



In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN**

COMMERCIAL BANK OF DUBAI (PSC)

Claimant

and

MOHAMMED Z A ALYAZJI

Defendant

JUDGMENT OF JUSTICE PAUL HEATH KC



Neutral Citation:	[2025] ADGMCFI 0008
Before:	Justice Paul Heath KC
Decision Date:	1 May 2025
Decision:	See paragraphs 65 and 67 of the Judgment and the corresponding Order referred to in paragraph 68 of the Judgment
Hearing Date(s):	5 November 2024 and 8 April 2025
Date of Orders:	1 May 2025
Catchwords:	Mortgage registered against real property located in Al Reem Island prior to 1 January 2025. Mortgage default. Remedies available to mortgagee. Foreclosure. Equity of redemption. Sale of property in lieu of foreclosure. Requirements under s.72(3) of Real Property Regulations 2024.
Legislation and Other Authorities Cited:	ADGM Real Property Regulations 2024 ADGM Real Property Regulations 2015 Abu Dhabi Law No. 3 of 2015 Abu Dhabi Law No (4) of 2013 (as amended by Law No (12) of 2020) ADGM Application of English Law Regulations 2015 ADGM Court Procedure Rules 2016 Halsbury's Laws of England, Mortgages, Vol 77, 2021
Cases Cited:	<i>Marks & Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Anor</i> [2016] AC 742 <i>Attorney-General of Belize v Belize Telecom Ltd</i> [2009] 2 All ER 1127. <i>Keith v Day</i> (1888) 39 ChD 452 <i>Noakes & Co Ltd v Rice</i> [1902] AC 24 <i>Santley v Wilde</i> [1899] 2 Ch 474 <i>Silsby v Hollyman and Anor</i> [1955] 2 All ER 373 <i>Palk v Mortgage Services Funding PLC</i> [1993] 2 All ER 481
Case Number:	ADGMCFI-2024-162
Parties and representation:	Ms Asha Bejoy of ATB Legal Consultancy FZ LLC for the Claimant Ms Fatima Akram of Balfaqueeh Advocates & Legal Consultants for the Defendant



JUDGMENT

The claim and application

1. Mr Mohammed Z A Alyazji is the registered owner of a residential unit in an apartment complex situated on Al Reem Island, Abu Dhabi, over which the Commercial Bank of Dubai (PSC) (the “**Bank**”) holds a mortgage (the “**Mortgage**”). The legal description of the property is: Plot No. C13, Building No. 1, Floor No. M3, Property No. 304, Sector RR2, Al Reem Island, Abu Dhabi (the “**Property**”). Mr Alyazji has fallen into arrears in the amount owing under the Mortgage. There are no subsequent encumbrances.
2. The Bank commenced these proceedings by way of its claim filed on 11 July 2024 (the “**Claim**”). In its application notice dated 4 September 2024 (the “**Foreclosure Application**”), the Bank sought the following orders (which reflected the relief sought in the Claim) based on Title 6 of Abu Dhabi Law No. 3/2015, *Concerning the Regulation of the Real Estate Sector in the Emirate of Abu Dhabi* (the “**Abu Dhabi Mortgage Law**”):¹
 - a. That the Property secured by the Mortgage be foreclosed.
 - b. That the Property secured by the Mortgage be sold at public auction and proceeds of sale applied towards the amount due under the Mortgage.
 - c. The costs of the Claim.
3. While Mr Alyazji has not entered an appearance, his wife, Ms Lana Khader, has done so under a “*General Power of Attorney*” (“**Power of Attorney**”) to act on her husband’s behalf “*in any legal or monetary matters*”. While the Bank made a faint suggestion that the Power of Attorney might not be valid, no real objection was taken by the Bank to Ms Khader responding to the Claim on Mr Alyazji’s behalf. The evidence suggests that Mr Alyazji is presently outside the United Arab Emirates, and has been since the Bank first took steps to enforce the Mortgage. Ms Khader opposes the Foreclosure Application on his behalf.

The hearing

4. The hearing of this proceeding began before Justice William Stone SBS KC, on 5 November 2024. At that time, a late appearance was entered by Ms Khader, on behalf of her husband. She explained her husband’s absence and that she had a Power of Attorney to act on his behalf. The Judge heard from Ms Khader on a provisional basis. Ultimately, His Honour decided to adjourn the hearing for evidence from Ms Khader to be filed.
5. The hearing resumed before me on 8 April 2025, Stone J having retired in the interim. I record that the parties consented to me determining the proceeding on the basis both of the evidence that was before Stone J at the 5 November 2024 hearing, and that filed and given orally afterwards.

¹ The relevant provisions of the Abu Dhabi Mortgage Law are set out at para. 29 below.



