants' account as agreed and cannot justly or fairly claim any monies due from the defendants unless it takes into account the loss its action has caused the defendants;
- (ix) the defendants are entitled to a set off of the monies outstanding from the plaintiff and to all penalties arising therefore applied to their mortgage account by reason of the non-credit of the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00) to the defendants' mortgage account in October, 1996 and the wrongful accrual of the insurance premiums payments charged to the defendants' mortgage account;

- (x) the plaintiff refused to credit the monies due to the mortgage and continues to allege that the defendants have defaulted in payment of its mortgage loan by 23 instalments. The plaintiff, at all material times, derived the benefit from the first defendant's property and improvements to its premises without payment for same and continues so to do. The plaintiff has also refused to allow Mr. Persad to enter thereon and remove his property from the premises inspite of the fact that it has failed to pay the agreed consideration therefor;
- (xi) despite the fact that the plaintiff reduced the rate of the interest on its mortgage loans to its mortgagors effective 1st May, 2002, it increased the defendants' monthly instalment to three thousand, two hundred and fifty-eight dollars and forty-four cents (\$3,258.44) per month on the basis of the defendants' alleged non payment of the mortgage instalments and life and property insurance premiums. The plaintiff has failed to provide them with a statement showing the basis of calculation of the amount claimed, inspite of Mr. Persad's request for the same;
- (xii) the plaintiff has failed to provide them with the mortgage amortized repayment schedules as a result of which the defendants were not in a position to ascertain the correct amounts due for the purpose of tendering and discharging the principal and interest due on the mortgage loan and redeeming the mortgage;
- (xiii) the defendants contracted to pay the plaintiff a total sum of four hundred and seventy-five thousand one hundred and sixty-seven dollars and eighty-six cents (\$475,167.86) for a loan of one hundred and seventy-five thousand dollars (\$175,000.00). To date (April 2005), the defendants have paid the total sum of four hundred and fifty-three thousand, two hundred and twenty-seven dollars and twenty-one cents (\$453,227.21) (excluding the forty-two thousand,

four hundred and seventeen dollars (\$42,417.00) and in continuing the monthly instalments of three thousand, two hundred and fifty-eight dollars and forty-four cents (\$3,258.44) the plaintiff will be paid the sum of five hundred and thirty-one thousand, five hundred and eighty-two dollars and five cents (\$531,582.05) as at 31st March, 2006, as to principal and interest on the mortgage loan;

(xiv) the plaintiff's conduct is and continues to be unfair, unconscionable, unreasonable and oppressive and has prevented and continues to prevent the defendant from redeeming the said mortgage.

[7] The defendants counterclaimed for:

- (i) an account of what if anything is due on a mortgage dated 18th March, 1986 and made between the plaintiff and the defendants;
- (ii) a declaration that the defendants may be at liberty to redeem the property;
- (iii) alternatively, a declaration that the defendants are entitled to mortgaged property discharged from all claims under mortgage;
- (iv) aggravated damages;
- (v) an inquiry into damages;
- (vi) an order that the plaintiff do execute a deed of release within 15 days of the same being presented for execution and in default of the plaintiff executing the said deed of release, the Registrar of the Supreme Court be and is hereby empowered to execute same without recourse to the plaintiff;
- (vii) costs;
- (viii) such other orders as may meet the justice of this case.

The plaintiff's Reply and Defence to Counterclaim

[8] In reply, the plaintiff admitted that:

- (a) the rate of interest charged by the plaintiff had been varied from time to time;
- (b) the defendants failed to effect payment of instalments between July, 1996 and May 1998;
- (c) the first defendant had been a tenant of the plaintiff and that his tenancy had been terminated;
- (d) certain fixtures, fittings and items were left by the first defendant at the plaintiff's premises at the request of the plaintiff.

It also admitted receipt of an invoice from the first defendant dated 30th September, 1996 in the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00) but denied any agreement to offset outstanding instalments against that sum.

[9] The plaintiff also denied that:

- (a) the defendants effected payments of each of the monthly instalments due under the deed of mortgage save for approximately 23 instalments in the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00);
- (b) the defendants paid to it, by way of instalments, the sum of four hundred and twenty-three thousand, nine hundred and ninety-six dollars and twenty five cents (\$423,996.25);
- (c) there was any verbal agreement with the defendants, or either of them, that it would purchase for the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00), any fixtures, fittings and items belonging to Mr. Persad and which were left at its premises after the termination of the tenancy; or any agreement between its

property manager, David O'Brien and Mr. Persad to compensate Mr. Persad for his property at the installed cost or at all, or that such compensation was to be effected by crediting his account;

- (d) there was any verbal agreement with the defendants or either of them, that payment of the instalments due from the defendants under the deed of mortgage would be effected by crediting the defendants' account with the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00) or any amount;
- (e) it had unlawfully terminated Mr. Persad's tenancy;
- (f) the defendants paid the premiums due on the life insurance policies and fire insurance policies directly to it;
- (g) it had duplicated any payments or falsely increased the amount of the defendants' indebtedness;
- (h) it had failed to notify the defendants of the variation of interest rates which it had effected;
- (i) it had not provided the defendants with the amortized repayment schedules of the mortgage loan consequent upon the variation of the interest rates.

[10] As to the variation of interest rates, the plaintiff contended that:

- (a) on or about the 23rd day of April, 1992, it notified the defendants, in writing, of its intention to vary the original rate of interest applicable to their mortgage loan account to 13% per annum, reducing to 12% per annum upon prompt payment, with effect from the 1st day of August, 1992;
- (b) by letter dated the 2nd day of July, 1992, it provided the defendants with a revised amortization schedule and reminded the defendants that

all mortgage instalments due by the 31st day of July, 1992 should be paid in full price to that date;

(c) by letter dated the 13th day of December, 2002, it notified the defendants of a further variation of the interest rate applicable to their mortgage loan account to 9.5% per annum with effect from the 1st day of December, 2002 and that all arrears of instalments must be settled in full in order to benefit from the rate reduction;

(d) by letter dated the 12th day of January, 2005, it notified the defendants of a further variation of the interest rate applicable to their mortgage loan account to 8% per annum with effect from the 1st day of January, 2005.

