COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2011/CLE/gen/00194

IN THE MATTER of an Indenture of First Demand Legal Mortgage dated the 21st day of September, A.D., 2004 and made between Clyde Ferguson (as Borrower) of the one part and Bank of The Bahamas Limited (as Lender) of the other part to secure advances to the said Clyde Ferguson by the said Bank of The Bahamas Limited

AND

IN THE MATTER of all that piece parcel or lot of land being Lot Number Eleven (11) situated College Gardens Subdivision in the Eastern District of the Island of New Providence

AND

IN THE MATTER of Rules of the Supreme Court Order 77

BETWEEN

BANK OF THE BAHAMAS LIMITED

Plaintiff

AND

CLYDE STEPHEN FERGUSON

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Jamal Davis for the Plaintiff**

Keod Smith for the Defendant

19 April 2022

RULING

WINDER, J

This is my brief decision on the short point of whether the Defendant has waived his right to object to what he claims is the Plaintiff's failure to serve the originating process.

[1.] The relevant facts are the following:

(a) The Plaintiff commenced this action against the Defendant on 15 February 2011 seeking vacant possession and payment on an outstanding mortgage.

(b) Judgment was given on 16 February 2012 by Barnett CJ (as he then was).

(c) On 24 April 2012 a Writ of Possession was issued against the property of the defendant but does not appear to have been executed upon.

(d) On 17 February 2016 a second Writ of Possession was issued against the property of the Defendant.

(e) On 18 March 2016 a Notice of Appointment was filed in the action by attorney Bradley Cooper of Legal Associates on behalf of the Defendant.

(f) On 19 February 2020 a third Writ of Possession was again issued against the property of the Defendant.

[2.] On 22 October 2021 the Defendant entered a fresh notice of appointment in the action. On the same day he filed a Summons seeking to challenge the Writ of Possession and seeking an injunction prohibiting the Plaintiff and the Provost Marshal from the executing upon the Writ of Possession. A certificate of urgency was also filed on that day.

[3.] The Summons was supported by the affidavit of Wellington Ferguson, the brother of the Defendant. Wellington Ferguson, who resides on the premises, stated that the Defendant was unaware that these proceedings had been commenced against him and that he has not been personally served with any of the documents in the action. In the affidavit, Wellington Ferguson challenged the authority of the Provost Marshal to evict him from the property.

[4.] The skeleton arguments which were initially filed by the Defendant challenged the Writ of Possession only. It was alleged that there is no jurisdiction in the Provost Marshal and that the Writ of Possession was not personally served on the Defendant as he had migrated to the United States since 2014.

[5.] On 29 March 2022 the defendant amended his summons to pray in aid Order 18 rule 19 of the Rules of the Supreme Court and seeking, for the first time, an order that the action be stayed permanently. The Defendant, also for the first time, relied on the action not being served as a ground for his objections.

[6.] The Plaintiff says that the Defendant has waived his right to object to the Writ of Summons on the ground that he has not been served, having not objected prior to taking a fresh step in the proceedings. At paragraph 1.1.4 of its submissions, the Plaintiff says:

> "...assuming but not accepting that the said Originating Summons and Affidavit of Gayland McBride were not personally served upon the Defendant as deposed to by Police Corporal Eric Burrows, the failure to do so was an irregularity pursuant to R.S.C. Order 2 Rule 1 and would not nullify these proceedings or any step taken in these proceedings. Further, the Plaintiff argued that in any event that that purported irregularity was waived by the Defendant when instead of seeking to set aside the said Originating Summons and Judgment filed herein on the 2/16/12 he applied pursuant to R.S.C. Order 18 Rule 19 and Order 29 for an order of the Honourable Court quashing or staying the said Writ of Possession and an injunction preventing the Plaintiff's recovery of the Mortgage Property."

[7.] Learned Counsel for the Plaintiff, Mr Davis, relied upon the dicta of Cave J in English case of ***Rein v. Stein 66 LT 469 at 471***. There, Cave J stated:

> "It seems to me that, in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all."

The Plaintiff also relied on the Court of Appeal decision in ***Hanna and another v. Lausten [2018] 1 BHS J. No. 172***.

[8.] There is merit in the submissions of the Plaintiff.

[9.] Order 2 of the Rules of the Supreme Court provides:

"Application to set aside for irregularity
2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."