The Mortgage transaction

The original facility

6. Mr Alyazji made a “*Home Lease Application*” to the Bank on 1 October 2017 (the “**Home Lease Application**”). His purpose was to obtain finance to purchase the Property. Mr Alyazji informed the Bank that the Property was freehold and was for personal use. The Property was described as “*Ready*”, as opposed to “*Under Construction*”.
7. In the Home Lease Application, the purchase price was recorded as AED 1,600,000, of which AED 640,000 had been paid by way of “*down payment*”. On that basis, the facility for which application was made was for AED 960,000, representing the balance of the purchase price. Various fees were contemplated: without being exhaustive, they included processing fees and an insurance fee.
8. Mr Alyazji appears to have acquired the Property from its developer, under a Sale and Purchase Agreement dated 20 September 2015 (the “**SPA**”). The Bank accepted Mr Alyazji’s Home Lease Application by letter of offer dated 17 January 2018 (the “**Offer Letter**”). The Offer Letter described the “*Facility Type*” as “*Primary market & Equity Release*”. Its purpose was to enable the Bank to purchase the Property and lease to Mr Alyazji. The “*Lease amount*” was shown as AED 960,000, and AED 640,000 was described as “*Advance Fixed Rent*”. Those two sums represented the purchase price of AED 1,600,000, albeit described as “*Market Value*” in the Offer Letter. The maximum lease period was recorded as 300 months; being 25 years.
9. The Offer Letter contained additional terms, including:
 - a. A requirement that each rental payment be made to Mr Alyazji’s current account with the Bank, through its “*Islamic Banking Department*”.
 - b. A “*Late Payment Fee*” was due in respect of any failure to pay rent on due date.
 - c. The need for a policy of insurance to be taken over Mr Alyazji’s life and the Property. The Bank was to “*recover a **life insurance premium of 0.033%** on monthly basis from ... the borrower on loan outstanding amount*” and an “*insurance premium of **0.040%**” for the property insurance based on the “current market value of **AED 1,600,000/-annually**” [original emphasis].*
 - d. The financing was to be secured by three cheques drawn on Mr Alyazji’s current account and a mortgage over the Property, both in favour of the Bank.
 - e. Clause 5 of the “*Other conditions*” of the Offer Letter provided:

“In the event of any breach of terms including settlement as per schedule, [the Bank] reserves the right to demand payment of all amounts due to it from [Mr Alyazji] and may commence legal proceedings to realize such amounts.”
10. The financing arrangement took the form of an “*Ijarah Lease Contract*”. The particular product type described as an “*Ijarah Muntahia Bittamleek*”. That product was for a “*Ready*



Property”, of the type mentioned in Mr Alyazji’s Home Lease Application.² Clause 13(a) of the “Other conditions” provided that the “Ijarah Home Finance” was subject to seven “Ijarah Muntahia Bittamleek Home lease documents” listed in that clause. Clause 13(b) provided for Mr Alyazji to open an “Islamic Current account” and “funded for insurance charges & relevant fees”. Clause 13(c) stated that the original title deed, a valid search certificate and the lease agreement documents were to be lodged with the Bank for the term of the lease.

11. Mr Alyazji accepted the offer contained in the Offer Letter, and all relevant documents were prepared and executed by the parties.

The Mortgage

12. Although the financing arrangements had been put in place in 2018, the Mortgage was not executed until 10 November 2022. By that stage, it appears that the Property had been transferred into Mr Alyazji’s name. The Mortgage records Mr Alyazji as mortgagor, and the Bank as mortgagee. There were no special conditions to the Mortgage. Its operative terms were:³

- “1. [Mr Alyazji] confirms that he is the sole owner of Residential Property

Plot Number: C13

Property Number: M304

Sector: RR2

District: Al Reem Island

Abu Dhabi. UAE [original emphasis]

And that the property is free and clear of all encumbrances and rights in them.

2. [Mr Alyazji] hereby executes a first Degree mortgage in favor of [the Bank] to secure repayment of the **AED 960,000.00 (UAE Dirhams Nine Hundred Sixty Thousand Only)** plus agreed profit and other amounts due by [Mr Alyazji] to the [Bank]. [original emphasis]
3. [Mr Alyazji] shall repay the full amount of the loan in timely installment according to the agreed schedule from 10/11/2022 to 09/11/2043.
4. If [Mr Alyazji] fails to pay an installment when due, [the Bank] reserves the right to take legal action to recover the debt during the mortgage term or thereafter in accordance with Abu Dhabi’s Mortgage Law.”

² See para. 6 above.

³ In evidence, Mr Hamid explained that the “profit” element was the equivalent of interest. Later in the hearing, Ms Akram on behalf of Mr Alyazji accepted that the reference to “profit” in clause 2 of the Mortgage was understood by all to be the equivalent of interest.



13. Mr Alyazji has fallen into default of his obligation to pay the agreed instalments. The Bank asserts that Mr Alyazji has been in default since 3 October 2023. It has acted on the basis that it is entitled to recover the whole amount advanced, seemingly relying on clause 5 of the “*Other conditions*” of the Offer Letter.⁴ The Bank’s right to treat Mr Alyazji’s defaults as having accelerated the requirement that he repay the Mortgage debt in full is not disputed.

What amount is due?

14. On 8 April 2025, I heard oral evidence from Mr Osman Mohamed Hamid, the Head of Litigation of the Bank, and Ms Khader. Mr Hamid confirmed on oath his seven prior witness statements and answered questions from counsel for Mr Alyazji and myself. Ms Khader also gave oral evidence, in which she confirmed on oath her witness statements of 15 November 2024 and 6 February 2025. At the conclusion of the hearing, it was clear that the only substantive dispute was whether payments that Ms Khader said that she had made on her husband’s behalf had or had not been credited against the mortgage debt and, if so, whether they had been credited by the Bank in a timely manner from the time of payment.
15. At the conclusion of the 8 April 2025 hearing, I directed that additional witness statements be provided to address this question. In a post-hearing order, I issued the following directions:

“2. By 4.00 pm on 10 April 2025, [Mr Alyazji] shall file and serve a witness statement which: [original emphasis]

a. is to set out the payments made by [Ms Khader] on behalf of the Defendant in relation to the Mortgage from 17 April 2023 to 8 April 2025 and for each payment made specify:

i. the amount of the payment;

ii. the date of the payment; and

iii. the account into which the payment was made.

b. attaches any documents that [Mr Alyazji] relies on evidencing the efforts undertaken by [Ms Khader] to sell the Property including any offers received to purchase the Property.