[11] It alleged that having received Mr. Persad's invoice dated the 30th day of September, 1996, it disagreed with the valuation of the fixtures, and by letter dated the 27th day of February, 1997, notified the defendants' valuator, Raghunath Singh & Co. Ltd, of its disagreement. (The letter indicated that the plaintiff's valuation of the fixtures amounted to four thousand, five hundred and sixty-five dollars (\$4,565.65)). It alleged that the plaintiff and the defendants failed to reach any agreement as to the value of the fixtures or for the crediting of the defendants' mortgage account with the amount claimed by the first defendant and that it credited the amount of four thousand, five hundred and sixty-five dollars (\$4,565.00) towards the outstanding amount of nine thousand, two hundred dollars (\$9,200.00) due and owing to it from the first defendant as arrears of rent for the period January to August, 1996. It thus denied any right of set off by the defendants.

[12] The plaintiff also contended that it was entitled to treat the defendants as being in arrears of mortgage instalment payments by reason of their admitted failure to pay the instalments and that in any event, any agreement to purchase the fixtures, fittings and items from the first defendants was statute barred as not having accrued within four years before the filing of the counterclaim, pursuant to section 5 of the Limitation of Personal Actions Ordinance, Chapter 5 No. 6.

[13] The plaintiff admitted that inspite of the reduction of the interest rates, the monthly instalments payable by the defendants, increased from time to time consequent upon the defendants' mortgage loan account being in arrears of payments of monthly mortgage instalments, life and fire insurance premiums, and automatic premium loans and charges, debited to the mortgage loan account.

[14] The plaintiff denied that the defendants were never provided with an amortized repayment schedule. Rather, they were provided with an amortization schedule at the time of the grant of mortgage loan and that it formed part of the deed of mortgage. Further, by letter dated the 2nd day of July, 1992 from the plaintiff, the defendants were provided with a revised amortization schedule.

[15] The defendants sought and were given extensive particulars in respect of the plaintiff's reply. These included:

- (i) the method used by the plaintiff in valuing the fixtures at four thousand, five hundred and sixty-five dollars (\$4,565.00);
- (ii) the amount attributed to each fixture and the identity of each fixture;
- (iii) the months for which Mr. Persad owed rent to the plaintiff and the amounts due for each month;
- (iv) the due date of each mortgage instalment; each unpaid life insurance premium and the date of payment; the automatic premium loans and the rate of interest charged on such automatic premium loans; the charges debited to the mortgage; each unpaid fire insurance premium ;and the due date of premium.
- (v) In respect of late payments:
 - (i) the dates on which the most instalments were made and the due date of each instalment;

- (ii) the dates on which the fire insurance premiums were paid and the due dates;
- (iii) the dates on which the life insurance premiums were paid and the due date of payment; and
- (iv) attorneys fees which were debited to the defendants' account in accordance with the terms of the mortgage. These latter fees were requested by the defendants under the general rubric of "*other charges*" made to their account with the request that such charges be itemized and particularized in respect of each payment made.

The issues

[16] The main issues which arose on the pleadings were as follows:

- (i) whether there was any agreement to set off the value of fixtures against the instalments due on the mortgage;

In my judgment, once no agreement was proven, then the plaintiff, having regard to the defendants' concession that they had not paid instalments 124 to 146, would have substantially succeeded because it meant that the defendants were in breach, having not paid the twenty-three (23) instalments which they alleged were agreed to be set off against the mortgage balance. Mr. Persad also conceded, during cross-examination that, he had not paid an instalment since May 2006.

- (ii) whether there were instalments paid by the defendants for which they were not given credit by the plaintiff;
- (iii) whether the plaintiff was entitled to charge the defendants' account with life and fire insurance premiums which it paid when the defendants allegedly failed to pay their premiums or were late in payment;

Additional issues of fact which arose were:

- (iv) whether the defendants were notified of the variation in the rate of interest on the mortgage;
- (v) whether the defendants were provided with an amortization schedule.

The evidence

[17] I turn then to the evidence. Michelle Abraham Chan Pak (I shall refer to her as Ms. Abraham) testified on behalf of the plaintiff, while the first defendant testified on behalf of the defendants. Both submitted witness statements and were cross-examined on their witness statements. Mr. David O'Brien submitted a witness statement on behalf of the plaintiff but was unable to testify due to serious illness and his witness statement was not considered. Ms. Abraham's evidence was by far the more credible and in my judgment, was more than sufficient to prove the plaintiff's case. The same cannot be said of the first defendant's. His oral evidence contradicted his assertions in the counterclaim. He was unable to substantiate any of his allegations, by documentary evidence. Such documentary evidence that he did produce was demonstrated in cross-examination to be not relevant to the allegations he made of the plaintiff.

Evidence of Miss Abraham

[18] Under cross-examination by Ms. Koorn, Ms Abraham displayed great command and understanding of the evidence she gave in her witness statement. She was clear and cogent. At the time of her cross-examination, she was the Manager, Mortgages but had had conduct of the defendant's file since January 2000, when she was Assistant Manager and was well acquainted with the defendants' mortgage loan account. She had custody of the file maintained by the plaintiff in respect of the defendants' account. She testified that:

“that file contains all the relevant documents and notations relative to the processing and management of the account which is the basis of this action.”

[19] She spoke from her “*direct knowledge*” and from her review of the file. Her evidence supported *in total* the plaintiff’s statement of claim and reply and was buttressed by supporting documents in all respects. She stated as follows:

- the original rate of interest of 13-1/2% was varied to 13% per annum reducible to 12% per annum if paid promptly, by letter of 23rd April, 1992 from the plaintiff to the defendants and with effect from 1st August, 1992 (copy of letter tendered);
- the plaintiff provided the defendants with a revised amortization schedule reminding them that all mortgage instalments due by 31st July, 1992 should be paid in full by that date (copy tendered);
- the defendants, for most of the life of the mortgage loan, failed to pay loan instalments, life and fire insurance premium on the due date (the last day of each calendar month).

