**[2026] JMCC Comm 18**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. SU2022CD00609**

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| **BETWEEN** | **ASCENDANCY CARIBBEAN I LIMITED** | **CLAIMANT** |
| **AND** | **HANSLEY BERRY** | **1ST DEFENDANT** |
| **AND** | **DELETA LAWRENCE** | **2ND DEFENDANT** |

Ms. Amanda Montague instructed by Myers, Fletcher & Gordon, Attorneys-at-law for the Claimant.

Ms. Charmaine Patterson instructed by Charmaine Patterson & Associates, Attorneys-at-law for the Defendants.

**Civil procedure - Breach of Contract - Trial after grant of Summary Judgment - Whether Defence is a bare denial - Whether a claim for fraud or forgery has been sufficiently pleaded - Without prejudice communication - Whether the Claimant has provided sufficient evidence to support its claim - Whether Secondary evidence can be used to prove interest rate – Costs - The Civil Procedure Rules, Rule 64.6.**

**IN OPEN COURT**

**Heard on: 23rd, 24th, 25th February, 6th March, 19th, 23rd June and 1st July, 2026**

**STEPHANE JACKSON-HAISLEY J.**

## INTRODUCTION

**[1]** On the 2ND December 2024 I granted Summary Judgment to the Claimant Ascendancy Caribbean I Limited (Ascendancy) in respect of the outstanding principal for mortgage instrument bearing number 1533692 entered into by the Defendants Hansley Berry and Deleta Lawrence. This was in exercise of my powers under Parts 15.6(1)(a) and 15.2(b) of the Civil Procedure Rules, 2002 (CPR) which provide for summary judgment to be granted on the claim or on a particular issue where the Defendant has no prospect of success. The Defendants admitted defaulting on mortgage instrument numbered 1533692 and that they were outstanding on the principal but disputed the interest and add-on charges.

**[2]** This did not bring the matter to an end as Summary Judgment was granted for the principal sum only in the sum of Seventeen Million, Four Hundred and Sixty-Six Thousand Seven Hundred and Twenty-Seven Dollars and Forty-Two Cents ($17,466,727.42). The issues of the calculation of accrued interest, total add-on charges and any interest on add-on charges were ordered to proceed to trial.

**[3]** In addition to mortgage instrument number 1533692, there were four (4) other mortgage instruments bearing numbers 1552880, 1574355, 1619676 and 1653766 which the Defendants vehemently denied and so those were also ordered to proceed to trial.

**THE CLAIM**

**[4]** By way of background, on April 28, 2008 the Bank of Nova Scotia granted credit facilities to the 1st and 2nd Defendants, son and mother respectively, to the tune of Twenty Million Dollars ($20,000,000.00) on their property registered at Lot 15, Great Pond, Ocho Rios in the parish of St. Ann registered at Volume 1424 Folio 37 of the Register Book of Titles. According to the Claimant, Ascendancy Caribbean I Limited (Ascendancy) there were a series of loans secured by Mortgage Instruments No. 1533692, 1552880, 1574355, 1619676 and 1653766 registered on Certificate of Title.

**[5]** The Claimant company is engaged in the business of collections and the Bank of Nova Scotia assigned all the Mortgages to them on March 10, 2021. Having been assigned these Mortgages filed a Claim against the Defendants seeking damages for breach of contract for having defaulted in paying the loans, in the sum of Sixty-Two Million, Two Hundred and Twenty-One Thousand, Eight Hundred and Nineteen Dollars ($62,221,819.00) and continuing. This represented Credit Facilities plus interest extended by the Bank of Nova Scotia Jamaica (BNS) to Hansley Berry and Deleta Lawrence during the period 2008 and 2010. As at November 30, 2022, the amounts due and owing are as follows:

| | |
|---|---|
| Principal Balance | $17,466,727.42 |
| Interest on principal | $27,475,767.20 |
| Add-on charges | $ 5,693,209.77 |
| Interest on Add-on charges | $11,586,114.61 |
| Total | $62,221,819.00 |

**[6]** The Defendants denied that they are indebted to the Claimant for the amount claimed. They admitted obtaining one (1) loan from BNS for the sum of Twenty Million Dollars ($20,000,000.00) which was secured by Mortgage Instrument No. 1533692 registered on April 28, 2008. They admitted defaulting on Mortgage Instrument No. 1533692. However, as it relates to the remaining Mortgage Instruments, they denied all knowledge of them. They asserted that they signed only this Mortgage instrument 1533692, did not sign any of the other Mortgage Instruments and did not receive any of the funds said to have been issued on these other Mortgage Instruments.

**EVIDENCE LED ON THE CLAIMANT'S CASE**

**[7]** Mr. Shane Panton has been the Operations Supervisor of Ascendancy since November 2019. Prior to that, he served in several roles at BNS for thirteen (13) years. He asserts that his knowledge of the matter is based not only from his review of the files but also on his involvement in the matter in his capacity as Operations Supervisor.

**[8]** Mr. Panton stated that the loans were assigned to Ascendancy on March 10, 2021 and the defaulting of the loan prompted Ascendancy to initiate power of sale proceedings. Demand letter dated April 19, 2021 was issued to the Defendants and by email dated April 25, 2021, the 1st Defendant responded and expressed a willingness to pay the outstanding debt. Mr. Panton stated that Ascendancy's attorneys-at-law responded to the 1st Defendant's email indicating that the power of sale will proceed whilst awaiting a response from his attorney-at-law regarding settlement of the outstanding sum.

**[9]** He asserted that despite making efforts to dispose of the property to liquidate the loan, the Defendants have not settled the outstanding amount and their posture indicated an acceptance of their entire indebtedness claimed by BNS pursuant to the Mortgages. Despite demanding payment of the Judgment sum awarded at Summary Judgment, the Defendants have only paid Thirteen Million, Five Hundred Thousand Dollars ($13,500,000.00) which was applied to reduce the principal and interest.

**[10]** Mr. Panton asserted that Ascendancy has been unable to locate the Promissory Note which confirms the interest rate of 19.63% however, the interest rate charged at the material time was consistent with the commercial bank loans reflected in the Bank of Jamaica Domestic Currency Loan Rates which ranged between 20% to 21% per annum for the period 2008 to 2009.

**[11]** As it relates to the add-on charges, Mr. Panton asserted that Clause 1(a)(b) of the Mortgage Instrument entitles them to recovery not only of the principal sums owing but also "all costs, charges and expenses incurred or to be incurred by the Bank in relation to any default….". He further asserted that the expenses include legal fees which bears interest at the same rate applicable to the principal debt. Mr. Panton contended that Ascendancy incurred charges and expenses associated with the power of sale and those charges and expenses also attract interest at the rate of 19.63% per annum. He contends that homeowners' insurance also forms a part of expenses incurred and that though the evidence provided regarding homeowners' insurance does not reflect the specific figure, the insurance for the mortgaged property falls under a blanket policy for a group of its mortgaged properties.