3. By 4.00 pm on 14 April 2025, the [Bank] shall file and serve a witness statement which: [original emphasis]

a. attaches the current account statement and the loan account statement for [Mr Alyazji] for the period 17 April 2023 to 8 April 2025;

b. for each payment that was made to the current account that was subsequently transferred to the loan account in the period 17 April 2023 to 8 April 2025, identify whether there was any delay in the transfer made between accounts and, if so, for each delayed

⁴ See para. 9.e above.



transfer: (i) set out the delay in calendar days; and (ii) state the reason for the delay;

- c. provides a calculation quantifying the impact of any delay(s) identified in sub-paragraph (b) in relation to amounts charged to the Defendant that would not have been incurred but for the delay, including in respect of: (i) late penalty or penal interest charges; and (ii) any additional interest charged on the principal; and
- d. explains the line items “Active to NonAccrual Status Change” and “Remove from NonAccrual” both dated 20 November 2022 as set out in the loan statement of account attached to Mr Hamid’s witness statement filed on 10 March 2025.”

16. Ms Khader provided a responsive witness statement, in which she set out payments that she had made towards the Mortgage in the period between 17 April 2023 and 8 April 2025. Ms Khader identified eight payments made during that period, totalling AED 98,750. Ms Khader states that each of those payments were made to the designated mortgage servicing account maintained by the Bank. She attaches relevant documents from the Bank to prove that the payments have been made.
17. Ms Khader did not give any evidence as to efforts taken to explore a sale, other than to say that they “were precautionary, intended to demonstrate co-operation and transparency”. It is clear that both Mr Alyazji’s and Ms Khader’s desire is to retain ownership of the Property and continue to meet Mortgage payments. I am satisfied that Mr Alyazji (whether himself or through Ms Khader) has taken no meaningful steps to sell the Property which is currently subject to a tenancy, the rent for which has been used by Ms Khader to make payments to the Bank on behalf of her husband.
18. Mr Souhayel Tayeb, the Chief Legal Officer of the Bank, provided the Bank’s post-hearing witness statement. Mr Tayeb states that the amount currently required to pay off the debt is AED 911,188.79. That is made up of: (i) AED 827,006.91 (principal); (ii) AED 82,025 (accrued interest); and (iii) AED 2,158.88 (penal interest).⁵
19. Mr Tayeb reviewed the statements produced by Ms Khader for the period from 17 April 2023 to 8 April 2025. Mr Tayeb produced both a “Loan Statement of Account” from 25 January 2018 to 8 April 2025 (the “**Loan Statement of Account**”) and a current account statement for the period 17 April 2023 to 8 April 2025. These showed that the payments made by Ms Khader had been received by the Bank through Mr Alyazji’s current account. They were only credited in part towards the mortgage debt, as reflected in the Loan Statement of Account.
20. Mr Tayeb’s evidence is that the statements “demonstrate that [Mr Alyazji] consistently failed to pay the life insurance premiums associated with the Mortgage”. As a result, Mr Tayeb says, Mr Alyazji’s “current account frequently reflected a negative balance due to the accumulation of unpaid life insurance premiums amount to AED 287.63 per month”. Mr Tayeb goes on to explain that:

⁵ These sub-amounts tally up to AED 911,190.79.



“These premium amounts are automatically debited from [Mr Alyajzi’s] current account whenever funds are debited from [Mr Alyajzi’s] current account whenever funds are credited to the current account. Therefore, the full value of the funds that are credited to the current account for the purpose of satisfying the mortgage payments are not paid to the mortgage .. without first having the current account balance at 0 from the negative balance.”

21. Mr Tayeb’s evidence (including the Loan Statement of Account attached to his witness statement) confirms that payments made by Ms Khader in excess of the overdue insurance premiums had been taken into account in calculating the mortgage debt. He added that no additional charge had been made for interest on the principal, which could have been avoided had Ms Khader’s payments been processed automatically from the current account to the loan (mortgage) account.
22. While Mr Tayeb accepts that late fees were incurred in relation to certain payments made, he explains that *“[Mr Alyajzi] was making payments intermittently to service the loan and hence would not be able to avoid the late fee charged for the already due principal and interest. Therefore, the amounts charged were not due to any delays in transferring the credited funds intended for the mortgage payments from the current account to the mortgage account.”*
23. At the 8 April 2025 hearing, Ms Akram, on behalf of Ms Khader, confirmed that there was no challenge to the Bank’s calculation of what was due, except in respect of the payments that were subsequently identified in her post-hearing witness statement. Based on the additional evidence, I am satisfied that the Bank is entitled to claim as of 8 April 2025 the sum of AED 911,188.79 as its mortgage debt, being the sum identified as the *“Current Pay Off”* amount in the Loan Statement of Account.

Jurisdiction

24. When the Bank filed its claim on 17 October 2024, the Property was located outside of the Abu Dhabi Global Market (**“ADGM”**). At that time, it was subject to the real property regime in force in the mainland Emirate of Abu Dhabi. Understandably, the Bank’s foreclosure application was based on the Abu Dhabi Mortgage Law that applied at the time the application was made.⁶
25. At the time the Property was acquired by Mr Alyajzi from the developer by the SPA⁷, Al Reem Island was part of the mainland Emirate of Abu Dhabi. From 24 April 2023, as a result of the expansion of the jurisdiction of the ADGM to cover Al Reem Island, the Property is now situated in the ADGM.⁸ While, until 31 December 2024, the mainland property laws of the Emirate of Abu Dhabi continued to apply in Al Reem Island,⁹ from 1 January 2025, the ADGM Real Property Regulations 2024 (the **“Real Property Regulations 2024”**) applied to

⁶ See para. 2 above.

⁷ See para. 8 above.

⁸ Cabinet Resolution (No. 41) of 2023, which was issued on 24 April 2023. The Cabinet Resolution came into force on that day.