The actual dates of payment and the due dates were provided in a four page table, setting out late payments, November 1990 to May 2006. In many instances, the payments were over two years late. I have summarised Ms Abraham’s witness statement thus:

- over the period August 1992 to November 1996, the defendants defaulted in the payment of mortgage instalments as well as insurance premiums due, as a consequence of which the plaintiff wrote calling upon them to liquidate their arrears. Various correspondence between the parties’ attorneys were attached as supporting documentation;
- by letter dated 19th December, 1996, the plaintiff wrote to Mr. Persad and, *inter alia*, refuted his claim that it was indebted to him for fixtures left at the plaintiff’s building in the office space which he had formerly tenanted. The plaintiff advised Mr. Persad that the sum of four thousand, five hundred and sixty-five dollars (\$4,565.00), being the amount due for the fixtures had been applied against the amounts outstanding and due from him for arrears of rent leaving a balance due

and owing from him of four thousand, six hundred and thirty-five dollars \$4,635.00). A copy of the plaintiff's letter was tendered into evidence;

- by letter dated 27th March, 1997, the plaintiff wrote to the defendant's valuer, Raghunath Singh & Co. Ltd, expressing its disagreement with their valuation of the fixtures in the amount of sixty-six thousand, one hundred and eighty-two dollars and fifty cents (\$66,182.50) and advised that the plaintiff's valuation had disclosed the value of the fixtures to be four thousand, five hundred and sixty-five dollars (\$4,565.00). A copy of the plaintiff's letter was tendered into evidence;
- by letter dated 25th June, 1997, the plaintiff responded to a letter dated 3rd March, 1997 from Mr. Persad and, *inter alia*, made it clear that there was no excess to be applied to the credit of his mortgage account. A copy of the plaintiff's letter was tendered;
- thereafter, the plaintiff placed the collection of arrears of mortgage instalments due to it from the defendants in the hands of its attorneys at law who corresponded thereafter with the defendants by letter dated 29th August, 1997, on behalf of the plaintiff;
- over the period December 1997 to May 2002, correspondence was exchanged between the respective attorneys at law concerning the arrears on the defendants' mortgage account. Finally, by letter dated 14th December, 2001, the plaintiff's attorneys at law demanded from the defendants, payment of the sums then due under the terms of the mortgage. A copy of that letter was tendered;
- between December 28, 2001 and the commencement of these proceedings in June, 2002, correspondence was exchanged between the respective attorneys at law, concerning the outstanding liability of

the defendants. Copies of this correspondence were set out in the plaintiff's bundle of documents;

- by letter dated 17th April, 2002, the plaintiff notified the defendants of a further reduction by 1% of the residential mortgage interest rate effective May 1, 2002 and stipulated that the reduction was only applicable to existing residential mortgagors whose accounts were up to date as at March 31, 2002. By letter dated 24th May, 2002, the plaintiff confirmed to the defendants the new mortgage instalment of three thousand, two hundred and fifty-eight dollars and forty-four cents (\$3,258.44) commencing end of May, 2002;
- These proceedings were first instituted by the plaintiff on 12th June, 2002;
- As at the date of commencement of these proceedings, the defendants had been in arrears of payments for some 23 months – seven months from June 2001 to December 2001, twelve months from January 2001 to December 2001 and four months from January 2002 to April 2002;
- by letter dated 13th December, 2002, the plaintiff notified the defendants of a further variation of the interest rate applicable to their mortgage loan account to 9.5% per annum with effect from 1st December, 2002 and that all arrears of instalments had to be settled in full in order to benefit from the rate reduction. A copy of that letter was tendered;
- the defendants failed or neglected to pay the sums demanded by the plaintiff in its letter dated 14th December, 2001 and remained indebted to the plaintiff in the sum of one hundred and sixty-one thousand, seven hundred and eighteen dollars and forty-one cents (\$161,718.41) as at 5th November, 2003 broken down as follows;

- (a) balance on principal = \$135,353.39
- (b) arrears of Interest (1/08/01-5/11/03) = \$ 4,107.31
- (c) outstanding fees = \$ 22,257.71;

- the outstanding fees in the sum of \$22,257.71 arose as follows:

- (a) Life Insurance Premiums =\$12,407.84
- (b) Fire Insurance Premiums =\$ 4,696.64
- (c) Legal fees = \$11,670.88
- Less amount in suspense =\$ 6,516.88**
- Balance = \$22,257.71;**

- As to the outstanding life insurance premiums of twelve thousand, four hundred and seven dollars and eighty-four cents (\$12,407.84), the first defendant had effected two insurance policies on his life with the plaintiff – Policy No. 90300 issued on 21st August, 1984 (which was a whole life policy issued by the plaintiff for the sum of \$50,000.00) and Policy No. 94643 issued on 28th August, 1985 (which was a limited life policy for 65 years issued by the plaintiff for the sum of \$150,000.00) (“the life insurance policies”);
- the defendants did not promptly pay the premium on the life insurance policies for the period December 1993 to May 2003. The premiums were paid by automatic premium loans against the life insurance policies. A table was produced setting out the amount of the premiums charged by the plaintiff by way of automatic premium loans against these policies over the period December 1993 to May 2003;
- the due date of payment of life insurance premiums for the life insurance policies which were unpaid by the defendants, the dates the payments which were debited to the mortgage loan account and the amount of the automatic premium loans and charges which were

debited to the mortgage loan account were set out in a table which was tendered along with Ms Abraham's witness statement;

- as to the outstanding fire insurance premiums amounting to four thousand, six hundred and ninety-six dollars and eighty-four cents (\$4,696.84), the fire insurance policy was effected with NEMWIL and the quantum of coverage was two hundred and seventy-five thousand dollars (\$275,000.00). The premiums which were not paid by the defendants and the periods which those premiums covered were for five years: 1993/1994, 1994/1995, 1995/1996, 1996/1997, 1997/1998;

(a table was provided of the due dates of payment and the dates when the premiums were debited to the account and the amounts of the automatic premium loan)

- the legal fees of eleven thousand, six hundred and seventy dollars and eleven cents (\$11,670.11) were incurred by the plaintiff for legal services rendered by the plaintiff's attorney at law over the period 1997 to 2003. A table setting out those fees was tendered;
- in 2003, the sum of six thousand, five hundred and sixteen dollars and eighty-eight cents (\$6,516.88) was in a suspense account to credit of the defendants. This sum represented two mortgage payments of three thousand, two hundred and fifty-eight dollars and forty-four cents (\$3,258.44) each received from the defendants on 1st October, 2003 and 3rd November, 2003. Whenever the defendants paid an amount that was less than the mortgage instalment due, the system automatically placed it in a suspense account until subsequent payments by the defendants were sufficient to pay a full instalment. After full instalments were paid, the balance was either left in the suspense account until another payment was made which made up a full mortgage instalment or the plaintiff would clear the suspense

account to pay unpaid fire and life insurance premiums or legal charges;