**[12]** Mr. Panton contended that all the mortgage instruments were executed by the Defendants in the presence of witnesses and a Justice of the Peace and the Instruments have the initials of the Defendants on each page. He asserted that all the mortgages refer to the previous one therefore the Defendants ought to be aware of the previous mortgages when they signed the subsequent ones.

## EVIDENCE LED ON THE DEFENDANTS' CASE

**[13]** The 1st Defendant, Mr. Hansley Berry asserted that on April 28, 2008, BNS granted credit facilities to him valued at Twenty Million Dollars ($20,000,000.00) which was used to secure property registered at Lot 15 Great Pond, Ocho Rios in the parish of St. Ann registered at Volume 1424 Folio 37 of the Register Book of Titles. He admitted that the loan he obtained was secured by Mortgage Instrument No. 1533692 however, he denied knowledge of all the other Mortgage Instruments endorsed on the title. Mr. Berry indicated that he has not executed any other Mortgage Instruments and he is unsure how the mortgages were endorsed on the Certificate of Title since it was always in BNS' possession.

**[14]** Mr. Berry contended that he did not receive any of the funds declared to have been issued under Mortgage Instruments 1552880, 1574355, 1619676 and 1653766 and he denied owing the amounts claimed for principal, interest and add-on charges. He contended that the amounts being claimed for legal fees, expenses, valuation fees, auction fees and insurance costs were never presented to him and there was no agreement for interest rate to be charged at 19.63%. He asserted that all letters received from Ascendancy's attorneys-at-law reflect an inaccurate amount owing on the loans.

**[15]** The 2nd Defendant in her witness statement stated her name as Dalitha Lawrence however, that conflicts with her name on the admitted Mortgage Instrument as well as the name on the title registered at Volume 11424 Folio 37 of the Register Book of Titles. However, she accepted that on April 28, 2008 she obtained credit facilities valued at Twenty Million Dollars ($20,000,000.00) from BNS. At that time, she was sixty-five (65) years of age. She subsequently became ill, only left home to visit the doctor's office or to go to church and she has no recollection of going into BNS to take out any further loans.

**[16]** Ms. Lawrence indicated that she is aware that her son defaulted on the admitted mortgage loan and that the loan was assigned to Ascendancy on March 10, 2021, however, she denied the amount claimed as outstanding. She also denied owing the sums being claimed for interest on principal, add-on charges as well as the interest rate being charged at 19.63% per annum.

## CLAIMANT'S SUBMISSIONS

**[17]** Counsel for the Claimant, Ms. Amanda Montague commenced by providing a chronology of the basis for filing the claim. Counsel maintained her position that the Defendants should not be allowed to introduce new issues that were not properly raised, in particular the authenticity, accuracy and methodology of the calculation of the debt.

**[18]** Ms. Montague submitted that the Court must first identify the issues which were properly before it and that the parties are bound by their pleadings. She contended that the Defence did not comply with the requirements of the CPR, it relied heavily on bare denials and did not plead fraud, forgery or non est factum, nevertheless they sought to expand their case during cross examination which amounts to a departure from the pleaded case. Counsel asserted that the Court should confine its analysis to the issues properly raised on the pleadings and disregard any matters which were not pleaded.

**[19]** As it relates to the Defendants' liability under mortgage numbers 1552880, 1574355, 1619676 and 1653766, Counsel relied on sections 68, 70 and 105 of the Registration of Titles Act and contended that the mortgages, having been registered between 2008 and 2010 amount to notice to the world. She asserted that the mortgages were admitted into evidence and the court has no basis for rejecting them. Counsel referred the Court to **Patvad Holdings Limited & Ors v Jamaican Redevelopment Foundation Inc & Anor**, Claim No. 2006HCV 01377, delivered on March 9, 2007 where McDonald-Bishop (as she then was) addressed the legal effect of an instrument of mortgage at paragraph 17

> *"17. It is from the mortgage instrument that the mortgagee derives his rights, duties and obligation and it is to this instrument that one must first look to ascertain the rights of the defendants over the mortgaged property in question."*

**[20]** Counsel also referred to **Donovan Crawford and Others v Financial Institutions Services Ltd** [2005] UKPC 40 where the Privy Council at paragraph 13 stated that *"It is well settled that actual fraud must be precisely alleged and strictly proved."* Ms. Montague also pointed the Court to the decision in **Wood v Commercial First Business Ltd. (in liquidation) and other companies** [2019] EWHC 2205 where the Court addressed allegations of forgery in respect of a disputed mortgage instrument which contained the signature of the mortgagor.

**[21]** Ms. Montague asserted that the evidence before the Court is that the disputed mortgages named the Defendants as the mortgagors, bore their signatures as well as the signatures of either an attesting witness or a Justice of the Peace and that the Defendants have not adduced any evidence to discharge the burden that they signed the mortgage instruments. She contended that the Defendants were given an opportunity to call a handwriting expert but did not and that the 2$^{nd}$ Defendant, during cross-examination accepted that her signature appears on all five (5) mortgage instruments, however, she recanted and indicated that her signature was forged. Counsel submitted that the 2$^{nd}$ Defendant's evidence should not be accepted since the case of forgery was not pleaded from the start and a party cannot at trial convert a bare denial into an accusation of forgery without pleading the allegations and giving the particulars.

**[22]** Ms. Montague submitted that notwithstanding the Defendants' denial of the Mortgage Instruments, they are liable as the mortgages were executed by them and registered on the title. Counsel invited the Court to find that the Defendants failed to establish any basis for avoiding liability under the disputed mortgage instruments and the dispute raised is immaterial to the Claimant's entitlement to recover the debt proved on the admitted Statement of Account.

**[23]** On the issue of assessment of damages, Counsel asserted that the Defendants did not challenge the interest rate or put forward an alternative rate in their Defence and they brought no evidence in relation to what the interest rate should be. Ms. Montague referred the Court to Section 3 of the Law Reform (Miscellaneous Provisions) Act that empowers the Court to grant an award of interest and also pointed to the Court of Appeal decision of **British Caribbean Insurance Company Limited v Delbert Perrier** SCCA No. 114/94 (unreported) where the Court found that the applicable interest rate can be determined by adducing oral or documentary evidence. Further, that the authority of **Development Options Limited v General Business Services Limited** Claim No. 2007HCV1803 also addressed the modern application of the best evidence rule.

**[24]** Counsel for the Claimant asked the Court to find that Mr. Berry accepted the interest rate by servicing the loan until he had financial difficulties. She referred the Court to the decisions of **Bradford & Bingley plc v Rashid** [2006] UKHL 37 and **Dorrett Wong Sam v Jamaican Redevelopment Foundation Inc** [2018] JMCC COMM 13 which confirmed that correspondence and proposal which treat a debt as an existing liability and seek time or indulgence may be admissible as acknowledgement of indebtedness. She asserted that the absence of the Promissory Note without more, does not defeat the Claim where the Defendants failed to produce the documents that demonstrates an interest rate. Counsel invited the Court to find that the applicable rate on the admitted facility is 19.63% per annum.

