

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

2009/CLE/gen/01398

IN THE MATTER of an Indenture of Mortgage made the 29th day of April, A.D., 2002 between Phillip Arlington Mitchell and Brenda Mae Mitchell (his wife) and Finance Corporation of Bahamas Limited

AND IN THE MATTER of an Indenture of Further Charge made the 26th day of January, A.D., 2007 between Phillip Arlington Mitchell and Brenda Mae Mitchell and Finance Corporation of Bahamas Limited

AND IN THE MATTER of an Indenture of Further Charge made the 17th day of July, A.D., 2007 between Phillip A. Mitchell and Brenda M. Mitchell and Finance Corporation of Bahamas Limited

AND IN THE MATTER of the Mortgages Act, Chapter 156 of the Revised Laws

BETWEEN

FINANCE CORPORATION OF BAHAMAS LIMITED

Plaintiff

AND

PHILLIP ARLINGTON MITCHELL

First Defendant

AND

BRENDA MAE MITCHELL

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Audley Hanna Jr with him Mrs. Sharon Rahming-Rolle of Higgs & Johnson for the Plaintiff

First Defendant in person. Pro se litigant

No appearance for the Second Defendant

Hearing Dates: 11, 15 and 19 February 2021

Civil - Mortgagee rights vis-à-vis Mortgagor - Enforcement Proceedings - Stay of Proceedings - Functus Officio - Irregularities - Section 23(3) of the Homeowners Protection Act, 2017

On 14 September 2009, the Plaintiff commenced proceedings against the Defendants seeking, inter alia, Judgment for sums due and owing under a Mortgage between the parties, an Order for vacant possession of the subject property and a declaration that the Plaintiff was entitled to exercise its power of sale over the subject property. The Order was granted as prayed on 15 April 2014 (the “Order for Vacant Possession”).

By Notice of Appeal Motion filed in the Court of Appeal on 20 May 2014, the First Defendant appealed the Order for Vacant Possession, and, in the interim, was granted a 90 day stay of execution of the said Order. The Court of Appeal dismissed the Defendant’s appeal on 21 March 2018. Thereafter, the Defendants filed a Notice of Appeal Motion seeking leave to appeal to the Judicial Committee of the Privy Council (“the Privy Council”) on 9 April 2018. By this Notice of Appeal Motion to the Privy Council, the Defendants also seek an Order for stay of proceedings pending the outcome of the Appeal. This application remains extant.

On 14 April 2020, a Writ of Possession was issued to the Plaintiff, by virtue of which the Deputy Provost Marshall of the Supreme Court attended at the residence of the Defendants to execute the same in January 2021. The First Defendant then filed the present application, seeking, *inter alia*, a stay of proceedings pending the Appeal to the Privy Council and also seeking to set aside the Order for Vacant Possession together with the Praecipe and Writ of Possession. The First Defendant claims that there are new facts which have arisen since the granting of the Order for Vacant Possession which would justify the said Order being set aside and that, due to issues of: limitation; and irregularities in form and procedure, the Order for Vacant Possession; the Praecipe; and the Writ of Possession ought also be stayed or set aside.

HELD: The Defendants’ application to set aside the Order for Vacant Possession, the Praecipe and Writ of Possession and to stay execution of the said Order and Writ of Possession is dismissed. The Defendants are to pay the Plaintiff’s costs of the application, to be taxed, if not agreed.

1. The court becomes *functus officio* once a judgment or final order has been entered. Having regard to the fact that an Order was granted in relation to the Bank’s entitlement to sums due and owing under the Mortgage and to vacant possession of the subject property, there are no further functions which this Court has the power to exercise as it relates to the terms or effect of the Order. This is particularly relevant in this case where there has been an appeal to the Court of Appeal and such appeal has been dismissed: **Swart and others v. Metaxides (In his capacity and as a representative of six others) and another** [2007] 2 BHS J. No. 10; **Colin Wright v The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)** (SCCivApp No. 111 of 2018) & Ors..
2. The type-written words ‘Higgs & Johnson’ is an acceptable signature on the Praecipe as recent cases have determined that the ordinary meaning of the word “signed” had developed in such a way to extend beyond strictly the writing of one’s name in one’s own

hand: **Neocleous v Rees** [2019] EWHC 2462. The case of **Firstpost Homes Ltd v Johnson** [1995] 1 WLR 1567 is distinguishable.