⁹ ADGM Real Property Regulations 2015, s 157(2); Real Property Regulations 2024, s.178.



properties located within the ADGM.¹⁰ Accordingly, the Bank's foreclosure application now falls to be determined under the Real Property Regulations 2024.

26. When the parties entered into the Mortgage, both the title and mortgage interests were registered with the Abu Dhabi Department of Municipalities and Transport (the "**DMT**"). As a result of passage of the Real Property Regulations 2024, both interests are now registered on the ADGM "*Register*" of "*real property interests*" (the "**ADGM Register**") where Mr Alyazji is shown as the owner of the Property and the Bank as the sole mortgagee.
27. The Bank's claim has been brought under the procedure set out in Rule 30 of the ADGM Court Procedure Rules 2016 (the "**CPR**"). Rule 30 of the CPR is an alternative means by which claims can be brought in the Commercial and Civil Division of this Court, and is used where a Court decision is requested "*on a question which is unlikely to involve a substantial dispute of fact*".¹¹ I accept that this is a suitable case for the Rule 30 procedure.

Analysis

(a) *The mainland Emirate of Abu Dhabi's legal framework*

28. The Mortgage did not stipulate a governing law other than to refer to "*Abu Dhabi's Mortgage Law*". However, it is common ground that, until 31 December 2024, the Bank's rights to seek recovery of the mortgage debt were governed by the Abu Dhabi Mortgage Law.¹²
29. In reliance on Articles 53, 54 and 57 of the Abu Dhabi Mortgage Law, the Bank sought an order for foreclosure of the Mortgage, sale of the Property at public auction and the use of the sale proceeds to repay mortgage debt. Those Articles provide:

"Article 53: Notifications of Violation"

- *The mortgagee creditor or his public or private successor may initiate the procedures of foreclosure of the mortgaged property and offer it for sale in public auction in the event of failure to settle the debt on the fixed date, or if a clause stipulating the maturity of debt before the expiry of such date is fulfilled.*
- *The mortgagee shall, prior to the initiation of the procedures of foreclosure of the mortgaged property and submission of a request before the magistrate of summary justice to attach the mortgaged property and offer it for sale in public auction, send a written notification to the mortgagor and guarantor, if any, by registered mail with acknowledgment of receipt to inform the latter of the occurrence of violation and claim the settlement of the debt and*

¹⁰ From 1 January 2025, the Real Property Regulations 2024 applied to real property on Al Reem Island subject to certain "transitional provisions" set out in Part 23 of the Regulations (see s.184(2) of the Regulations). By article 13(7)(b) of Abu Dhabi Law No (4) of 2013 (as amended by Law No (12) of 2020) the Court of First Instance has exclusive jurisdiction over all civil and commercial claims relating to a contract entered into, executed or performed in whole or in part in the ADGM, or a transaction entered into or performed in whole or in part in the ADGM, or to an incident that occurred in whole or in part in the ADGM.

¹¹ CPR, Rule 30(2).

¹² Articles 53, 54 and 57 of the Abu Dhabi Mortgage Law are set out at para. 29 below.



other dues within a period of no less than (30) days from the date of notification.

Article 54: Violation of the Mortgagor

- Taking into account the provisions of Clause (2) of the previous Article of this Law, should the mortgagor or his guarantor or their public or private successor fail to settle the debt, the magistrate of summary justice shall issue, at the request of the mortgagee creditor, a decision to sell the mortgaged property in public auction according to the procedures applicable at the competent court.

Article 57: Binding Force of Mortgage

The mortgage registered according to the provisions of this Law shall have a binding force upon others concerning what was provided for therein and shall be considered a writ of execution to be executed before the competent execution judge.”

30. Article 53 provides that the mortgagee may initiate foreclosure of the mortgaged property and offer it for sale at public auction in the event of failure to settle the debt on the maturity date. Article 54 provides a means by which a public auction could be ordered. However, importantly, Article 53 requires the mortgagee to give “a written notification” to the mortgagor to inform the mortgagor of the occurrence of a violation and require settlement of the claim within a period of no less than 30 days from the date of notification. In the event of failure to settle pursuant to the notification letter, the mortgagee is entitled to seek orders for the sale of the mortgaged property from the “magistrate of the summary justice”.¹³

(b) The ADGM real property regime

31. From 1 January 2025, the legal landscape changed. It was necessary for the Bank to transfer the registration of its mortgage from the DMT to the ADGM Register established by s. 7 of the Real Property Regulations 2024 and maintained by the Registrar.¹⁴ The Bank has attended to those formalities. Both the title to the Property and the Mortgage are now registered on the ADGM Register.
32. There are a number of hurdles for a mortgagee to overcome to obtain relief under the Real Property Regulations 2024. The first requires compliance with the definition of the term “mortgage” contained in s. 1 of the Regulations:

“1. Types of Real Property Interests

The only estates or interests in real property which are capable of subsisting or of being Conveyed or created at law in the Abu Dhabi Global Market are the interests enumerated in subsections (a) - (j) below, with all other

¹³ Article 54 of the Abu Dhabi Mortgage Law, set out at para. 29 above.

¹⁴ Real Property Regulations 2024, ss. 7–9.



estates, interests and charges in or over real property taking effect as equitable interests–

...

- (g) *mortgage – An interest in real property held by a lender (mortgagee) as security for repayment of indebtedness, where default under that indebtedness entitles the mortgagee to foreclose on the secured interest in real property pursuant to the terms and conditions of the mortgage instrument and other documentation relating to the indebtedness and as described in Part 9 of these Regulations;*

....