**[25]** Ms. Montague submitted that the evidence of the Defendants is inconsistent. She stated that Ms. Lawrence was evasive and in one instance she stated she could locate the Promissory Note however, when asked by the Court for specific disclosure, nothing was forthcoming. She contended that Mr. Berry appeared to be knowledgeable but failed or refused to put forward any evidence. In contrast, Counsel contended that Mr. Panton was frank and that where he did not know, he stated as such and what he knew, he willingly shared.

**[26]** Counsel accepted that the Claimant has no receipts for the add-on charges incurred by BNS prior to the loan being assigned to the Claimant, however highlighted that documents were tendered into evidence as proof of Ascendancy's expenditure on add-on charges. She concluded by submitting that the Claimant is entitled to claim for add-on charges including legal fees, insurance premiums, valuation fees, auction expense and asset search costs in connection with the exercise of its power of sale which are recoverable under the mortgage instruments.

**DEFENDANTS' SUBMISSIONS**

**[27]** Ms. Charmaine Patterson submitted that the Claimant has not sufficiently pleaded or proven the sums charged for add-on charges and the Claimant's sole witness was unable to explain the discrepancies in the inherited statement of account. This, she submitted, undermines the reliability of the records. Ms. Patterson submitted that the burden of proof lies with the Claimant who relied on computer generated documents without the proper certification in proof of the authenticity pursuant to section 31G of the Evidence (Amendment) Act and failed to show that the chain of custody was not broken since the documents passed through multiple organizations before reaching the witness' possession. Counsel contended that the document therefore is hearsay and is inadmissible unless it falls within the statutory exception.

**[28]** Counsel submitted that Clause 1(k) of the Mortgage Instrument does not give a full right to a claim for add-on charges. She argues that the clause creates a contractual obligation on the mortgagor to reimburse the bank for all expenses incurred in relation to the mortgage security on being made aware of such expenses. Ms. Patterson asserted that the Claimant has not substantially proven the add-on charges listed on the Statement of Account and there is no evidence or explanation of what those charges are for.

**[29]** Ms. Patterson asserted that the communication from the Defendants dated April 25, 2021 and tendered as exhibit 28 requires critical examination against the governing legal principles. Counsel expressed that communication made in the course of discussions directed towards resolving a dispute cannot amount to admission of liability. She referred the court to the guidance in **Rush & Tompkins Ltd. v Greater London Council** [1988] 3 All ER 737 where Lord Griffiths explained the underlying rationale of settlement communications as well as **Bradford & Bingley plc v Rashid** where the Court analysed whether certain letters amounted to an acknowledgment of debt. She asserted that the principles have been applied in the **Dorrett Wong Sam v Jamaican Redevelopment Foundation. Inc**. as well as **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2016] JMCA Civ 34 where the court reiterated that communication made in the context of resolving dispute must be carefully examined before being treated as admission of liability.

**[30]** Counsel asserted that the Claimant cannot establish a contractual rate of interest having failed to establish the legal basis upon which the interest claimed for the additional four (4) mortgages are said to arise. Further, the Claimant has not presented any evidence regarding the promissory note to support the loans and there is no evidence of disbursement of these loans or any statement for each mortgage. Counsel submitted that these mortgages cannot be enforced.

## DISCUSSION

**[31]** The proceedings before me were two-fold. I conducted a trial in respect of the additional mortgage instruments and a trial in relation to the accrued interest, the add-on charges and interest thereon.

**[32]** The Claimant has raised the preliminary issue that the Defence did not comply with the requirements of CPR 10.5 as the Defence is a bare denial and is in material respects unsupported by reasons, lacking in particularity and unaccompanied by any alternative factual case. It is true that CPR 10.5(4) requires the Defendants to state reasons for their denial and to assert their own version. The question then is whether the Defendants have done so satisfactorily. In relation to the Claimant's assertion that they secured loans with five (5) mortgage instruments, they admitted mortgage instrument no. 1533692 and denied knowledge of the others. They denied receiving any further loans or receiving the amounts stated in the other mortgage instruments and put the Claimant to strict proof of them. In the context where they averred that they know nothing about these mortgage, they could hardly have been expected to give any further context to these mortgages which were unknown to them.

**[33]** It has been submitted on behalf of the Claimant that in light of the Defendants' assertion that they did not sign these instruments, they were required to go further and pleaded fraud or forgery. The Claimant in the pleadings did not go into any details concerning the circumstances under which signatures purporting to be that of the Defendants appeared on the instruments. In fact, two of the instruments attached to the Particulars of Claim were deficient as they bore no dates and one (1) was missing the signature of the Justice of the Peace. The Defendants did respond to say that they put the Claimant to strict proof that the said Mortgage

Instruments were signed by them. They went further and asserted that they were not aware of these mortgages as the Duplicate Certificate of Title was in the Bank's possession so they did not have sight of the endorsements on the title. In those circumstances, the Defendants could hardly have been required to make assertions about how the 'non-execution' arose or plead fraud or forgery or non est factum. As the Claimant's case was lacking in specificity, the Defendants' response in the Defence was sufficient to take it outside a bare denial Defence.

**[34]** The Claimant also contends that the Defendants' response to the pleaded quantum was deficient. In the Defence the Defendants assert that they do not admit the outstanding sum listed in paragraph 8 (presumably they meant paragraph 9) and put the Claimant to strict proof. They go further and deny owing the sums stated and aver that the sums in the letters are not accurate and reflect amount owing which they know nothing about. This sufficiently captures what is required under CPR 10.5(4). They say they know nothing about these sums and so it is for the Claimant to show how they arrived at these sums. To have required more from the Defendants at that point might have operated to shift the burden of proof, which was the Claimant's task to bear.

**[35]** Counsel for the Claimant also argued that there was no pleaded challenge to the interest rate or to the add-on charges. In both the Claim Form and the Particulars of Claim, the Claimant asserted that interest continued to accrue at a rate of 19.63% per annum. The Defendants, although they did not mention the fact of the interest rate, denied owing the outstanding sums and even stated that the sums stated in the letter are not accurate. The mortgage instruments attached to the Particulars of Claim were devoid of any interest rates and in those circumstances, the Defendants' denial of the outstanding sums was sufficient to take it outside a bare denial.

**[36]** I do not agree with counsel for the Claimant that the Defence was deficient in these regards. I am of the view that the Defence sufficiently met the pleaded case. The preliminary point fails.

**[37]** I will deal firstly with the trial of the additional mortgage instruments in respect of which the main issues arising are as whether the documents relating to Mortgage Instruments bearing numbers 1552880, 1574355, 1619676 and 1653766 were duly executed by the Defendants and whether the Defendants are liable for the sum claimed in relation to them.