3. The six year period for the enforcement of the Order for Vacant Possession must be counted from the date of the Court of Appeal Judgment (2018) and not the date of the Supreme Court Judgment (2014). Further, if there were to be an appeal to the Privy Council, then it would be from the date of the delivery of the Privy Council Judgment. Further, the Homeowners Protection Act came into force in 2017 and is therefore not applicable to the present action which was commenced in 2009.
4. The Praecipe and the Writ of Possession are in the standard and accepted form. Further, even if an application is defective and/or irregular, the Court still retains the inherent power to remedy such defects, particularly at an early stage of the proceedings if they are not fatal: **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46.
5. Order 45 rule 3(2) of the Rules of the Supreme Court has no applicability to the present case. The issue as to whether that this is an Order 77 action was settled by two courts. This Court therefore has no jurisdiction to consider this ground. The Defendants have appealed to the Privy Council, which is the only court which can now deal with this issue.
6. The Defendants have sought to utilize the machinery of this Court by virtue of a series of hopeless applications to thwart the right of the Bank to obtain vacant possession of the subject property. The mechanisms of the Court cannot be allowed to be used to circumvent the objectives of the Court in delivering justice to a successful plaintiff. The Court must also prevent its machinery from being used as a means of vexation and oppression. The court will only grant a stay in special circumstances, so as not to deny the successful plaintiff of the fruits of his victory: **Smith v. The Bahamas Real Estate Association** [2015] 2 BHS J No. 8; **Linotype-Hell Finance Ltd. V. Baker** [1993] WLR 321; **Citibank NA v. McDonald** [2004] BHS J. No. 452; **In the Matter of the Contempt of Court of Donna Dorsett-Major on 3 June 2020** [2020/CLE/gen/0000] (unreported); **Opac Bahamas Ltd. v. Duane Bennett Parnham and Leigh Magdalene Parnham** 2019/GLE/gen/00127 (unreported);
7. The facts which the First Defendant says are 'new facts' were within the Defendants' knowledge or were available to them at the time when these proceedings were first commenced.
8. Any consideration as to the prospects of the Defendants being able to successfully appeal to the Privy Council falls outside of the jurisdiction of this Court and can only now be considered by the Court of Appeal.

RULING

Charles J:

Introduction

- [1] By *ex parte* Summons filed by the First Defendant (“Mr. Mitchell”) on 2 February 2021 (“the Summons”) and supported by the affidavit of Mr. Mitchell with a Certificate of Urgency filed on 6 February 2021, Mr. Mitchell seeks, in the main, a stay of execution by the Plaintiff (“the Bank”) to enforce the Order for Vacant Possession by virtue of a Writ of Possession (“WOP”) which was issued and filed on 14 April 2020. The WOP seeks possession of the Defendants’ matrimonial home situate at Twynam Heights, in the Eastern District of New Providence (“the subject property”). The stay application is made pursuant to Order 45 Rule 11, Order 2 and Order 77 of the Rules of the Supreme Court (“RSC”).
- [2] According to Mr. Mitchell who appeared *pro se*, if this Court does not grant the stay, he and his family will be rendered homeless; they will lose their sacred and holy sanctuary where they gather to rest, pray and give thanks to the Heavenly Creator and they will face the predicament of catching Covid-19 with the possibility of dying from it. He therefore implores the Court to grant him a stay pending his appeal to The Judicial Committee of the Privy Council (“the Privy Council”). Indeed, his plea is emotive.
- [3] The Bank opposes the application and relies on the following documents:
1. the Originating Summons filed on 14 September 2009 (the “Originating Summons”);
 2. the Judgment of Justice Milton Evans (“Evans J”) dated 15 April 2014 (the “Possession Judgment”);
 3. the Notice of Appeal Motion filed on 28 May 2014 (the “Notice of Appeal”);
 4. the Order of Evans J. granted on 28 May 2014 (unfiled) (the “Stay of Execution Order”);