(Emphasis added)”

33. Section 67 of the Real Property Regulations 2024 sets out the requirements for a valid mortgage. Section 67 states:

“67. Requirements for mortgage

- (1) *In order to be registered, a mortgage shall include the following–*
- (a) *a description sufficient to identify the real property;*
 - (b) *a description sufficient to identify the interest to be mortgaged;*
 - (c) *a description of the debt or liability secured by the mortgage; and*
 - (d) *a maturity date of the debt or liability secured by the mortgage.*
- (2) *Subsection (1) does not limit the matters that the approved form of mortgage may require to be included in order to permit registration.”*

34. I am satisfied that the requirements of s 67 of the Real Property Regulations 2024 have been met.

35. The definition of “*mortgage*”¹⁵ presupposes that the mortgage document contains a provision entitling foreclosure on the secured interest in the event of default in repayment. In my view, while there is no such express provision in the mortgage,¹⁶ one can be implied. English law as to the implication of terms was considered by the Supreme Court of the

¹⁵ Set out at para. 32 above.

¹⁶ See para. 12 above.



United Kingdom in *Marks & Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Anor*.¹⁷

36. In delivering the majority judgment in *Marks & Spencer*, Lord Neuberger P (with whom Lord Sumption and Lord Hodge agreed) distanced English law from that set out in the advice given by the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd*.¹⁸ Lord Neuberger framed his approach as follows:¹⁹

“[28] In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. ...

[29] In any event, the process of implication involves a rather different exercise from that of construction. As Bingham MR trenchantly explained in Philips [1995] EMLR 472, 481:

'The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.'

(Emphasis added)”

37. At the time the mortgage was executed, in November 2022, the laws of the mainland Emirate of Abu Dhabi applied to it. Articles 53–57 of the Abu Dhabi Mortgage Law²⁰ expressly contemplate use of a foreclosure regime, followed by sale at public auction, to secure repayment of the debt. It is clear that both Mr Alyazji and the Bank understood that a foreclosure order was a remedy available to the Bank if Mr Alyazji were to default on his obligations under the Mortgage. Neither the Bank nor Mr Alyazji would have thought to include an express term giving the Bank the right to foreclose, as that was available under the general law. In those circumstances, I am prepared to imply the right to apply for

¹⁷ Generally, see *Marks & Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Anor* [2016] AC 742 (UKSC).

¹⁸ *Attorney-General of Belize v Belize Telecom Ltd* [2009] 2 All ER 1127 (PC).

¹⁹ Above n 17, at paras [28] and [29].

²⁰ See para. 29 above.



foreclosure under those provisions as a term of the mortgage itself. Accordingly, I hold that the Mortgage is a security to which the relevant enforcement provisions of the Real Property Regulations 2024 will respond.

38. The second question concerns the validity of the legal notice of breach that the Bank asserts was properly served on Mr Alyazji. Under the Abu Dhabi Mortgage Law a “*legal notice*” of that type was required as a precondition to exercise of any remedies available to the mortgagee.²¹ The same is true in respect of mortgages over property in ADGM.²²
39. During the course of argument, Ms Bejoy, for the Bank, submitted that a notice given by the Bank on 13 February 2024, under the Abu Dhabi Mortgage Law, was sufficient to comply with the notice requirements of both Article 53 of the Abu Dhabi Mortgage Law and s. 72(3)(a) of the Real Property Regulations 2024. Both Article 53 and s. 72(3)(a) require a mortgagee to give not less than 30 days’ notice to a mortgagor to enable any default to be remedied.
40. Ms Akram, for Mr Alyazji, resisted Ms Bejoy’s submission, contending that the notice was inadequate. It was served by SMS to, she submitted, a deactivated mobile telephone number that had previously been used by Mr Alyazji. Ms Akram submitted that Ms Khader’s evidence establishes that, from around the date on which the notice was “*served*”, Mr Alyazji was in war-torn Gaza and was unable to contact her. In those circumstances, she submitted that the notice did not comply with either the Abu Dhabi Mortgage Law or the Real Property Regulations 2024.
41. The Bank disputes the basis on which Ms Akram contends the 13 February 2024 notice was not validly served. However, I am not satisfied that the Bank has demonstrated that service was effective. That being so, it is necessary for the Bank to issue a notice under s 72(3)(a) of the Real Property Regulations 2024²³ in order to exercise the powers conferred by s.72(1) of those Regulations. It is clear that an order of the Court must be obtained before a mortgagee can enforce a mortgage registered prior to 1 January 2025²⁴ over a property situated in Al Reem Island. If an order were made, it would be necessary in the circumstances for a s.72(3)(a) notice to be given, irrespective of whether the remedy ordered was foreclosure or sale.²⁵
42. The third question concerns the nature of relief that a mortgagee may obtain under the Real Property Regulations 2024. In the present case, the relevant options are an order for sale under s 72(1)(a) or a foreclosure order under s 78. The Bank has not sought an order entitling it to enter into possession of the Property and to receive rents and profits from it. There is authority for the proposition that an order of that type could be made later.²⁶
43. Sections 72–78 (inclusive) of the Real Property Regulations 2024 govern the circumstances in which the Bank may seek relief for breach of the Mortgage. Those sections have been crafted to make special provision “*in respect of mortgages registered and existing over real*

²¹ See paras. 29 and 30 above.

²² Real Property Regulations 2024, s. 72(3)(a), set out at para. 44 below.

²³ Set out at para. 44 below.

²⁴ Section 72(3)(b) of the Real Property Regulations 2024 is set out at para. 44 below.

²⁵ Real Property Regulations 2024, s. 72(1)(a) and (e), read in conjunction with s. 72(3), both set out at para. 44 below.