**TRIAL OF THE DISPUTED MORTGAGE INSTRUMENTS**

**Whether the documents relating to Mortgage Instruments bearing numbers 1552880, 1574355, 1619676 and 1653766 were duly executed by the Defendants and Whether the Defendants are liable for the sum claimed in relation to them.**

**[38]** The Claimant pleaded that the facilities provided by BNS to the Defendants, in addition to Mortgage Instrument 1533692, were also secured by Mortgage Instruments (Nos. 1552880, 1574355, 1619676 and 1653766) which were all duly executed by the two (2) Defendants.

**[39]** On behalf of the Claimant, it was submitted that a Certificate of Title is conclusive evidence of title in accordance with section 68 of the ROTA. Ms. Montague submitted that despite the Defendants' allegation of lack of knowledge of Mortgage Instruments bearing numbers 1552880, 1574355, 1619676 and 1653766, they are liable as the Instruments were executed by them and are registered on title. Counsel quoted the provisions under the Registration of Titles Act as well as the principle set out by the Court in **Patvad Holdings Limited** and argued that the endorsement on the Certificate of Title amounts to notice to the world and that it is from the mortgage instrument that the mortgagee derives its rights.

**[40]** This is consistent with the law, however, in light of the fact that the Defendants deny signing these mortgage instruments, then they could not be bound by the endorsements on the Certificate of Title, if their account is found to be true. The Defendants deny ever executing the mortgage instruments and deny receiving these sums, however, they did not plead a case of fraud or forgery and they did not obtain expert evidence to dispute the allegations that the signatures are not in fact their own. They relied on their own assertions that they did not sign these mortgage instruments.

**[41]** Counsel for the Claimant submitted that the Defendants have failed to adduce evidence that they did not execute the mortgage instruments, however, the starting point could not be with the Defendants. It is the Claimant who asserts that the Defendants duly executed the instruments and so the burden is on the Claimant to prove that the Defendants did in fact sign the documents. To present the Court with the instruments of mortgages, bearing signatures allegedly belonging to the Defendants, without more could not be proof of that. This is particularly so in light of the Defendants' assertion that they did not know about these mortgages. To place the burden on the Defendants to call expert evidence would only be necessary if the Claimant had satisfactorily proven that the Defendants had in fact signed the Mortgage Instruments. In light of the Claimant's failure to lead satisfactory evidence that they signed, there is no burden placed on the Defendants to disprove this.

**[42]** There are many ways in which the Claimant could have proven that the Defendants signed. They could have called an expert to prove that the signatures on the instruments were those of the Defendants. However, they need not have even gone that far. They could have called a bank officer who witnessed their signatures or the Justice of the Peace who certified their signatures, yet they failed to provide any such evidence. What they have placed before the Court is woefully inadequate. In light of the failure on the part of the bank to prove the signatures of the Defendants, the Defendants would not be required to do anything but to say this is not our signature. It is then for the Court to assess whether the Defendants' evidence in that regard is credible.

**[43]** Counsel has sought to say that the 2nd Defendant Ms. Lawrence admitted her signatures on the documents and has asked me to find that she is not credible and that this change of position came after the luncheon adjournment. When presented with the mortgage instruments in Court, she accepted that her signatures were on the documents but she also asked Counsel if she could ask a question. She was not then given the opportunity to do so as it was cross-examination. I noted that she appeared concerned when she expressed that she wanted to ask a question, however Counsel did ask her to wait.

**[44]** When further confronted that she had signed five (5) documents, she insisted that she only signed one (1) document. She explained that the question she wanted to ask was 'she getting so many signatures on the document and she had only signed once'. She insisted that the other four (4) signatures are from someone forging her signatures. I have assessed the witness, her age, how she came across and I noted that the other signatures do in fact look like the first and accept the explanation she provided. I accept her evidence that it was only one (1) set of documents she signed. Her account is corroborated by that of Mr. Berry who also struck me as credible on this point.

**[45]** The state of the bank's evidence on the other hand is wanting. Firstly, there are no original mortgage instruments presented. There are also no Promissory Notes. In respect of the first disputed mortgage instrument numbered 1552880 dated July 7, 2008, it purports to have been signed in the presence of a Kahadine K. Brown and an attorney-at-law whose name cannot be deciphered. Mr. Panton said he knew of a Kahadine, however no attempts were made to call any Kahadine as a witness to support the Claimant's contention that it was Mr. Berry and Ms. Lawrence who signed these instruments. To add to that, the section where the Justice of the

Peace is purported to have signed bears no date. No Justice of the Peace was called to give evidence as to the signature of the parties on the instrument.

**[46]** The mortgage instrument numbered 1574355 dated October 17, 2008 suffered from an even worse affliction. The witness who purportedly witnessed their signatures was not called to testify about that, and there is an absence of any date or signature of a Justice of the Peace in the required section.

**[47]** Mortgage instruments numbered 1619676 dated August 28, 2009, and 1653766 dated April 13, 2010 reflected signatures and dates in the required places but no witnesses were called to testify to having witnessed the signatures of the Defendants. The evidence of Mr. Panton does not assist the Claimant's case in this regard. Although he at first said he can attest to the mortgage instruments being executed by Mr. Berry, he accepted that he was not present when the signature was affixed, that he does not know personally the witness who purports to have witnessed the signature, that he did not see Mr. Berry sign and that he is not a trained expert. In these circumstances, the Claimant has failed to prove on a balance of probabilities that it was the Defendants who signed these four (4) disputed mortgage instruments.

**[48]** On behalf of the Claimant it was also submitted that even if these additional mortgages were omitted that would not affect the Claimant's case on the debt owed. This begs the question, if this is so, why include them. On the face of these mortgage instruments they bear additional mortgaged sums in the total sum of Seven Million, Seven Hundred Thousand Dollars ($7,700,000.00). it is also true that the statement of account relied on does not reflect any of these individual disbursements. Mr. Panton explained that the additional mortgage instruments may be executed and registered when a customer borrows additional money or where an existing mortgage is upstamped. Mr. Panton was unable to give any credible explanation for how these additional mortgage instruments came about. In fact, during cross-examination when he was asked to show where the figures on the mortgage instruments were disbursed he accepted that there were no disbursements of either Two Million Dollars ($2,000,000.00) or One Million Seven Hundred Thousand Dollars ($1,700,000.00) and that the statements do not reflect that they were disbursed and that other than the mortgage instruments, there is nothing to show that these sums were disbursed. His evidence in this regard was wholly speculative and he was not able to explain how, when and the circumstances under which these alleged additional mortgages were disbursed.

**[49]** On an assessment of the evidence on Mr. Panton, although he appeared to be a credible witness, he was not able to give the required evidence that supported the contentions made by the Claimant.