5. the Ruling of the Court of Appeal pronounced on 21 March 2018, (the “Court of Appeal Ruling”);
6. the Notice of Appeal Motion filed on 9 April 2018 seeking leave to appeal to the Privy Council (the “Privy Council Motion”);
7. the Praecipe for Writ of Possession filed on 23 January 2020 (the “Praecipe”);
8. the Order of Evans J. pronounced on 15 April 2014 and filed on 14 April 2020 (the “Order for Vacant Possession”);
9. the Writ of Possession filed on 14 April 2020 (the “WOP”);
10. the Summons;
11. the Affidavit of Mr. Mitchell filed on 5 February 2021 (the “Mitchell Affidavit”);
and
12. the Affidavit of Trevor J. Lightbourn filed on 11 February 2021 (the “Lightbourn Affidavit”).

Background facts

- [4] Some background facts, which can be distilled from the documents relied upon by both parties, will put this case in its proper perspective.
- [5] By Originating Summons filed on 14 September 2009 and made pursuant to RSC O.77 r 1(a) and (d), the Bank commenced the present action against Mr. Mitchell and his wife, Brenda Mae Mitchell (“Mrs. Mitchell”) (together “the Defendants”) seeking, inter alia, Judgment for sums due and owing under a Mortgage between the parties, an Order for vacant possession of the subject property and a declaration that the Bank was entitled to exercise its power of sale over the subject property. On 15 April 2014, the Bank obtained the Order for Vacant Possession

before Evans J (as he then was). Both Defendants were present in Court at the time of delivery of the Judgment (“the Possession Judgment”).

- [6] On 20 May 2014, the Defendants filed a Notice of Appeal in the Court of Appeal, following which, Evans J. granted a stay of the Possession Judgment to enable the Defendants to prosecute their appeal.
- [7] On 21 March 2018, the Court of Appeal delivered a unanimous decision dismissing the Defendants’ appeal and affirming the Possession Judgment of Evans J. Subsequent to the dismissal of the Defendants’ appeal, the Defendants filed, on 9 April 2018, a Notice of Appeal Motion seeking Leave to Appeal to the Privy Council (“the Privy Council Motion”). The Defendants also sought a Stay of Execution of the Judgment of the Court of Appeal.
- [8] The relief sought in the Privy Council Motion remains extant. There is no evidence before this Court as to the efforts made by the Defendants to have the Privy Council Motion heard. The Privy Council Motion was filed two months shy of three years.
- [9] By virtue of the Praecipe, the Bank applied to enforce the Order for Vacant Possession and the WOP was issued and filed on 14 April 2020.
- [10] Following the issuance of the WOP, Counsel for the Bank notified the Defendants by way of email of the issuance of the WOP and the intention to execute the same within fourteen (14) days following the cessation of the Emergency Order which was then in place.
- [11] The Deputy Provost Marshal (“the Marshal”) effected service of the aforesaid documents in July 2020. However, based upon general and specific instructions provided by the Bank in relation to suspending repossessions due to the Covid-19 Pandemic, a request was made to the Marshal to hold off on repossessing the subject property.

[12] At the end of the suspension period, a request was made to the Marshal in January, 2021, to proceed with the execution of the WOP. It was upon the return of the Provost Marshall in January 2021, with a request for the Defendants to vacate the subject property by the first week in February 2021 that the Defendants then filed the present application for a stay of execution.

[13] After filing an appeal to the Court of Appeal and the Privy Council Motion; the latter still pending, the Defendants now turn around and argue that the Bank is out of time (since the Judgment of Evans J was given in April 2014) and is no longer in the position to enforce the Order for Vacant Possession. The Defendants seek the following reliefs:

1. an Order that the Praecipe, the WOP and the Order for Vacant Possession be set aside or their execution stayed pending their appeal to the Privy Council;
2. a declaration that the Bank is prohibited from recovering any sums borrowed by the Defendants;
3. an order that the Bank return all title documents for the subject property to the Defendants;
4. an order preventing the Bank from enforcing any WOP and/or preventing it from evicting the Defendants; and
5. an order that the Bank do pay the Defendants costs of the application, to be taxed if not agreed.