- by letter dated the 12th January, 2005, the plaintiff notified the defendants of a further variation of the interest rate applicable to their mortgage loan account to 8% per annum with effect from the 1st January, 2005. However, the defendants did not get the benefit of the rate reduction because they did not pay the instalments of four thousand, six hundred and thirty dollars and ninety cents (\$4,630.90) set out in the letter;
- the plaintiff has not duplicated any payments or falsely increased the amount of the defendants' indebtedness. Despite the reduction in interest rates payable on the defendants' mortgage loan, their monthly instalment increased from time to time consequent upon the mortgage loan being in arrears of payments of monthly instalments, life and fire premiums and because of automatic premium loans and charges debited to their account. The rates of interest charged by the plaintiff on automatic premium loans granted to the defendants were as follows:

between	December 1993 to December 1995	-12%
	January 1996 to April 2002	-11-1/2%
	May 2002 to December 2003	-10-1/2%
	January 2004 to December 2004	- 8-1/2%
	January 2005 to present	- 8%

- The defendants continue to occupy the premises.

Evidence of the first defendant

[20] Mr. Persad gave a lengthy witness statement several paragraphs of which were struck out as being either hearsay, irrelevant or unsupported by the pleadings. As to the alleged right to set off the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00)

against the mortgage instalments, he said that he spent a total of seventy-five thousand dollars (\$75,000.00) to make the premises habitable. While he described the state of disrepair of the building (no doors, no electricity, no lighting fixtures, no air conditioning distribution, missing ceiling tiles, unpainted walls) he provided no written details of what he actually did to the office nor did he provide any supporting documentation.

[21] He said that after the termination of the lease, and while in the process of “*dismantling and removing partitions and electrical fittings from the premises*”, Ms Lisa Rampersad spoke to him by telephone stating that they needed, “*some of those things and that he should leave them and he would be compensated*”. He eventually called her back and told her he was prepared to sell the items at *installed* cost.

[22] He said one Robert Ramrattan visited the premises and identified the items which the plaintiff wanted and, “*asked to see/inspect my bills relative to the items he had pointed out*”. He showed Mr. Ramrattan the file. Mr. Persad said that by letter of 29th August, 1996, he confirmed with Ms. Rampersad the fixtures and fittings left on the premises pursuant to the plaintiff’s request. He said he subsequently learned, via a letter of 19th December, 1996 signed by Ailsa Cummings, the plaintiff’s mortgages manager, that a credit of four thousand, five hundred and sixty-five dollars (\$4,565.00) was applied to the rent account which the plaintiff contended was in arrears. However, when the tenancy was terminated there was no allegation that he owed rent.

[23] Mr. Persad also disputed that the method of valuation by the plaintiff of using historical cost less depreciation, was an accepted basis of valuation. He contended that if the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00) had been duly and properly paid to his account, there would have been no moneys owing on the mortgage account and there would have been no increase in the mortgage instalment to three thousand, two hundred and fifty-eight dollars and forty-four cents (\$3,258.44) from May 2002 to March 2006. He said that, “*if our account is in arrears it would be for the reason that the plaintiff has failed to date to pay in accordance with my tax invoice dated 30th September, 1996*”. He contended that the plaintiff not only reduced the amount he had charged for “*his personal property*” but also misapplied the sum of forty-two thousand,

four hundred and seventeen dollars (\$42,417.00) with the result that it increased his indebtedness and obtained an unfair advantage.

[24] He employed Raghunath Singh & Co. Ltd, to carry out an appraisal of the fixtures and other items he had installed on the plaintiff's premises. That appraisal valued the items at fifty-seven thousand, five hundred and fifty dollars (\$57,550.00) and inclusive of VAT amounted to sixty-six thousand, one hundred and eighty-two dollars and fifty cents (\$66,182.50). He forwarded the appraisal report to the plaintiff by letter of 3rd March, 1997 and, confirming his instructions to credit the mortgage account, requested that "*appropriate corrections be made to the mortgage account*". Thereafter, because neither side would retreat from their positions, correspondence was exchanged between their respective attorneys.

[25] The first defendant's witness statement thereafter disputes the increased monthly instalments which the plaintiff notified had to be paid. This notification came by letter of 24th May, 2002 and set out the monthly instalment at three thousand two hundred and fifty-eight dollars and forty-four cents (\$3,258.44). He denied ever getting an amortization schedule or any proper loan statement. He alleged that the details given in the letter of 24th May, 2002 did not conform to the requirements of the deed of mortgage. He said he was able to ascertain through his own resources that the change in instalments reflected:

- (a) the plaintiff's failure to credit the instalments with the sum of forty-two thousand, four hundred and seventeen dollars (\$42,417.00).
- (b) charges by the plaintiff to the mortgage in respect of capitalized interest attributable to the instalments not credited.

He states that "*in consequence we were put to further financial loss of having to pay the plaintiff additional sums of money amounting to eighty-two thousand, four hundred and thirty-six dollars (\$82,436.00) in order to satisfy the mortgage term*". However, other than that bold allegation, no substantive proof was provided

[26] The first defendant went on to state as follows:

“After we had repaid the plaintiff the principal the interest at the original rate and as varied and the additional monies demanded by the plaintiff by letter dated 24th May, 2002, I requested that our property be released from the mortgage. In response the plaintiff advised us by letter dated 19th May, 2006, inter alia, that the debt is still active and its internal records were amended to reflect a new maturity date of May 31, 2008.”

It was unclear how this repayment was effected. No details were provided. He said that following a letter from the plaintiff dated 19th May, 2006, by letter dated August 21, 2006 he raised queries on its claim for an additional payment of one hundred and forty-one thousand, eight hundred and two dollars and two cents (\$141,802.02). He disputed the validity of the debt. By a letter dated August 21, 2006, he asked the plaintiff, *inter alia*, to (a) explain and substantiate the amounts on the statements of account which gave rise to the new claim for one hundred and forty-one thousand, eight hundred and two dollars and two cents (\$141,802.02); (b) explain why it had unlawfully retained their payments in suspense accounts, (c) explain by what authority it had introduced these accounts as an encumbrance on their mortgage securities; and (d) provide him with a reconciliation of these statements with its disclosures dated April 15th and May 24th, 2002. Ms. Abraham, Manager, Mortgage department, by letter dated August 30, 2006, advised that he correspond with its attorneys. He said that on many occasions, both before and after this action was filed, he had asked the plaintiff to provide him with information concerning the status of the accounts in keeping with the terms but the plaintiff has *“refused, neglected, failed so to do”*.