**[50]** In light of these concessions made by Mr. Panton as a whole, the case presented by the Claimant in relation to the statement of accounts and these mortgages is devoid of credibility. I find on a balance of probabilities that the Defendants did not execute these additional mortgage instruments. I accept the evidence of the Defendants, find that they are not bound by the additional mortgage instruments and received no sums in relation to them.

**TRIAL OF THE INTEREST, ADD-ON CHARGES AND INTEREST THEREON**

**[51]** With respect to the interest, add-on charges and interest thereon, two (2) main issues arise. They are as follows:

(i) Whether the Claimant is entitled to interest at the rate of 19.63% on the admitted Mortgage Instrument bearing Mortgage Number 1533692.

(ii) Whether the Claimant is entitled to accrued interest, add-on charges and interest on add-on charges on the admitted Mortgage Instrument bearing Mortgage Number 1533692.

**Whether the Claimant is entitled to interest at the rate of 19.63% on the admitted Mortgage Instrument bearing Mortgage Number 1533692**

**[52]** The admitted mortgage instrument does not reflect the interest rate applicable to the mortgage. Although the Claimant asserts that they are entitled to an interest rate of 19.63% they were unable to produce any evidence to support this. Mr. Panton's evidence was that the normal practice is that the applicable interest rate is stated on both the Promissory Note as well as the mortgage instrument however, despite his best efforts and search of the files which date back to 2008, he is unable to locate the Promissory Note.

**[53]** Mr Panton gave evidence that the prevailing bank rate at the time was 19.63% and Ms Montague asked this court to find that based on his evidence, the Claimant has established that the prevailing bank rate in 2008 when the Defendants received the credit facility was 19.63%. She further asserted that the Defendants did not dispute the interest rate being claimed at 19.63% and have accepted that interest is payable under the admitted mortgage since they did not challenge the rate of interest in their Defence. She contended that the Court is left with only the Claimant's evidence that the contractual rate was 19.63% and that Mr. Berry accepted the debt as he was making payments for years up until his financial difficulties arose.

**[54]** The Claimant had submitted that as the Defendants are seeking to prove a different version of events from that given by the Claimant, being that the interest rate is not 19.63% they are required to prove the applicable interest rate as indicated in Rule 10.5 of the CPR and they failed to adduce any positive evidence of a different contractual rate. Counsel further submitted that the Court is entitled to place weight on the contemporaneous operation of the account, the statement of account for the mortgage, the undisputed receipt of statements by the Defendants over the years, the absence of any complaint to BNS about the interest rate of 19.63%, the demand letters from Ascendancy and the settlement proposals made in the face of those demands. During the course of the trial Counsel sought to tender into evidence documents relating to settlement proposals. The Court did not allow these documents to be tendered as the Court took the view that they were subject to the without prejudice protection.

**[55]** I considered the evidence in relation to the statement of account and the nature of the evidence given by Mr. Panton in relation to it including the unexplained inconsistencies and found that no weight can be placed on the statement of account. Any interest rate stated therein is not evidence that this Court is prepared to accept. Similarly, the fact that over the years the Claimant has placed this rate of interest on the statements sent to the Defendants and there was no complaint from the Defendants is not sufficient to say that the Defendants accepted this rate. There is no evidence led as to how the Claimant arrived at this rate of 19.63% in the first place.

**[56]** On behalf of the Claimant, it was argued that correspondence exhibited as Exhibits 27, 28 and 29 constitute an admission by Mr. Berry.

**[57]** The Defendants have contended that it is accepted that the without prejudice rule applies to exclude all negotiations genuinely aimed at settlement whether or not the writing is headed "without prejudice" as explained by Lord Griffiths in **Rush & Tompkins v Greater London Council**. The authority of **Dorrett Wong Sam** relied on by both Counsel is instructive. In **Dorrett Wong Sam**, Laing J. referred to the House of Lords authority of **Bradford & Bingley v Rashid**, also relied on by both Counsel. Paragraph 14 of the Judgment which states:

> *"The Court notes that when viewed in the context of the instant claim, the case of Bradford & Bingley must be treated with caution. This is because in that case the Court was primarily concerned with the extent to which a written acknowledgement of a debt (which could start time running afresh under the English Limitation Act 1980) could gain the protection of the without prejudice rule and be deemed to be inadmissible. Their Lordships*

*unanimously held the communication to be admissible but differed in their opinions as to the reasons."*

**[58]** The Court stated further at paragraph 15:

> *"Notwithstanding some difference in analysis and reasons, as the head note in Bradford and Bingley confirmed, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance were all in agreement that there was no dispute to be compromised since the correspondence treated the debt as an undisputed liability and the debtor was simply asking for a concession but was not giving one."*

**[59]** The Courts have always exercised care in the admission of communications made in the course of discussions regarding resolving a dispute. Although the documents were tendered as exhibits they must still be carefully scrutinized in light of the legal position set out in cases like **Rush & Tompkins v Greater London Council**, where the Court has underscored the care which courts must exercise when treating with communications said to be admissions.

**[60]** I agree with Counsel for the Defendants that the **Wong Sam** decision sets out clear requirements for acceptance and that the critical elements set out there are absent in this case. Mr. Berry did not accept the specific sum being claimed and he disputed the quantum of the debt. I am in agreement with Counsel for the Defendants that the email is protected under the without prejudice rule.

**[61]** Even if the email was found to not be protected, the question of whether it was a clear admission of liability of the interest rate of 19.63%, add-on charges and interest thereon would have to be determined.

**[62]** Ms. Montague contends further that Mr. Berry acknowledged the debt when he responded to the demand letter. Counsel for the Defendants submitted that the 1st Defendant's email dated April 25, 2021 does not amount to an admission of the indebtedness as the correspondence is not a clear, unequivocal admission of the debt and the interest rate.

**[63]** The greater portion of Mr. Berry's email dated April 25, 2021 is worth sharing :

> *"Good day. I am in receipt of your email and I acknowledge the content herein…..However I am some what taken aback given the amount being pursued, the time period in which to pay given the banking restrictions in our country and the interest to be apply after April 30th 2021….I have asked Bns to revised (sic) the interest added as there was no way I could possibly make any payment whatsoever when the supreme court literally froze me out of business. We look forward to share correspondents (sic) and to have the matter resolved in the best possible way…*

**[64]** The email is an acknowledgment of the demand letter, however, Mr. Berry challenged the amount being claimed as well as the interest rate applied. Whilst Mr. Berry accepts liability of the principal sum, it is clear that the sums being claimed for add-on charges and interest on add-on charges are in dispute.

**[65]** Ms. Montague also asserted that when Mr. Berry was asked during cross-examination if he challenged the amounts being charged, his response was, *"no I did not challenge*". She contends that this amounts to acknowledgement of the debt. I do not find merit in this submission that the mere fact of not challenging an interest rate amount to an admission when from the outset Mr. Berry indicated that he did not agree to the sums being claimed. In these circumstances this could not amount to an admission on the part of the Defendants of the interest rate being claimed.