[14] There are 14 grounds listed by Mr. Mitchell in support of the Summons, namely:

- 1) The Praecipe, WOP and Order for Vacant Possession are all based on conditional terms of events which never occurred, nor breached by the Defendants to justify or warrant any possession procedures and are

irregular and amount to nullities, as they are all manifestly defective and/or procedurally wrong;

- 2) There are **material changes** in circumstances since the pronouncement of the aforesaid Judgment or Order of the Court;
- 3) The Bank is now **time barred** by statute pursuant to section 23(3) of the Homeowners Protection Act, 2017 (“HOPA”) and is no longer permitted to recover any sum owing under any Judgment by the Court for the repayment of any sums borrowed by the Defendants, after expiry of six years from the date on which the judgment was obtained or the date of the last payment pursuant to that judgment;
- 4) Leave of the Court was required for the issuance of the WOP and the Bank failed to seek or obtain any such leave, as its action was not a mortgage action to which Order 77 of the Rules of the Supreme Court 1978 (the “RSC”) applies, and is a violation of Order 45 Rule 3(2) of the RSC;
- 5) Pursuant to Order 45 Rule 7(2)(a) of the RSC, the Court Order was not served on the 2nd Defendant personally or otherwise, and as such it is not enforceable against her. Further, at the time the said Praecipe and WOP were issued, no Order of the Court had been served on any of the Defendants personally or otherwise and as such the said WOP is also not enforceable against any of the Defendants;
- 6) The Bank is also time barred pursuant to Order 46 Rule 2(1) of the RSC, as it did not seek leave of the Court for the issuance of the said WOP, as the Judgment or Order of the Court was only valid for six years, and such time has lapsed since the date of the Judgment or Order;
- 7) The Bank also failed to seek leave of the Court to issue the said WOP, as it is a mandatory requirement pursuant to Order 46 Rule 4 of the RSC;

- 8) The said WOP did not contain sufficient description of the Defendants' property (sole marital dwelling home etc.). Further, whether or not there was the existence of a dwelling house, the value thereof, the occupants or possessors inter alia which is also a mandatory requirement pursuant to law;
- 9) The body of the said WOP was devoid of the names of any of the Defendants and simply referred to unnamed Defendants. Therefore, the said WOP was not addressed to any of the Defendants. The names of the Defendants in the body of the said WOP is mandatory to enable them to be bound thereby;
- 10)The said Praecipe is invalid, as it was not signed by or on behalf of the attorneys of the person (bank/purported execution creditor) entitled to the execution. The said Praecipe was not signed at all, which contravenes the mandatory requirements or provisions of Order 46 Rule 6(3) of the RSC;
- 11)The Defendants **would be ruined** if the aforesaid documents and enforcement thereof are not set aside or stayed;
- 12)The Defendants have an application by way of Notice of Appeal Motion for leave to appeal to the Privy Council, which also contains an application for a stay of execution relative to this action. Such application is currently pending before the Court of Appeal, which has **some prospect of success**;
- 13)To preserve the status quo until the Court of Appeal can hear and determine the relative stay of execution application and leave to appeal to the Privy Council; and
- 14)It would create a grave **risk of injustice** if the aforesaid documents and the pending enforcement thereof are not set aside or stayed.

Discussion

- [15] Mr. Mitchell made comprehensive oral as well as written submissions to the Court. Firstly, he submits that this Court has allowed the Bank to cause it to err in interfering and usurping the functions, powers and authority of the Court of Appeal and the Privy Council in wrongfully issuing the WOP pursuant to matters which are pending before the Court of Appeal and/or the Privy Council. According to him, this is a Contempt of Court. Therefore, the WOP and its enforcement must be stayed.
- [16] The Court observes that after the Defendants filed the Privy Council Motion (“For Leave to Appeal to the JCPC, a Stay, a Waiver, inter alia”) on 9 April 2018, they have done little or nothing to have that application heard. Why the rush to this Court on an urgent basis is inexplicable since this Court is *functus officio* as the discussion below will demonstrate.