[27] He added that during the term of the mortgage, the initial instalment payment of one thousand, eight hundred and seventy-one dollars and twelve cents (\$1,871.12) was varied by the plaintiff on the dates and in the manner set out in a chart which he prepared from his records.

[28] As to the insurance premiums (both life and fire), Mr. Persad also disputed the charges and increases made to the mortgage instalment by the plaintiff. He stated that the life policy statements, in respect of the two life insurance policies which were assigned to the

mortgage, reflected progressively higher cash values from year to year and that the plaintiff was not entitled to pay outstanding premiums and add the charges to the mortgage because “that charge could only attach to the policy of insurance itself”. He added that although the plaintiff added several automatic premium loans to the mortgage account, the statements issued in respect of the policies reflected that the automatic premium loans on the policies remained outstanding.

[29] He said that the plaintiff had been paying fire insurance and life insurance premiums which he has already paid. This was his evidence:

“By the terms of the mortgage deed we were required to effect a policy of insurance with an insurance company approved by the plaintiff and keep the property insured to full insurable value. We were required to deliver up the insurance policy and the receipt for every such payment of premium upon demand to the plaintiff. The receipts which I have are contained in a bundle and shown as document #.... defendants’ list. (No document number is given). I have lost some receipts due to flooding of my office while I was the plaintiff’s tenant.

The plaintiff has been allegedly paying our fire insurance and life insurance premiums which I have already paid. The plaintiff has been provided with copies of the receipts issued to us for payment of both the fire and life insurance premium. These alleged charges on the Statements of Account by the mortgagee have increased the principal sum claimed by the plaintiff. Of the 240 premiums payable approximately 215 have been settled by cash. The remaining 25 premiums not paid in cash have been charged by the plaintiff to the policy loan statements, together with compound interest at the rate of 12% per annum, thereby reducing the bonus value credited to these policies. The premiums were not owing. In this regard the plaintiff has duplicated the policy loan by charging them again to the mortgage account and again applying interest.”

These allegations did not stand up to cross-examination.

[30] As an example of the plaintiff's improper accounting, the first defendant said that in 1996, when NEMWIL returned a payment for fire insurance in the amount of one thousand, two hundred and six dollars and eighty cents (\$1,206.80), advising that the mortgagee had already assumed the obligation for this premium, he reimbursed the plaintiff, yet it falsely and improperly continued to represent this amount on its statements of account as being due. Also, in 1997 the plaintiff again paid a premium that it alleged was overdue in the sum of one thousand, one hundred and seventy-three dollars and thirty cents (\$1,173.30). However, the correct amount due was nine hundred and twenty-one dollars and eighty-seven cents (\$921.87) and "we paid it". The plaintiff, although notified, continued to demand re-imburement of the sum of one thousand, one hundred and seventy-three dollars and thirty cents (\$1,173.30).

[31] As to payment of inadequate mortgage instalments to a suspense account, the first defendant stated:

"We do not maintain a 'suspense account' with the plaintiff and the terms of the mortgage deed do not provide for the maintenance of such an account. The plaintiff would hold monies paid to our loan account in the suspense account on these statements of account for an indefinite period of time during which our loan account was charged interest which was capitalized for non payment. The plaintiff did not credit the suspense account with any interest. Mortgagees are not authorized to retain payments made by the mortgagors in this manner."

Cross-examination of Ms. Abraham

[32] Both parties were cross-examined on their affidavits. Ms. Abraham confirmed that as at the date of her cross-examination, the outstanding balance due on the mortgage was three hundred and forty-two thousand, two hundred and fifty-six dollars (\$342,256.00). She stated that she had personally verified all the figures and that she was the author of the document which showed the calculation. That document was put in as **MAC 22**.

[33] She explained that premium receipts issued by the plaintiff were confirmed by a staff member of the mortgages department and re-confirmed by her. She said that whatever information submitted is collated and fed into the computer. A life premium can be paid at a branch of the plaintiff. Records are updated immediately and a receipt issued. The information goes directly to the customer's account. With respect to life insurances, the payment goes straight to the customer's account on the computer. The recording of the payment is instantaneous. The information is left on the computer as long as the insurance remains an active one.

[34] Ms. Abraham said that letters were continuously dispatched to the defendants advising them of what was outstanding in respect of insurance premiums. The charging of the defendants for the payment of fire insurance premium was done through the computer. When the client disputed the amounts the company alleged to be outstanding, the company only demanded that the client produce his receipts. She added that there was never a time when the plaintiff paid the insurance for the defendant's house and he disputed it. She said that such payments were pursuant to the provisions of the deed.

[35] It was put to Ms. Abraham that before the plaintiff could pay insurance premiums on the defendant's property, two eventualities were required:

- (a) the defendants had to deliver up the policy on demand.
- (b) a default by the defendants in producing a receipt of payment or the policy after either had been demanded by the plaintiff.

Ms. Abraham responded that the insurance policy was kept by the plaintiff and the defendant's payment was made pursuant to the provisions of the mortgage deed which permitted the plaintiff to pay the premium if the premium was unpaid. She said that the payment was charged to the mortgage account by an automatic premium loan which effectively increased the outstanding principal balance on the mortgage. That way, the premium is paid and the policies assigned to the mortgage remain in force. She said that the cash surrender values are only considered when the customer decides to surrender the policy, otherwise it remains untouched. Ms. Abraham stated that when the company paid

the premiums no receipt was issued because “*we do not issue receipts for something which we have paid*”.

[36] Mrs. Koorn questioned the witness as to why some of the defendants’ instalments went into a suspense account. Ms. Abraham explained that that occurred when the moneys paid into the mortgage account by the customer fell short of the actual instalments expected to be paid. In this case, the customer paid instalments which did not include the charges added to the instalments in respect of unpaid insurance premiums. When that occurred, the money was put into a suspense account until another customer contribution towards the mortgage, then brought the instalment up to the required amount and triggered a payment from the suspense account.