**[66]** It comes back to the point that the burden of proving the rate of the agreed interest rate rests on the Claimant. In fact, none of the circumstances identified on behalf of the Claimant, whether the fact of statements bearing the interest rate, or the Defendants' failure to adduce positive evidence of a different contractual rate amount to proof that the Defendants had agreed with BNS that the interest rate was 19.63%. There is therefore no evidence of the interest rate to be applied to the mortgage instrument.

**[67]** Counsel for the Defendants submitted that a party claiming interest must demonstrate a legal basis for the claim through a contractual agreement, by a statutory provision or through the equitable jurisdiction. I accept that the burden of proof lies with the Claimant which the Claimant has not sufficiently discharged.

**[68]** Counsel for the Claimant has relied on the provisions of section 3 of the Law Reform (Miscellaneous Provisions) Act to say that the Court is empowered to grant an award of interest as it thinks fit. Counsel contended that this empowers the Court to grant interest at such a rate as it thinks fit. This is supported by authorities from the Court of Appeal and the Supreme Court. In the Court of Appeal decision of **British Caribbean Insurance Company Limited v Delbert Perrier** SCCA No. 114/94 Carey JA opined at page 19 that *"The Judge in my view should be provided with evidence to enable him to make that realistic award…Statistics produced by reputable agencies could be referred to the judges to enable him to ascertain and assess an appropriate rate"*.

**[69]** Ms. Montague also relied on the **Development Options Limited v General Business Services Limited** Claim No. 2007/HCV 1803 case to support her argument on the best evidence rule.

**[70]** An extract from the Bank of Jamaica (BOJ) Table of Commercial Banks Domestic Currency Loan Rates was tendered into evidence as exhibit 30. Counsel for the Claimant has suggested that the table shows that the overall average weighted interest rate offered by commercial banks between 2008 and 2009 ranged between 20% and 21%. This 20% to 21% rate comes under the heading instalment credit. There are other rates of interest reflected in the document.

**[71]** The Defendants' submission in response to this is two-fold. They submit that in the absence of an agreed interest rate, the Court cannot enforce a rate of interest that has not been proven to have been agreed between the parties and so the Claimant has failed to establish the legal basis upon which the interest claimed is said to arise and in those circumstances, the Court ought to find that no interest is recoverable beyond the principal sum which has already been paid. On behalf of the Defendants, it was pointed out that section 29 of the Judicature (Supreme Court) Act which empowers the Court to award interest on judgment debts at the statutory rate applies only to sums adjudged to be due. Thus while the bank may recover the expenses, it cannot impose interest unless and until judgment is entered at which point statutory interest may accrue. She contended that this provision does not relate to the outstanding debt and cannot be used to establish a contractual rate of interest and that the Claimant having failed to establish the legal basis of interest should not be awarded any interest.

**[72]** The case of **British Caribbean Insurance Company Limited v Delbert Perrier** relied on is distinguishable from the instant case as the Court in that case was referring to the rate of interest to be awarded after judgment pursuant to section 3 of the Law Reform (Miscellaneous Provision) Act. Section 3 relates to the power of the Court to award interest on debts and damages. This would be relevant to the determination of the rate of interest to be applied on judgment sums and not to be applied in a situation where the Claimant has failed to prove an interest rate relating to the contract itself. In this regard, I find there to be merit in the Defendants' submissions. Section 3 should be applied only in respect of the interest rate on a debt or damages.

**[73]** Ms. Montague has also advanced that this Court can apply the best evidence rule. I do not think that the best evidence rule should be used to circumvent a party's obligation to prove its case. My understanding of the best evidence rule is that it applies where for example an original document cannot be located and a copy is available for the court's examination. In the **Development Options Limited** case

Edwards JA explored the more modern approach which she explained as *"to trust judges to give proper weight to evidence which is not the best evidence"*, and seems to build on the more settled approach but not to change it. I do not think that strictly speaking it is applicable to the instant case although this is a case where the Promissory Note which was said to bear the interest rate cannot be found as there is no copy document or lesser document tendered into evidence that indicated any interest rate.

**[74]** In this case there is no evidence of an agreed interest rate, and the Court is being called upon to use external evidence to arrive at an appropriate interest rate. I do not think the Court is precluded from doing so. In that regard the guidance of Carey JA may have some value in that a Court can use available evidence to arrive at a realistic rate of interest if the circumstances of the case allow for it.

**[75]** The Defendants have not averred or given evidence that there was no interest agreed. In fact, the evidence of Ms. Lawrence was that she expected that there would be some interest to be paid. This was a commercial transaction and so it is expected that there must be some interest. If no interest was agreed, I would have expected the Defendants to have testified to this which they have not done. I do not agree that if no rate is proven from the documents that the Court cannot impose one.

**[76]** I find the Extract from Bank of Jamaica's IR.CB.02 Table of Commercial Banks' Domestic Currency Loan Rates for January 1980-March 2025 to be useful. It sets out Interest Rates for Commercial Bank's Domestic Currency Loan Rates for the period January 1980 to March 2025 and includes rates for mortgage credit and commercial credit, and I am prepared to use it as a guide.

**[77]** Counsel for the Claimant suggested that based on this extract the overall average weighted interest rate offered by commercial banks between 2008 and 2009 ranged between 20% and 21% and so the rate of 19.63% is commercially plausible and this is what the court should impose. Counsel for the Defendants has submitted that the applicable interest rate must be that coming under mortgage credit which reflects a rate of 7.49% at the relevant time. I am in agreement with the Defendants that there is no evidence that this loan was a commercial or business loan and that the mortgage deed was registered on the Defendants' residence which is suggestive of a residential mortgage. The unchallenged evidence of Mr. Berry and Ms. Lawrence is that in April 28, 2008, the Bank granted credit facilities to them which were used to secure the property. I find that it is more probable than not that the interest rate applied was consistent with 'mortgage credit' rates than with commercial rates.

**[78]** I therefore accept on a balance of probabilities that the applicable rate should be that applicable to mortgages. Based on the BOJ extract, the applicable mortgage credit rate in April 2008 was 7.49%. I am prepared to make an order applying this rate.

**[79]** There is also the issue of how interest is to be computed based on the terms of the mortgage instrument. The mortgage instrument speaks to the original rate of interest as being compound "(per centum (%) per Annum calculated as Compound Interests with monthly rests". Although the actual rate is missing from the mortgage instrument, the mode of calculation is set out and so it is clear that the parties agreed to this.

**[80]** I am prepared to make an order that the interest of the mortgage be calculated at a rate of 7.49% per annum (compounded on the reducing balance) calculated from the date of disbursement to the date of judgment, taking into account all payments made to date towards interest and deducting them from the total interest accrued. Thereafter the rate on judgment debts is to be applied which is at a rate of 6% per annum.