Functus officio

- [17] The Bank submits that none of the grounds advanced by the Defendants in the present application have any merit and they cannot justify their application. In any event, says the Bank, this Court is *functus officio* in relation to most of the issues raised. The Bank further submits that, to the extent that this Court may retain jurisdiction in respect to any of the grounds, the Defendants have not established any legal basis as to why such jurisdiction should be exercised.
- [18] Learned Counsel Mr. Hanna Jr., who appeared for the Bank, submits that it is well-established that the court becomes *functus officio* once a judgment or final order has been entered. He relied on **Swart and others v. Metaxides (In his capacity and as a representative of six others) and another** [2007] 2 BHS J. No. 10, where Isaacs, JA, at paragraph 32 cited, with approval, **Highway Customs Warehouse Ltd. v The Queen** 2007 TCC 715 (CanLII) as authority for the position that the Court becomes *functus officio* once a judgment or final order disposing of the dispute has been entered.

[19] This very point of a judge becoming *functus* once final judgment had been entered was restated in another judgment of the Court of Appeal just two days ago (17 February 2021) in the case of **Colin Wright v The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)** (SCCivApp No. 111 of 2018) & Ors. The Court of Appeal dealt with an application for Leave to Appeal to the Privy Council and a Stay of Execution. In delivering the Judgment of the Court of Appeal, Isaacs JA stated, at paragraph 31:

“The Judge did not err when she focused on the applications that were before her and did not allow herself to be distracted by an application to impeach the action in which the final judgments had been given. We are satisfied that the Judge was functus officio once final judgment had been entered and, even if she had been minded to entertain a summons questioning the propriety of the results in the case, she would have fallen into error had she so done. Thus, we hold the view that there is little prospect in this ground and it is not of sufficient moment to warrant their Lordships’ attention; and the exercise of our discretion to grant leave on this ground.”[Emphasis added]

[20] Having regard to the fact that an Order was granted in relation to the Bank’s entitlement to sums due and owing under the Mortgage and to vacant possession of the subject property, there are no further functions which this Court has the power to exercise as it relates to the terms or effect of the Order. This is particularly relevant in this case where there has been an appeal to the Court of Appeal which was dismissed.

[21] Therefore, the relief sought by Mr. Mitchell, in particular, to set aside the Order for Vacant Possession is fundamentally flawed.

Alleged irregularities in the form of the Praeceptum and the WOP

[22] In his submissions, Mr. Mitchell raises a number of issues with respect to irregularities and defects of the Praeceptum and the WOP. He submits that the Praeceptum, filed on 23 January 2020, was not signed by the attorney for the Bank or at all and this violates the mandatory requirements for the issuing of the WOP.

- [23] He next submits that the type-written words HIGGS & JOHNSON are not considered a signature as the signer of the Praecipe document must sign his own name (or the name of the law firm with his own hand upon it). In this regard, he relies on the case of **Firstpost Homes Ltd v Johnson** [1995] 1 WLR 1567. **Firstpost** was decided in 1995 and concerns the sale of land. As the case of **Neocleous v Rees** [2019] EWHC 2462 shows, the times have changed. This case concerned settlement of a right of way dispute in the First-tier Tribunal. The parties' solicitors agreed terms by telephone, which were then confirmed by email. One of the parties subsequently sought to resile from the agreement, on the basis that the email exchange did not comply with section 2 of the 1989 Act.
- [24] The issue which arose for determination was whether the automatic generation of the solicitors' electronic signature was sufficient to "sign" the document in accordance with section 2. The Court found that the guide as to whether an automatically generated electronic signature could be considered proof of signature in land law, was the test set out in **J Pereira Fernandes SA v Mehta** [2006] EWHC 83 (Ch). The case concerned the requirements set out in the Statute of Frauds namely, that an automatic electronic signature has the power to create a contract if the sender of the email intends, by the inclusion of the signature, to give their authority to the document.
- [25] In my view, having the type-written words of HIGGS & JOHNSON are acceptable. The reasoning emanating from the later cases decided after **Firstpost** was that the ordinary meaning of the word "signed" had developed since **Firstpost**, to extend beyond strictly the writing of one's name in one's own hand. [Emphasis added]
- [26] Mr. Mitchell also argues that the WOP which was filed on 14 April 2020 was issued without leave of the Court and it was not an action to which O. 77 applies. He submits that the Bank did not apply and indeed did not receive leave of the Court as six years have elapsed since the Judgment or Order.