²⁶ *Keith v Day* (1888) 39 ChD 452 at 455–456 per Cotton LJ, with whom Fry and Lopes LJ agreed.



property located in Al Reem Island prior to 1 January 2025”.²⁷ For present purposes, s 72(3)(b) of the Real Property Regulations 2024 recognises the need for a court order to be obtained by a mortgagee in order to enforce a mortgage “*registered and existing over real property located in Al Reem Island prior to 1 January 2025*” pursuant to s.72(1) of the Regulations. Section 72(1)(e) acknowledges that the s 72(3)(b) requirement for an order of the Court applies equally to a foreclosure application.

44. Subject to the need, in this case, for the Bank to obtain an order from this Court to enforce its mortgage, s 72(1), (3) and (4) set out what must be done by a registered mortgagee to enforce a mortgage on default by the mortgagor:

“72. Implied powers of mortgagees

- (1) *A registered mortgagee of real property has the following powers on default by the mortgagor–*

- (a) *to sell the whole or part of the real property or any interest in the real property by whatever means the mortgagee, acting reasonably, determines appropriate, including by tender, public auction or by private contract;*
- (b) *to sever and sell fixtures apart from the balance of the real property;*
- (c) *to sell any easement, right or privilege of any kind over or in relation to the real property;*
- (d) *to enter into possession of the real property and receive the rents and profits from it, and, after obtaining possession, grant any easement, right or privilege of any kind over or in relation to the real property; and*
- (e) *to foreclose.*

...

- (3) *A mortgagee may not exercise a power under subsection (1)–*

- (a) *without first serving on the persons listed in subsection (4) a notice giving the mortgagor thirty (30) calendar days in which to remedy the default. If within that time the default is remedied, then the mortgagee may not exercise a power for that default; and*
- (b) *in respect of mortgages registered and existing over real property located in Al Reem Island prior to 1 January 2025, without first applying to the Court to request the right to enforce its security in accordance with these*

²⁷ Real Property Regulations 2024, s. 72(3)(b), set out at para. 44 below.



Regulations and the mortgage documentation and obtaining an order allowing the exercise of such power.

(4) *The persons on whom the notice shall be served are–*

- (a) *the mortgagor;*
- (b) *any guarantor or surety of the mortgagor; and*
- (c) *any other registered mortgagee or chargee.*

(Emphasis added)”

45. A specific right to seek the remedy of foreclosure is conferred by s. 78 of the Real Property Regulations 2024:

“78. Foreclosure

- (1) *On application by a registered mortgagee, the Court may make an order for foreclosure.*
- (2) *If the Court makes an order for foreclosure, the Registrar shall register the order if requested by a party to the proceedings or directed by the Court.*
- (3) *On registration of the order, the mortgagor’s interest in the real property vests in the mortgagee, free from all liability under mortgages or other interests registered after the mortgage, except for leases and other interests that bind the mortgagee”.*

46. The remedy of foreclosure is derived from English law. Foreclosure enables a mortgagee to obtain an order that has the effect of vesting title in the land in it, and retaining the whole of the proceeds of sale of the land, even though a surplus may have been achieved at sale. In short, an order for foreclosure removes the right of a mortgagor to redeem.

47. To meet that unsatisfactory state of affairs, equity intervened to protect a mortgagor’s right to redeem the mortgage: the equity of redemption. The English courts developed a practice to ensure that a foreclosure order did not act as a “clog” on a mortgagor’s equity of redemption. It did so by making an order *nisi*, to give the mortgagor the opportunity to pay the mortgage debt. If the debt were not paid within the stipulated time, the order *nisi* would be made absolute. At that stage, the mortgagee was authorised to sell the property. The right of redemption was then lost.²⁸

48. Section 68 of the Real Property Regulations 2024 makes it clear that a mortgage of real property operates only as a security interest, and not as a conveyance of the legal

²⁸ Halsbury’s Laws of England, Mortgages, Vol 77, 2021 at paras 598, 605, 607–609 and 611.



ownership of the property.²⁹ Section 68(2) emphasises that a mortgagor retains an equity of redemption. In full, s. 68 provides:

“68. Mortgage as charge only

- (1) *A mortgage of real property operates only as a charge on the real property for the debt or liability secured by the mortgage.*
- (2) *For the avoidance of doubt, the mortgagor is taken to have an equity of redemption, which may not be waived by agreement or otherwise clogged by the actions of the mortgagee; provided that the rights of redemption shall not preclude the parties from agreeing to prepayment premiums or restricting periods for repayment.”*

49. One difference between a s. 72(1)(a) sale order and the ability to seek foreclosure under s. 78 is the express statement (in the latter) that a mortgagee takes its interest in the real property subject to any leases or other interests that may bind the mortgagee. Given that an order for foreclosure terminates any interest a mortgagor may have in the property, s. 78(3) confirms the need for the mortgagee to respect existing interests that bind it as the new owner.

50. The fact that there are two options available means that I must decide whether it is more appropriate to grant permission for the Bank to exercise remedies by way of sale under s. 72(1)(a) of the Real Property Regulations 2024 or to permit foreclosure under s. 78. In addressing that question, I need to consider the impact that each order may have on both the mortgagee and the mortgagor.

(c) Exercise of the Court’s discretion

51. In my judgment, to determine the most appropriate remedy, the starting point is the primacy that the law gives to the right of a mortgagor to redeem the mortgage.

52. The importance of the equity of redemption was spelt out by the House of Lords in *Noakes & Co Ltd v Rice*.³⁰ The Earl of Halsbury LC, adopted³¹ what had been said by Lindley MR in *Santley v Wilde*.³² Sitting in the Court of Appeal in *Santley*, the Master of the Rolls had said:³³

“The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law.”

²⁹ This is consistent with the definition of “mortgage” in s. 1(g) of the Real Property Regulations 2024: Section 1(g) is set out at para. 32 above.