[37] Ms Abraham added that the creation of a suspense account was consistent with the mortgage deed which provides that the plaintiff may charge the mortgage in the event of non payment and it was part of the plaintiff’s programme to hold the payment until it could be applied to the instalment. She said that once the full amount was paid, it was applied first to the interest and then the principal. She said the plaintiff did not release the defendant’s property at the end of the initial mortgage term because the plaintiff’s records indicated that the defendants were still indebted to it. In her quantification of the amount, she took into account anything which had been unpaid by the defendant. In re-examination, Ms Abraham said that she told the defendant of the extension of the mortgage term by letter of 19th May, 2006 and in it, explained the reason for the extension. She supplied them with a statement of account. The letter was tendered into evidence.

Cross-examination of Mr. Persad

[38] Mr. Persad was permitted to amplify his witness statement with additional oral evidence (against the strong objections of Mr. des Vignes.) He contended that he had repaid the loan in full and that the term ended in March 2006, it having commenced in April 1986. He and his wife signed no documents varying the mortgage terms. He said the sum of thirteen thousand, six hundred and forty-one dollars and twenty-five cents (\$13,641.25) set out in the letter of 9th October, 2008 as the total principal paid as at 9th October, 2008 was “*grossly incorrect*”. He contended that the figure was calculated in violation of the

provisions of the second schedule to the mortgage as regards the apportionment of his instalments between principal and interest.

[39] He pointed to several entries which he contended showed a misapplication of principal such as to falsely inflate the loan balances. He alleged that in some cases, his principal was applied to attorneys' fees. He said that from time to time the insurance company issued statements in respect of his life insurance policies which showed the policies to have been in force. They also showed the yearly values on the two policies as well as the automatic premium loans and the interest accruing. He said the contract of insurance provided for interest to be charged on the loan but the rate of interest was at the discretion of the issuer. Two statements in respect of each policy were permitted to be tendered into evidence (against the strong objections of Mr. des Vignes). They added little to the defendants' case. Two further statements which the first defendant said was an update of his insurance contracts were also admitted into evidence. They showed that at the dates of the statement, the policies had surrender values of thirty-one thousand, seven hundred and twenty-two dollars and forty-seven cents (\$31,722.47) and forty-two thousand, seven hundred and ninety-two dollars and seventy-four (\$42,792.74).

[40] Mr. Persad was cross-examined by Mr. des Vignes on the alleged agreement to credit the cost of fixtures he had installed to the mortgage account. He was not persuasive. He conceded that he understood that by letter of 19th December, 1996, the plaintiff was claiming outstanding mortgage instalments and other charges from him. He also conceded that he understood from it, that the plaintiff was unwilling to credit his mortgage account with the value he had ascribed to the fixtures. He was referred to his letter of 3rd March, 1997 by which he purported to confirm to the plaintiff, his earlier instructions that "*amounts due*" from the plaintiff, be credited to his mortgage account and by which, he attached a copy of the appraisal done by Raghunath Singh & Co. Ltd.

[41] Mr. des Vignes put to him that there was no reference by him in that letter to any agreement with any representative of the plaintiff in respect of his claim. Mr. Persad conceded that the letter made no reference to an agreement with anyone but insisted (quite disingenuously) that the letter did refer to an agreement (although there was no reference to any date of agreement in the letter.)

[42] Mr. Persad was also forced to concede that at the end of his conversation with Miss Rampersad, “*nothing had been fleshed out*” and that there had been no discussion on the value of the fixtures. He was taken through his subsequent correspondence with the plaintiff’s representatives dated 29th August, 1996 and 30th September, 1996 and was forced to concede;

- (a) that the plaintiff was insisting that he pay the mortgage instalments;
- (b) that the plaintiff was refusing to credit the mortgage account with the amounts stated in his invoice of 30th September, 1996.
- (c) that between September 1996 and March 1997, the plaintiff did not at any time write to him accepting his valuation or agreeing to apply the amount set out in his invoice to the mortgage account;
- (d) that no officer of the plaintiff, during the same period, verbally indicated to him that they were calling to credit his mortgage account with the amount set out in the invoice;
- (e) that the plaintiff did not either orally or in writing inform him that he was relieved of his obligations to pay his mortgage instalments as set out in the mortgage.

[43] He accepted that by letter of 25th June, 1997, the plaintiff wrote to him telling him that there was no excess to be applied to the arrears of mortgage. He also conceded by letter of 27th August, 1997, the plaintiff called upon him to settle the arrears of thirty-two thousand, five hundred and ten dollars and seventy cents (\$32,510.70) plus charges of eighteen thousand, four hundred and fifty-eight dollars and sixty-eight cents (\$18,458.68) totaling fifty thousand, nine hundred and sixty-nine dollars and thirty-eight cents (\$50,969.38) and threatening legal action should he fail to do so.

[44] He also accepted that, as at 27th August, 1997, the plaintiff was demanding the instalments for the period May 1996 to July 1997 and had also notified him that there were charges for unpaid life and fire insurance premiums amounting to eighteen thousand, four hundred and

fifty-eight dollars and sixty-eight cents (\$18,458.68). He accepted (reluctantly) as “*more than likely*”, that he would have, at that time, “*clearly*” understood, that by the letter of 27th August, 1997, the plaintiff was “*embarking on legal proceedings*” against him for non payment of his mortgage liabilities.

[45] Mr. Persad also conceded that in cases of late payment of an instalment, the mortgagee was entitled to charge interest on all outstanding instalments and to add that accrued interest to the principal balance, as well as to interest of such new balance (which included the interest so capitalized) for the succeeding instalment. He was forced to concede that the plaintiff was entitled to add to the mortgage liability, moneys “*properly*” expended to keep the property insured in the event that he had not done so. He would not however, accept that such insurance moneys when paid could be added to increase the principal balance outstanding but, oddly enough, conceded that it would increase the liability on the mortgage on which the plaintiff was entitled to charge interest.

[46] As to the payment of insurance premium, Mr. Persad held to his evidence that he paid his life and fire insurance premiums on time and that the plaintiff had duplicated such payments. He conceded that “*there may be instances where payments may have been paid late*” but stated that these instances were very few and “*for that privilege I paid 12% interest to the life insurance department*”. He was unable to say whether the bundle of receipts tendered into evidence on his behalf was in respect of on time premiums.