[27] It must be noted that the six years which Mr. Mitchell speaks about must be counted from the date of the Court of Appeal Judgment (2018) and not the date of the Supreme Court Judgment (2014). Further, if there were to be an appeal to the Privy Council, then it would be from the date of the delivery of the Privy Council Judgment. Further, the Homeowners Protection Act (“HOPA”) came into force in 2017 and is therefore not applicable to the present action which was commenced in 2009.

[28] Mr. Mitchell also submits that the WOP failed to include a sufficient description of the subject property such as (i) the existence of a dwelling house; (ii) the value there of; (iii) the occupants therein: See Supreme Court Practice Section 45/3/2. He further argues that the WOP failed to include the names of any of the Defendants in the body. It only noted unnamed defendants and was thereby not addressed to them. For these reasons, he submits that the Defendants are not bound by it as it is fatally flawed and defective. He also submits that the Bank somewhat accepted that it breached the provisions of the RSC.

[29] As regards any irregularities in the form of the Praecipe and the WOP, the Bank contends that both of these documents are in the standard and accepted form. This is correct. The Bank further contends that, in any event, any defect or omission would at worst be a procedural defect which does not invalidate the documents. In this regard, the Bank relies on Order 2 rule 1(1) of the RSC which provides:

“Where, ... at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.”

[30] In addition, the guidance notes in The Supreme Court Practice, 1995, Volume 1, in relation to the above Rule, state that such irregularities may be cured by the Court by the exercise of its discretion, which is likely to depend on whether it

appears that the other party has suffered prejudice as a direct consequence of the irregularity.

- [31] In reference to Mr. Mitchell's contention that the procedure adopted in execution of the WOP being flawed due to non-service of the Order for Vacant Possession on the Defendants, the Bank submits that this ground must also fail based on the facts outlined in the Mitchell Affidavit. Mr. Mitchell admits, at paragraphs 9 and 10 of his Affidavit, that attempts were made to serve the Order for Vacant Possession in July 2020 and that it was in fact served in January 2021. As the Bank correctly contends, in any event, both Defendants were present in Court at the time that Evans J delivered the Possession Judgment. They also received a copy of that judgment. It follows that the Defendants were, at all material times, fully aware of the terms of the Order for Vacant Possession. Further, they even applied for a stay of the Possession Order. In addition, the Defendants filed and participated in an appeal of the Possession Judgment.
- [32] The Bank denies that there are any irregularities in the form of the WOP since it was drafted in accordance with directions issued by the Court by virtue of the Memorandum of the Registrar of the Supreme Court to Members of the Bahamas Bar Association dated 11 May 2019 ("the Memorandum"): paragraph 13 of the Lightbourn Affidavit. In any event, the Defendants have not alleged that they suffered any prejudice as a result of alleged irregularities.
- [33] In terms of procedural irregularities (which I did not find), even if an application is defective and/or irregular, the Court still retains the inherent power to remedy such defects particularly at an early stage of the proceedings if they are not fatal. In this regard, I am reminded of my own judgment in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 which was appealed to the Privy Council. Lord Collins, who delivered the Judgment had this to say at paragraph 1:

"It has often been said that, in the pursuit of justice, procedure is a servant and not a master...."

[34] As I see it, the Defendants (and particularly Mr. Mitchell) are clutching at straws in their numerous attempts to prevent the execution of the WOP and enforce the Order for Vacant Possession.

The Limitation Issues

[35] Mr. Mitchell argues that the Bank cannot execute the WOP because it requires leave of the Court. This argument lacks merit.

[36] The Order for Vacant Possession was granted on 15 April 2014 and the application for the WOP filed on 23 January 2020. The WOP itself was issued and filed on 14 April 2020 (one day shy of six years) and therefore the six (6) year limitation period referred to by Mr. Mitchell would not have expired at the relevant time; even if I were to accept (which I do not) that time began to run from 15 April 2014, immediately after the pronouncement of the Order for Vacant Possession, as opposed to from the date of the Court of Appeal Ruling. Accordingly, there was no need, in any event, to apply for leave to issue the WOP. The Bank is, therefore, well within its right to continue with enforcement proceedings under the WOP.