³⁰ *Noakes & Co Ltd v Rice* [1902] AC 24 (HL).

³¹ *Ibid*, at 28.

³² *Santley v Wilde* [1899] 2 Ch 474.

³³ *Ibid*, at 474–475.



53. In the same case, Lord Macnaghten put the matter more bluntly:³⁴

“Redemption is of the very nature and essence of a mortgage, as mortgages are recorded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption.”

54. In addition to the express reference to the right of redemption in s. 68(2) of the Real Property Regulations 2024, s. 1(1) of the ADGM Application of English Law Regulations 2015 (the “**English Law Regulations**”) confirms that the “*common law of England (including the principles and rules of equity), as it stands from time to time, shall apply and have legal force in, and form part of the law of, the [ADGM]*”. Section 3(1) of the English Law Regulations requires the ADGM Courts to “*administer English common law and equity on the basis that, wherever there is a conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail*”.
55. While s. 1(1)(a) and (b) of the English Law Regulations make it clear that the principles and rules of equity apply only so far as applicable to the circumstances of the ADGM, and subject to such modifications as those circumstances require, I am satisfied that the express reference to the right of redemption in s. 68(2) of the Real Property Regulations 2024³⁵ is sufficient to apply the principle without modification. In my view, application of the principles and rules of equity in the ADGM supports adoption of the views expressed by the House of Lords in *Noakes & Co Ltd v Rice*.³⁶
56. *Silsby v Hollyman*³⁷ illustrates the difference between an order for foreclosure and one for sale. In that case, the mortgagee sought an order for foreclosure of the premises, whereas the mortgagor sought an order for sale in lieu of foreclosure. There were two different valuations before the Court: one was based on vacant possession, while the other was calculated on the basis of a yield from an existing tenancy. Upjohn J considered it was open to the mortgagee to take possession of the premises subject to the lease. As a result, he made an order for foreclosure. The Judge took the view that because the mortgagee had assessed that foreclosure presented a better opportunity for it to recover its debt, it would “*plainly be inequitable to grant a sale*”.³⁸
57. In *Palk v Mortgage Services Funding PLC*,³⁹ the Court of Appeal of England and Wales considered an application by a mortgagor to direct a sale of mortgaged property against a mortgagee’s wishes, notwithstanding the fact that a large part of the mortgage debt would remain unsecured and outstanding. The mortgagee wished to foreclose. In what circumstances, the Court of Appeal considered, would it be right to override a mortgagee’s choice of remedy in favour of one proposed by the mortgagor?

³⁴ *Noakes & Co Ltd v Rice* [1902] AC 24 (HL) at 30.

³⁵ Section 68(2) is set out at para. 48 above.

³⁶ *Noakes & Co Ltd v Rice* [1902] AC 24 (HL), at 28 (Earl of Halsbury LC) and 30 (Lord Macnaghten), with whom, on this point, Lord Shand, Lord Davey, Lord Brampton, Lord Robertson and Lord Lindley agreed.

³⁷ *Silsby v Hollyman and Anor* [1955] 2 All ER 373 (ChD).

³⁸ *Ibid*, at 396.

³⁹ *Palk v Mortgage Services Funding PLC* [1993] 2 All ER 481 (CA).



58. Delivering the principal judgment of the Court of Appeal, Sir Donald Nicholls V-C (with whom Butler-Sloss LJ and Sir Michael Kerr agreed on this point) explained the existing practice in relation to foreclosure and the reason why such actions had diminished in number over a period of years. The Vice Chancellor said:⁴⁰

“The practice

As one would expect, if a mortgagee seeks to foreclose the court will only direct a sale contrary to his wishes if repayment of his debt is fully secured. This can be achieved by fixing a suitable reserve price for a sale, or by requiring the mortgagor to make a payment into court. Thus in Woolley v Colman (1882) 21 Ch D 169, a mortgagor in a redemption action sought an order for sale. Sale was opposed by the first and second mortgagees. Fry J directed a sale but fixed a reserve price sufficient to protect their interests. In Merchant Banking Co of London v London and Hanseatic Bank (1886) 55 LJ Ch 479 the same approach was adopted. A first mortgagee sought a foreclosure order, and the second mortgagee asked the court to order a sale but postpone it for a year or two. Chitty J. refused to direct a sale and made a foreclosure order. To have directed a sale would have been to extend the usual redemption period without cause. The value of the property was speculative and it was not just that the rights of first mortgagees should be postponed to a speculative sale at the instance of second mortgagees. The judge said (at 480):

'If a sale were ordered, the reserved price would be fixed at an amount which would cover the first mortgage and costs; and if no bid were made, the market value of the property would be depreciated by the knowledge that there had been an abortive attempt to sell it. Therefore, were the Court to direct a sale, the plaintiffs' rights might be seriously prejudiced. The plaintiffs have satisfied me as to the insufficiency of their security.'

The approach exemplified in these two cases hardened into an established practice in the Chancery Division. In its own particular field of foreclosure proceedings the principle underlying this practice is as sound today as ever. In that field it strikes a fair balance between the interests of the parties.

59. Sir Donald Nicholls then explained why foreclosure actions were rarely pursued by the time that *Palk v Mortgage Services Funding PLC* was decided in 1992. His Lordship said⁴¹:

“So far as I am aware, foreclosure actions are almost unheard of today and have been so for many years. Mortgagees prefer to exercise other remedies. They usually appoint a receiver or exercise their powers of sale. Take the present case: the security is inadequate, but [the mortgagee in the case before the Court] is not seeking to foreclose, nor is it seeking to sell at once. It is seeking to hold onto the house, preferably without becoming

⁴⁰ Ibid, at 485.