[47] Mr. Persad was shown a bundle of insurance payment receipts spanning the period 1998 to 2005 (which were admitted into evidence as HP7) and it was put to him, that, except for five receipts (which were for payments which preceded the premium date) all the other receipts for the year 1999 were in respect of payments which were paid late. The dates of the receipts speak for themselves but Mr. Persad was only prepared to concede that “*perhaps*” they were. A similar pattern emerged for 2002, 2003.

[48] Mr. Persad also conceded that the plaintiff did give him credit for instalments he made between 1986 and 1993. He also conceded that a bundle of receipts (**MAC 34**) put in by the plaintiff and by him (**HP 8**) were receipts which were from a subsequent period and had nothing to do with his complaint. Mr. des Vignes put to him that he was not able to

produce any receipts for the period 1986 to 1993 for which he (Mr. Persad) alleged the plaintiff did not give him credit. Mr. Persad could only say that he could not recollect having produced such receipts (after the question was repeated to him several times). He also conceded that, having reviewed the plaintiff's statement at **MAC 32** and his own receipts **HP 8** and **MAC 34**, all the payments reflected in those receipts had been credited to his account, save and except the first 93 instalments. (These were the same payments he alleged were not credited from 1986 to 1993 but from which he could not recollect having produced any receipts.)

[49] This was a characteristic of the defendants' claim in this case, the making of allegations which they could not substantiate and which were undermined by the plaintiff's documentation to the contrary.

[50] Mr. des Vignes also pointed out to Mr. Persad, that, consistent with his evidence (that he had not made payments directly to the plaintiff between July 1996 and May 1998), the plaintiff was making principal disbursements towards the insurance payments, and debiting his account. Mr. Persad did not agree, contending disingenuously that it was "*money taken out of my principal and paid out*". He insisted, contrary to his own defence and earlier evidence, that he was paying principal. Oddly enough, he then went on to say that it was correct that he made no payments directly to the plaintiff during July 1996 to May 1998, so that the moneys reflected on the plaintiff's statement were not credits which came directly to his mortgage account.

[51] It was put to Mr. Persad that when he resumed payment in 1998, the plaintiff began to apply his payments to the instalments which fell due two years before. He agreed. ("*I believe that is what the statement shows*"). He also agreed that payments made in 1998 were being applied to a payment which fell due some twenty-three months earlier. He denied however that when he received the letter of 24th May, 2002 from the plaintiff, he was aware that the plaintiff was claiming that he was indebted to it for eighty-eight thousand dollars (\$88,000.00) for arrears of instalments, as well as fire and life insurance premiums. He said he was not aware of it because there was no statement or substantiated amortisation schedule attached to the letter of 24th May, 2002. (The letter of 24th May was

sent by Ms Abraham to the plaintiff informing that his new instalment premium was three thousand, two hundred and fifty-eight dollars and forty-four cents (\$3,258.44)).

[52] His denial of any awareness of the claim for insurance premiums was untruthful because earlier in cross-examination, Mr. Persad had been shown a letter of 14th December, 2001, written to him by the plaintiff's attorneys in which they called upon the defendants to pay a total of eighty-eight thousand, nine hundred and sixty-three dollars and sixty-nine cents (\$88,963.69) due on the mortgage account.

(That sum comprised sixty-two thousand, eight hundred and fifty-four dollars and two cents (\$62,854.02) in mortgage instalments and twenty-six thousand, one hundred and nine dollars and sixty-seven cents (\$26,109.67) in unpaid fire and life insurance premiums).

[53] He said that the last payment he made to the plaintiff was on 2nd May, 2006 in the sum of three thousand, two hundred and eight-eight dollars and forty-four cents (\$3,288.44) and he has paid nothing since. He alleged however, that he has paid the life and fire insurance premiums every month but conceded that he produced no receipts after 26th May, 2006.

[54] Ms. Abraham was called to rebut certain evidence given by Mr. Persad (which I had earlier permitted against the quite vigorous objections of Mr. des Vignes.) Mr. Persad had contended that moneys paid by him were insufficiently applied to principal and had pointed to a particular entry on **MAC 32** which reflected an instalment of one thousand, nine hundred and fourteen dollars and sixty-four cents (\$1,914.64) paid on 24th May, 1994. He alleged that the payment of only seven dollars and eighty-three cents (\$7.83) towards principal was wrong (the rest went to interest).

[55] In respect of that particular entry, Ms. Abraham explained that interest on the principal accrues daily from the last payment and, because the next day of collection (which was late) was approximately 54 days after the last, a greater proportion of that particular instalment was applied to interest and leaving a "*residual component*" of seven dollars and eighty-three cents (\$7.83) to be applied to principal. She also explained that the previous instalment was fully applied to the principal (it having been paid on the scheduled date).

Conclusion

[56] Having regard to the evidence, particularly the documentary evidence put in by the plaintiff, I found that the plaintiff had proven its case. Ms. Abraham displayed an intimate knowledge of the history of the plaintiff's claim against the defendants and was able to support her witness statement in cross-examination. Mr. Persad, on the other hand, could not substantiate his allegations with any documentary evidence.

[57] The plaintiff was able to show that the defendants had failed to pay their mortgage instalments between July 1996 and May 1998 and consequent upon that, the mortgage had fallen into arrears which had to be liquidated when the defendants resumed payment. The result was that all subsequent instalments had to be related back to payments which were due and payable almost two years before.

Issue 1

Existence of an agreement

[58] Critical to that issue was the question whether there was any agreement to set off the value of the fixtures against the instalments due on the mortgage. The evidence disclosed no such agreement. In the first place, there was no agreement as to the value to be placed on the fixtures. The documents **MAC 6** (Mr. Persad's letter of 3rd March, 1997) and **MAC 7** (the plaintiff's letter of 27th March, 1997) show that each party had a different opinion on the value of the fixtures and how that value was calculated. There was therefore, no meeting of minds on the value to be ascribed to the fixtures.