[37] The Bank further correctly submits that, in any event, by virtue of the Supreme Court (Covid 19) Rules 2020, the Supreme Court (Covid 19) (No. 2) Rules, 2020 and the Supreme Court (Covid 19) (No. 3) Rules, 2020, various extensions were granted to the time within which actions could be taken under the Rules of the Supreme Court, with the final extension ending 7 September 2020. These are in addition to Order 4 of the Emergency Powers (Covid 19) (Special Provisions) Order, 2000 which provides:

“Any limitation of time provided under the Limitation Act ... is suspended from the 17th day of March, 2020 for the duration of the state of public emergency and extending thirty days thereafter.”

[38] The Bank urges the Court to find that all grounds of the application dealing with the issue of limitation must also fail and the orders and declarations sought in connection thereto must be refused. I agree.

Leave Required for Issue of a Writ Pursuant to RSC Order 45 Rule 3(2)

[39] Mr. Mitchell contends that the WOP filed on 14 April 2020 was issued without leave of the Court and it was not an action to which Order 77 applies. He relies on RSC Order 45 rule 3(2) which states:

“A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 77 applies.”

[40] Mr. Mitchell submits that the Bank did not apply by *ex parte* Summons with affidavit in support for leave of the Court for the issuance of the WOP.

[41] This action was commenced by virtue of the Originating Summons pursuant to RSC Order 77. This was accepted by Evans J and confirmed by the Court of Appeal. Therefore, Order 45 rule 3(2) has no applicability to the present case. The issue that this is an Order 77 action was settled by two courts. This Court has no jurisdiction to revisit this ground. The Defendants have appealed to the Privy Council. That is the only court which can now deal with this issue.

Preservation of the status quo

[42] The Bank submits that, having regard to the legal issues open for consideration, the Defendants' intended appeal to the Privy Council has no reasonable prospect of success. According to the Bank, the legal principles surrounding the rights of a mortgagee as against a mortgagor are well settled. There is no basis, upon the facts before the Courts, upon which any Court can find that the Bank was not entitled to the grant of the Order of Vacant Possession at the time it was made. To the extent that there is any controversy remaining on this issue, it is a matter which can only be considered and determined by the Privy Council. For that reason, the Bank submits that any issues which relate to the right of the Bank to vacant possession have been determined by the Court of Appeal and it is now squarely and solely within the jurisdiction of the Court of Appeal to consider whether or not to grant a stay pending appeal to the Privy Council in relation to matters underlying the merits of the action. I agree with these submissions.

- [43] Learned Counsel for the Bank, Mr. Hanna Jr., invites the Court to reject any contention that it is not now entitled to enforce the Order for Vacant Possession. Mr. Hanna Jr. submits that it is plain from the history of this action that the Defendants have sought to utilize the machinery of this Court by virtue of a series of hopeless applications, such as the instant one, to thwart the right of the Bank to obtain vacant possession of the subject property.
- [44] Mr. Hanna Jr. also submits that the Defendants' application for leave to appeal to the Privy Council has been pending for nearly three (3) years and the Defendants should not be allowed to continue to stall the Bank's enforcement of its legal rights by the multitude of applications. The mechanisms of the Court cannot be allowed to be used to circumvent the objectives of the Court in delivering justice to the Bank who was successful in this Court and the Court of Appeal.
- [45] According to Mr. Hanna Jr., the history of hopeless applications on the part of the Defendants is clearly an abuse of the process of the Court and the Court must prevent its machinery from being used as a means of vexation and oppression. It is clear from the contents of the Mitchell Affidavit that what Mr. Mitchell seeks to litigate are matters which could or should have been litigated in earlier proceedings which have already been determined. In particular, Mr. Mitchell contends that new facts and circumstances have arisen since the making of the Order for Vacant Possession. However, the facts of the case dictate that the matters which Mr. Mitchell contends constitute new facts, were facts and matters which were within the Defendants' knowledge or available to them at the time when these proceedings were first commenced.
- [46] Mr. Hanna Jr. urges this Court to dismiss the application herein in accordance with settled legal principles associated with the striking out of applications which are an abuse of the process of the Court: see RSC Order 18 rule 19 and Order 31A, rules 18 (powers of the Court) and 20(1)(b) (Striking out as abuse of the process). Such principles are not novel. They have been applied by the Court over and over

throughout the years and are well settled: see, for example, the case of **Goldsmith v. Sperrings Ltd.** [1972] 2 All ER 566 at page 574.