**Whether the Claimant is entitled to add-on charges and interest on add-on charges.**

**[81]** In my earlier judgment at the stage of the grant of summary judgment I had ordered the issue of add-on charges and interest thereon to procced to trial. Clause 1(a)(b) of the Mortgage Instrument provided that the Bank is entitled to recover cost, charges and expenses incurred by the bank in relation to the preparation of, stamping, perfecting and discharge of this instrument or any collateral security or any default hereunder or thereunder and for the protection or enforcement of the Bank's rights and interest hereunder on an indemnity basis. This provision seems to relate more to charges incurred in the preparation of the mortgage and its discharge at the appropriate time. Clause 1(k) appears to be wide and incorporates more of the relevant charges.

**[82]** Counsel Ms. Montague accepted that the Claimant has no receipts for the add-on charges incurred by BNS prior to the matter being assigned to the Claimant, however, the Claimant tendered the documents it had in its possession. Counsel indicated that the sole witness for the Claimant made it clear that he was unable to speak to entries predating September 30, 2018. The statement of account also reflected entries for which no definite account was given as to how they appear. In particular, entry dated January 29, 2009 in the sum of Four Million, Two Hundred and Six Thousand, Seven Hundred and Fifty-Seven Dollars ($4,206,757.00). When Mr. Panton was asked about this add-on charge he explained that it represents a disbursement other than the original principal amount but he could not say precisely what it was for. He explained that where customers are having difficulty the bank sometimes grant relief by way of add-on entries. nor could he say precisely what an entry dated January 29, 2009 for the sum of Four Million, Two Hundred and Six Thousand, Seven Hundred and Fifty-Seven Dollars ($4,206,757.00) described as "Add-on charge other", is for, however based on his experience, it could be a situation where customers are in difficulty and the bank grants relief by way of such an add-on entry.

**[83]** He clearly accepted that he cannot attest to the accuracy of the Scotiabank statement and he cannot attest to the accuracy of the add-on charges. He accepted not being able to attest to the accuracy of what is stated as interest on principal in the Ascendancy statement of Twelve Million, Nine Hundred and Seventy-Nine Thousand, Nine Hundred and Six Dollars and Eighty-Sex Cents ($12,979,906.86). He accepted not being able to attest to the accuracy of the figures in the charge of Five Million and Seventy-One Thousand Five Hundred and Thirty-Seven Dollars and Thirty-Four Cents ($5,071,537.34), not being able to attest to the accuracy of the interest charged on the add-on charges. He was unable to explain the inconsistencies presented in the statement of accounts. I am of the view that the inconsistencies identified were material and affected the calculation of interest and add-on charges and results in the statement of account being unreliable. The Court places very little weight on the statement of account. The Court would only be able to accept the unchallenged aspects of it which includes the fact and date of disbursement of the principal sum of Twenty Million Dollars ($20,000,000.00).

**[84]** I accept that Clause 1(a)(b) of the admitted Mortgage Instrument stipulated that all costs, charges and expenses incurred by the Bank in relation to the default are recoverable, however, this section is silent as to any interest to be applied here. It is in Clause 1(k) that there is a stipulation that such sums are recoverable at the rate of interest payable on the principal sum.

**[85]** Ms. Montague pointed the Court to a portion of the authority **Enoch Blake & Pamela Blake v First Jamaica National Bank** on page 9 which speaks to the principle that a mortgagee is entitled to add to the secured debt his costs, charges and expenses, however, on my review of the authority, page 9 also states that such sums should be "properly' incurred. Langrin J defined "properly' incurred as follows:

> *"It must be noted that the costs, charges and expenses must be "properly" incurred. "Properly" means reasonably as well as honestly incurred. The Court will examine the costs, charges and expenses sought to be added to the security (by way of taxation) and disallow those that is considered not properly incurred subject of course to the express contractual provisions."*

**[86]** In order to recover these charges, they must be clearly identifiable as these sums are special damages and so must be specifically proven.

**[87]** The Claimant asserts that it is entitled to add-on charges which include legal fees, insurance premiums, valuation fees, auction expenses and asset search costs in connection with its power of sale enforcement of the mortgage instruments, and preservation of the mortgage property and that this attracts a contractual rate of interest of 19.63% per annum. I have already decided that the Claimant has failed to prove this rate of interest and so the rate of 7.49% is to be applied. On my review of the sums being claimed as add-on charges, the majority are invoices from the Claimant's attorney-at-law to the Claimant for what appeared to be invoices for services rendered. The Court enquired whether the invoices tendered as exhibits 3-13, 15, 17, 18, 20 & 21 are for services rendered on behalf of the Claimant to which Ms. Montague stated in the affirmative. She further stated that the Claimant is entitled to these sums under the mortgage.

**[88]** I accept that the admitted Mortgage Instrument allows for add-on charges which include legal expenses, however, I believe that legal fees incurred before the filing of the Claim should be treated differently from legal fees incurred after the filing. The legal fees which were incurred after the matter came before Court would be subject to the Court's order in relation to how cost should be treated with and could be treated with through the process of taxation. To do otherwise may result in some ambiguity and inconsistency in the apportionment of costs.

**[89]** With respect to the other charges, the Claimant is entitled to them once they can show proof of them being incurred. In this regard the invoices tendered as exhibits which reflects these charges are recoverable. I am prepared to accept the invoices tendered into evidence including the invoices relating to legal fees incurred before the date of filing of the Claim Form. They are set out below are follows:

| **Invoices** | **Amounts** |
|---|---|
| Invoice No. 2017553 from MF&G dated April 30, 2021 tendered as exhibit 12 | $46,500.00 |
| Invoice from Gallagher Insurance Broker Jamaica Limited dated April 30, 2021 tendered at exhibit 14 | $125,632.44 |
| Invoice No. 2018239 from MF&G dated June 30, 2021 tendered as exhibit 13 | $67,635.00 |
| Invoice from D.C. Tavares & Finson dated July 28, 2021 tendered as exhibit 2 | $138,575.00 |
| Invoice No. 2018411 from MF&G dated July 30, 2021 tendered as exhibit 3 | $46,575.00 |
| Invoice from MF&G dated September 27, 2021 tendered as exhibit 4 | $81,190.00 |
| Invoice No. 2019228 from MF&G dated October 26, 2021 tendered as exhibit 15 | $69,000.00 |
| Invoice from Guardsman Group Limited dated August 31, 2022 for asset search tendered as exhibit 16 | $46,000.00 |
| Invoice No. 2023572 from MF&G dated September 30, 2022 tendered as exhibit 18 | $411,849.50 |
| Pro-forma Invoice dated October 24, 2022 in the sum of $200,000.00 tendered as exhibit 17 of which $40,000.00 was paid | $40,000.00 |
| Invoice from Gallagher Insurance dated April 6, 2023 tendered as exhibit 19 | $186,300.00 |
| Invoices from Gallagher Insurance dated July 29, 2021 and November 8, 2024 tendered as exhibit 22 | $125,621.89 |
| Invoice from Gallagher Insurance dated July 29, 2024 tendered as exhibit 23 | $310,500.00 |
| Invoice from Gallagher Insurance dated November 8, 2024 tendered as exhibit 24 | $388,125.00 |
| **Total** | **$2,083,503.83** |

**[90]** The Defendants are liable to the Claimant for the charges set out amounting to the sum of $2,083,503.83 plus interest at a rate of 7.49% per annum from the date each charge was incurred to today's date. Thereafter interest on any outstanding sum at a rate of 6% from the date incurred to the date of payment.