⁴¹ Ibid, at 485.



accountable as a mortgagee in possession, with a view to exercising its own power of sale at some future date. It is seeking to do this despite the income shortfall mentioned above. The nineteenth century cases were not concerned with this situation. The principle applied in those cases does not address the problem which has now arisen. Underlying the present case is not merely a disagreement between a mortgagor and a mortgagee about the likely future trend of house prices. I suspect that probably another feature is a difference in their attitudes towards taking risks. We were told that [the mortgagee] has many properties in a similar situation and that this case raises an important question of principle for the company. A substantial lender may be prepared to take risks that would be imprudent for a householder with limited financial resources.”

...

60. Sir Michael Kerr also considered the boundaries around a judicial power to order a sale of the property against the wishes of a mortgagee. His Lordship said:⁴²

“... I accept, of course, that it must be only in exceptional circumstances that the power will be exercised against the mortgagee’s wishes when a substantial part of the mortgage debt will nevertheless remain outstanding. Whenever a mortgagee can demonstrate a real possibility, let alone a probability, that a refusal or postponement of a sale would be financially beneficial, because of the property’s likely increase in value or because of the extent of the revenue which it would generate in the interim, then the mortgagor’s request for a sale will no doubt be refused out of hand, even though either of these events would also pro tanto inure to his financial benefit. The reason is that when the financial prospects are fairly evenly balanced, let alone when the balance of the argument favours the mortgagee, his wishes should be given preference. An order for sale would deprive him of contractual rights without any fault on his part, and would confer a benefit on the mortgagor to which he is not contractually entitled.

...”

61. In this case, there is no evidence of current market value. Mr Alyazji paid AED 1,600,000 for the Property when the SPA was entered into on 20 September 2015. Whatever the state of the market for apartments in Al Reem Island, I am not prepared to infer that the market has fallen so far that a surplus could not be available for Mr Alyazji on sale. If the purchase price paid (AED 1,600,000) was equivalent to the 2025 valuation, foreclosure and sale by the Bank could provide a windfall to it of something in the order of AED 690,000. That sum is calculated by deducting the amount that Mr Tayeb says is owing to the Bank (AED 911,188.79) from the 2015 price of AED 1,600,000.
62. At this stage, it cannot be asserted confidently that a sale of the Property would not yield an amount that would produce a surplus for the mortgagor. If an order for foreclosure were made, its effect would be to deem the equitable right of redemption to be at an end.⁴³ To

⁴² Ibid, at 491.

⁴³ Halsbury’s Laws of England, Mortgages, Vol 77, 2021 at para. 609.



refuse an order for foreclosure in those circumstances is not unprincipled. In *Palk v Mortgage Services Funding PLC*, Sir Michael Kerr made it clear that the respect to be afforded to a mortgagee's choice of remedy arises primarily in cases where there is real doubt that the mortgage debt will be repaid in full.⁴⁴

63. In the absence of clear evidence as to the likelihood or otherwise of a surplus being available on sale by the Bank, I consider that a remedy should be granted under s. 72(1)(a) of the Real Property Regulations 2024 to avoid the possibility (whether likely or remote) that the mortgagor's right to receive a surplus from the sale price might be lost. It would be unjust for the Bank to retain a windfall of something in the vicinity of AED 690,000 if the Property were sold for something close to the original purchase price paid by Mr Alyazji.
64. It is clear that neither Mr Alyazji nor Ms Khader currently have the means to meet regular payments due under the Mortgage. Nor are they able to repay the outstanding debt at the present time. Applying relevant equitable principles, however, it would be wrong in principle for them to be deprived of any surplus from the sale after the Bank's debt has been paid in full together with all attendant costs, including those incurred in this proceeding and costs of sale. Furthermore, at the hearing on 8 April 2025, Ms Bejoy fairly agreed with my indication that "*if there is a chance that there could be a surplus, then the equity of redemption needs to be retained*", and was content to leave it to the Court "*to deal with the best approach taking care of both the mortgagor's and the mortgagee's interests.*"

Decision

65. For the above reasons, I have decided that:
 - a. Pursuant to s 72(3)(b) of the Real Property Regulations 2024, the Bank is entitled to exercise its rights to enforce the Mortgage in the manner set out below.
 - b. Pursuant to s 72(3)(a) of the Real Property Regulations 2024, the Bank must serve on Mr Alyazji a notice giving him 30 calendar days in which to remedy the default.
 - c. Unless Mr Alyazji were to remedy the default within the period of 30 calendar days, on the expiry of that period, the Bank may sell the Property or any interest in it by public auction.
 - d. From the proceeds of any sale, the Bank shall, after payment of all amounts to be paid to the Bank and any third parties pursuant to s.76 of the Real Property Regulations 2024, account to Mr Alyazji for any surplus.
 - e. Leave is reserved for the Bank to seek an order for possession under s. 72(1)(d) of the Real Property Regulations 2024 should it consider that remedy more appropriate, given the existence of the present tenancy.
66. In relation to costs of the proceedings, these are to follow the event. However, I will defer my decision on costs pending receipt of the parties' costs submissions. The parties will have an opportunity to make submissions on whether indemnity or standard costs should

⁴⁴ *Palk v Mortgage Services Funding PLC* [1993] 2 All ER 481 (CA), at 491, set out at para. 60 above.



be ordered, and, if so, in what sum, following which the Claimant's costs are to be summarily assessed.

67. Accordingly, I direct that costs submissions be filed and served as follows:
- a. The Bank shall file and serve its costs submissions by 4.00 pm on 16 May 2025.
 - b. Mr Alyazji shall file and serve any costs submissions in reply by 4.00 pm on 30 May 2025.
68. The formal orders of the Court that give effect to this judgment will be set out in an Order to be issued contemporaneously.



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
1 May 2025