[47] Also, in **Smith v. The Bahamas Real Estate Association** [2015] 2 BHS J No. 8, a case relied upon by the Bank, Fraser J applied the principles in **Linotype-Hell Finance Ltd. V. Baker** [1993] WLR 321 on the common law position regarding a stay of execution of an order pending an appeal. She held that the main ground for granting the stay would be that a defendant is able to convince the court that without a stay, he will be ruined financially and that the appeal has some prospect of success. She stated further, at paragraph 19 of the ruling, that the court will only grant a stay in special circumstances, so as not to deny the successful plaintiff of the fruits of his victory. Fraser J also cited the case of **Citibank NA v. McDonald** [2004] BHS J. No. 452. In refusing the application for the stay, the learned judge found that:

“...the stay could only prejudice the plaintiff and deny him what he is entitled to as a result of the decision of this court.”

[48] These very principles were applied by this Court in the case of **In the Matter of the Contempt of Court of Donna Dorsett-Major on 3 June 2020** [2020/CLE/gen/0000 (unreported) - Ruling delivered on 8 December 2020: see paragraphs 26-28.

[49] Also, in **Citibank NA v. McDonald** [supra], Lyons J. held that special circumstances justifying a stay may include the possibility that defendants are able to show that a successful appeal may be nugatory if a stay is not granted.

[50] In the present case, Mr. Hanna Jr. asserts that, even if the Defendants were to be successful in their appeal to the Privy Council, an award of damages could easily compensate them for any losses sustained as a result of the refusal of the application for a stay of proceedings. I agree.

- [51] Mr. Hanna Jr. also relies on the recent Ruling in **Opac Bahamas Ltd. v. Duane Bennett Parnham and Leigh Magdalene Parnham** 2019/GLE/gen/00127 (unreported) at paragraphs 54 to 63 where this Court considered the applicable principles with respect to the exercise of the Court's discretion in granting an application for a stay. These principles are equally applicable in the present case.
- [52] Before I conclude this sub-head, the Court observes that Mr. Mitchell, a former police officer, is an intelligent man. He, like all litigants, ought to know that there must be finality in litigation. Attempting to argue and re-argue the same issue(s) (however differently dressed up it might appear) before another judge is a futile effort of any litigant. Mr. Mitchell cannot be permitted unlimited bites at the cherry. That would be a dangerous precedent. If permitted, the courts would be opening up unsurmountable floodgates for thousands of similar claims of unhappy litigants who are bent on refusing to accept rulings of courts. A lot was also said about justice in this case. It is one of the most abused or misused word in the judicial lexicon. It is trite that doing justice means justice to both parties. It is not a one-way street.
- [53] In addition, Mr. Mitchell contends that new facts and circumstances have arisen since the making of the Order for Vacant Possession. As Mr. Hanna Jr. correctly pointed out, the new facts which Mr. Mitchell says are 'new facts' were within the Defendants' knowledge or available to the Defendants at the time when these proceedings were first commenced.

Jurisdiction of this Court

- [54] Mr. Hanna Jr. correctly submits that any consideration as to the prospects of the Defendants being able to successfully appeal to the Privy Council fall outside of the jurisdiction of this Court and can only now be considered by the Court of Appeal. There is an extant application for leave to appeal and stay of execution of the Judgment of the Court of Appeal which must be properly considered by that superior court.

[55] In my judgment, the Bank should not be deprived of the fruits of the judgment.

Other issues raised by the Defendants

[56] The Defendants have raised several other issues including allegations of false and misleading information by the Bank and the attorneys who represent the Bank. In my considered opinion, these issues do not warrant further consideration as this Court is *functus officio* and lacks jurisdiction to deal with any issues concerning the Defendants' prospects of success at the Privy Council.

Conclusion

[57] In the premises, I will dismiss the Defendants' application in its entirety. Mr. Mitchell shall pay the Bank's costs of and occasioned by the application; such costs are to be taxed if not agreed.

[58] The undertaking which the Bank had previously given at the hearing of the matter on Thursday 11 February 2021 not to proceed with the enforcement of the Writ of Possession until the determination of this application is formally discharged.

Dated the 19th day of February, A.D., 2021.

**Indra H. Charles
Justice**