**COSTS**

**[91]** I asked the parties to make oral submissions on the question of costs. Ms. Montague advanced that costs should be awarded to the Claimant for a percentage north of seventy percent (70%) on the basis that the Claimant was largely successful and was also awarded interest albeit not at the rate it claimed. Counsel relied on Part 64.6 CPR to argue that the Claimant's conduct from the onset of the proceedings was more than reasonable. She asserted that the Claimant admitted its deficiencies and sought to present the best evidence. Ms. Montague contended that the Claimant is not only entitled to recover its costs but entitled to recover at a rate outside of the rate of Judgment. Counsel argued that costs of the proceedings should be recovered on an indemnity basis.

**[92]** In contrast, Ms. Patterson argued that the Defendants are entitled to costs for the matter in relation to the trial on the basis that the Claimant's behaviour in pursuing the matter in the way it did was totally inappropriate. Counsel argued that the Defendants made a proposal to settle in the sum of Thirty-Five Million Dollars ($35,000,000.00), have constantly denied the additional mortgages and did not have documentary proof of the interest rate being claimed. Ms. Patterson contended that the conduct of the Claimant both before and during the proceedings is the reason why the Defendants could not settle as it was unreasonable to pursue the particular allegation knowing the lack of proof. Ms. Patterson asserted that the Claimant is not entitled to costs on an indemnity basis as the Mortgage Instrument is silent on that.

**[93]** Having considered the submissions advanced on behalf of both parties, I agree with Ms Montaque that Rule 64.6 of the CPR is relevant to my determination as to how to award costs.  The general rule is that the unsuccessful party is to pay all of the costs of the successful party. However, the court may divert from this rule under certain circumstances. In doing so the court must have regard to several factors as set out in Rule 64.6(4) which include the conduct of the parties before and during the proceedings and whether a party has succeeded on particular issues even if not successful in the whole of the proceedings. Rule 64.6(5) permits the court to make orders including ordering that a party pays, among other things: a proportion of another party's costs; costs relating to particular steps taken in the proceedings; and costs relating to a distinct part of the proceedings.

**[94]** At the stage of the grant of summary judgment, I had ordered that costs be cost in the claim. I am of the view that costs up to that stage should be treated differently from the costs incurred post the grant of summary judgment. In its application for summary judgment, the Claimant claimed a total of $70,080,430.06 which included principal, accrued interest, total add-on charges and interest on add-on charges. The Claimant was successful in being awarded summary judgment in respect of the principal sum of $17,466,727.42 which was only one issue raised in the application. The Claimant was unsuccessful in respect of their claim for summary judgment in relation to accrued interest, add-on charges and interest thereon.

**[95]** Having succeeded on one issue and failed in relation to the other issues it could not be said that they were largely successful. The Defendants had never challenged that they owed the principal sum. Their challenge had been and remained throughout that they did not admit the sums being claimed. In these circumstances, up to the stage of summary judgment, the Claimant having only partially succeeded, I am prepared to order that they should only be awarded fifty percent (50%) of their costs up to that point.

**[96]** Subsequent to the grant of summary judgment three main issues remained to be resolved. In respect to the question of the additional mortgages, the Claimant failed to prove the mortgages and so judgment in that respect is for the Defendants so in that regard cost would be to the Defendants. In respect to the issue regarding the interest rate being claimed of 19.63% the Claimant failed to prove this and so were unsuccessful on this issue. The Court awarded a rate of interest, taking into account that the Defendants had never said they were not liable to pay any interest at all. Then there is the issue of the add-on charges, the Claimant claimed a total of $5,586,114.61 but the Court has awarded the sum of $2,083,504.83 which is less than half of what was claimed. The Claimant has also failed to prove their entitlement to the full sum claimed as interest on add-on charges. In these regards, the Claimant is only partially successful.

**[97]** I take into account the conduct of the parties throughout. I do not agree with Ms. Montague that the Claimant's conduct was reasonable and that they admitted their deficiencies. Au contraire, I found the Claimant's conduct to be highly unreasonable. The Claimant vigorously pursued a case for which they had scant documentary proof. The Defendants has always accepted their liability but not in the sums claimed. The Claimant knew from the beginning that they had no promissory note and no document showing the agreed interest rates, yet they insisted on the rate of 19.63%.

**[98]** The Claimant should have appreciated that in respect of the additional mortgages, the mortgage instruments were shoddy and lacking in certainty and there was no proof of any sums associated with these mortgages set out in the statement of account. The Claimant ought to have appreciated that their main witness could not account for what took place before the Claimant company took over this mortgage. It should have been obvious that they lacked the evidence required to substantiate these mortgages and their claim as a whole. Yet they persisted and did so in a high-handed manner. This conduct persisted before and during the proceedings so despite their success in securing a sum for add-on charges and interest, I am not prepared to award any costs to them. Costs are to the Defendants to be taxed if not agreed.

**[99]** My Orders are as follows:

1. Judgment for the Defendants against the Claimant in respect of mortgage instruments bearing numbers 1552880, 1574355, 1619676 and 1653766.
2. The Claimant is not entitled to interest on the principal sum in the amount of 19.63% per annum.
3. The Defendants are to pay interest on the principal amount of $20,000,000.00 at a rate of 7.49% per annum.
4. The interest rate of 7.49% is to be applied to the principal sum from the date of disbursement, March 25, 2008, to the date of judgment. Thereafter interest is to accrue at a rate of 6% from today's date to the date of payment.
5. The Claimant is entitled to a sum representing the balance arrived at when the total sums paid by the Defendants towards interest on account of the mortgage are deducted from the total interest accrued at the rate of 7.49% calculated in the manner agreed by the parties.
6. The Claimant is entitled to add-on charge amounting to $2,083,503.83 plus interest at a rate of 7.49% per annum from the dates each charge was incurred to today's date. Thereafter interest on any outstanding sum is to accrue at a rate of 6% from today's date to the date of payment.
7. The Claimant is entitled to fifty percent (50%) of their costs up to the stage of grant of summary judgment. Costs post the date of Summary Judgment to the Defendants to be taxed if not agreed.

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Stephane Jackson-Haisley
Puisne Judge