[59] Secondly, there was never any agreement by the plaintiff to credit the value of the fixtures (even if agreed) to the plaintiff's mortgage instalment. The plaintiff set off against its assessment of the value of the fixtures, what it alleged were arrears of rent in respect of Mr. Persad's previous tenancy. The exhibits **MAC8, MAC 9, MAC 11, MAC 12** and **MAC 14** bear out the lack of agreement. This absence of consensus was brought out in cross-examination of Mr. Persad when these exhibits were put to him. The concessions he made were as follows:

- (a) that the plaintiff was insistent that the mortgage instalments be paid;

- (b) that it refused to credit the mortgage account with the amounts stated in his invoice of 30th September, 1996;
- (c) that the plaintiff did not at anytime write to him accepting his valuation;
- (d) that no officer of the plaintiff either orally or in writing informed him that he was relieved of his obligation to pay his mortgage instalments as set out in the mortgage.

[60] Having regard to those concessions, it was extremely difficult to conclude that there was ever any set off agreement in the terms alleged by Mr. Persad. Indeed, it was clear to me that no agreement was ever concluded between the parties. The inexorable consequence was that there could be no set off of any of the outstanding instalments against the value of the fixtures and that the defendants were in breach of the mortgage terms for not having paid the instalment. When the defendants resumed in 1998, those payments then had to be applied toward instalments due since 1996 and this continued until May 2006 when the defendants ceased payments altogether.

[61] The evidence as set out in **MAC 32** showed that insurance premiums were sometimes paid by automatic premium loans from the plaintiff and that the defendants' payments were sometimes put into a suspense account and subsequently paid out to the mortgage account. The fact remained however that when the defendants ceased payments in May 2006, they were virtually two years in arrears of mortgage instalment and in breach of their mortgage covenants. Ms. Abraham stated that at the commencement of these proceedings the defendants were in arrears of payments for some twenty-three months, seven months from June 2001 to December 2001, twelve months from January 2001 to December 2001 and four months from January 2002 to April 2002.

[62] I accepted that evidence, since the arrears were consistent with the shortfall brought about by the hiatus in mortgage payments between July 1996 and May 1998. I also found that

the plaintiff's evidence was far more reliable with documentation provided to support virtually every allegation.

Issue II - Non crediting of payments made by defendants

[63] The defendants alleged that there had been "*duplication*" of their payments to the mortgage account. I do not agree that that was a proper representation of the defendants' complaint. In my judgment, the complaint of the defendants was to the effect that they were not credited with payments which they made to the mortgage account. However, that allegation was not borne out by the evidence. For example, the defendants alleged that the plaintiff had not given them credit for 93 instalments paid between 1986 and 1993. Mr. Persad produced two bundles of receipts, which were tendered into evidence as "**HP 8**", evidencing payments he made towards the mortgage account. He conceded, in cross-examination, however, that those receipts were reflected in the plaintiff's statement of account (**MAC 32**) which dealt with the period July 1993 to May 2006 and that he could not complain that no credit had been given to him for that period. As to the 93 instalments he claimed to have paid but for which he had been given no credit, he produced no receipts evidencing such payments. The plaintiff, on the other hand, produced documentary evidence setting out its record of the defendants' payments and non payment and Mr. Persad virtually conceded in cross-examination that all the receipts in his possession had been reflected in the plaintiff's statement of account as set out in **MAC 32**.

Issue III - Charging of insurance premiums to mortgage account

[64] In my judgment, the plaintiff was entitled to apply the outstanding insurance premiums to the mortgage account. The payment of the premiums by the plaintiff was necessary to ensure the continuation of the plaintiff's security for the loan, such payments fell within the provisions of clause 3 of the first part of the third schedule and constituted "*costs, charges and expenses properly incurred ... and moneys properly paid*" by the plaintiff under the provisions of clause 9 of the second part of the third schedule to the mortgage.

[65] The defendants, on the evidence, were consistently late in their payment of the insurance premiums. The plaintiff was entitled to protect its security by making the payments on the defendants' behalf. Under cross-examination, Mr. Persad conceded that his payment of premiums was generally late. This was so, particularly for the years 1999, 2002, 2003.

These concessions were extracted from him by Mr. des Vignes after the defendants' receipts (admitted as H P 7] were tendered into evidence during cross-examination which showed the due date for payments and the dates of actual payment.

[66] Mr. Persad contended that given the considerable surrender value of the policy, any late or non payments should have been taken from the net worth of the policy. Certainly, that was an option, however, any such deduction would have been governed by the policy contract and not the mortgage.

[67] The bigger question was whether the plaintiff's payments should then be deemed a loan on which interest is charged which is then consolidated and capitalised. I concluded that the plaintiff was entitled to charge interest on the use of its resources to upkeep the defendants' policy and that these constituted "*properly incurred*" charges for the purposes of the mortgage.

[68] The defendants also complained that the plaintiff was wrong to have placed their mortgage instalments in a suspense account instead of applying them (however inadequate) to the mortgage account. They contended that this permitted interest to accrue on the outstanding mortgage balance and that this would also have been capitalised. It was important to note, however, that this contention would not have been dispositive of the plaintiff's claim but at best would have resulted in a re-working of the outstanding balance. The defendants were long in breach of the mortgage.

[69] In my judgment, it was for the defendants to prove their case. No proper account was presented to me of what was the actual interest which should have accrued on the mortgage had the instalments (however inadequate) been applied to the mortgage, rather than to the suspense account. It is important to note that since those instalments were short of what should have been the actual instalments, interest would still have accrued on the outstanding balance. No evidence of what the amount of that interest should have been or of what the defendants claimed should have been charged, was presented.

Other issues

[70] The defendants also alleged that they were not notified of the variations in the rate of interest on the mortgage and that they were not provided with amortisation schedules. The evidence as provided by the plaintiff showed that the defendants were notified of reductions in the rate of interest on three occasions (at least) but that they were not able to take advantage of the reductions because they were in arrears of payment.

[71] As to the provision of amortisation schedules, I did not believe the defendants' allegation that they were not provided with amortization schedules. This issue was the subject of many a discussion at the pre trial hearings, with counsel for the defendants insisting that, before the trial could start, they must be provided with the very amortization schedules they claimed not to have received and they wished to have discovery of them. The plaintiff's position was that such schedules had already been provided. I ordered that these schedules be provided (over the very vigorous objections of Mr. des Vignes) to the defendants before the start of the trial. There were no further complaints by Ms. Koorn and the matter proceeded. I considered that the allegation had not been proven.

For these reasons, I gave judgment for the plaintiff and dismissed the defendants' counterclaim.

NOLAN P.G. BEREAX
Judge

30th June, 2010