[Emphasis added]

[10.] The facts in the decision of ***Hanna and another v. Lausten***, as gleaned from the headnote, were as follows: On 17 August, 1994, the respondent commenced action against the appellants for breach of contract seeking, inter alia, possession of property and for damages. On 5 January, 1996, the appellants having failed to file a Defence in the action, the respondent applied for leave to enter judgment against the appellants for possession of the said property, and costs. On 12 April, 1996, a Defence having still not been filed, a default judgment was entered for the respondent which entitled him to recover possession of the property together with a further order for damages to be assessed. The latter portion of the judgment was irregularly entered as it exceeded the relief applied for in the Summons. The default judgment was personally served on both appellants on the same day as it was entered. The respondent subsequently obtained a Writ of Possession in June, 1996. On the 30th July, 1996, the appellants issued a Summons returnable on the 6 August, 1996, seeking a stay of the order for possession. In August, 1996 and before the Summons was heard, the appellants were duly evicted from the property pursuant to the Writ of Possession. Following their eviction, the appellants took no steps to set the default judgment aside for almost 8 years when a Summons was filed on 5 July, 2004 seeking orders, inter alia, that the default judgment and the Writ of Possession be set aside and the appellants be given leave to defend. The 5 July 2004 Summons was set aside for want of prosecution and on 27 February, 2013 the 2004 Summons was reissued on 18 December, 2013. The judge dismissed the 2013 Summons and refused to set aside the default judgment. The judge further refused the appellants leave to file and serve a Defence and Counterclaim and ordered them to pay the costs of the application. The appellant appealed the decision of the learned judge on the basis that she erroneously exercised her discretion not to set the irregular default

judgment aside and to consider the inordinate delay as opposed to considering whether they had a meritorious defence.

[11.] According to the headnote, the Court held that:

> The general rule that a litigant is entitled ex debito justitiae to have an irregular judgment set aside is not absolute. The principle has always been subject to the power of the court in an appropriate case to, inter alia, vary a default judgment so as to correct an irregularity. It is subject also to the court's power under R.S.C. O.2, r. 2(1) to allow amendments to correct irregularities. Furthermore, a party's right to apply to set aside any proceeding, judgment or order for irregularity is pre-conditioned on his duty to apply under O.2 r.2(1) to set it aside "within a reasonable time" and before...he has taken any "fresh step" after becoming aware of the irregularity. In light of the facts the learned judge was expressly prohibited by O.2 r. 2(1) from granting the appellants' application to set the judgment aside for irregularity due firstly, to the inordinately unreasonable period (17 years) which had elapsed since it was entered; and secondly, due to the appellants having taken several 'fresh steps' in the proceedings after becoming aware of the irregularity. Both of these matters provided more than sufficient justification for the learned judge's refusal to set the judgment aside on the ground of irregularity.

[12.] Crane-Scott JA, delivering the decision of the Court, stated as follows:

> 56. The default judgment in this case was (as the judge correctly found) irregular in that when it was entered before the Deputy Registrar on the 12th April, 1996, it included an order for damages to be assessed which exceeded the relief sought in the respondent's Summons of the 5 th January, 1996 in respect of which the Deputy Registrar's 'unless order' of the 7 th March, 1996 had been made. [See paragraphs 11 through 15 (above).]
> 57. Additionally, as appears from the affidavit of Police Corporal Chester Walker which was filed in the court below on the 21st June, 1996, both appellants were duly served with a true copy of the judgment and must therefore be taken to have become aware of the irregularity from as far back as the 12th April, 1996 when the judgment was entered and a copy served on them. [See page 82-83 of the Record.]
> 58. Following service of a copy of the default judgment, the respondent filed a Praecipe in accordance with the relevant rules of court and obtained a Writ of Possession on 21st June, 1996 directed to the Provost Marshal to execute the Judgment by causing possession of the premises to be delivered to the respondent. [See pages 96 to 99 of the Record.]
> 59. Additionally, the Record clearly establishes that after becoming aware of the default judgment and the existence of the Writ of Possession, the appellants took a 'fresh step' in the proceedings on or around the 30th July, 1996 when, instead of applying to set aside the default judgment, they instead filed a Summons to stay the Writ of Possession. The Summons in support of the stay was supported by an affidavit of the first-named appellant, filed the same day. At paragraph 3 of his affidavit, Anthony Egbert Hanna clearly deposed that the respondent had entered

> judgment against the appellants for possession and had subsequently obtained an order for possession of the said premises. [See pages 100 to 99 of the Record.]
> 60. As we see it, in the light of the foregoing facts, the learned judge was expressly prohibited by O.2 r. 2(1) from granting the appellants' application to set the judgment aside for irregularity due firstly, to the inordinately unreasonable period (17 years) which had elapsed since it was entered; and secondly, due to the appellants having taken several 'fresh steps' in the proceedings after becoming aware of the irregularity. Both of these matters provided more than sufficient justification for the learned judge's refusal to set the judgment aside on the ground of irregularity. ...

[13.] The failure to serve the proceedings personally, if true, is an irregularity within the meaning of Order 2. It does not, as asserted by the Defendant, nullify the proceedings. Order 2 rule 1 provides:

> 1. (1) Where, in beginning or purporting to begin any proceedings or 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.
>
> (Emphasis added)

Further support for this contention may be found in the decision of Sawyer CJ (as she then was) in the case of ***Deveaux v. Munnings Estate [1995] BHS J. No. 79***, where she stated:

> [8] The failure to effect personal service of the writ in this case is an irregularity - See eg. Order 2 rule 1 of the Rules and Sheldon v. Brown Bayleys Steel Works Ltd. and Dawnays Ltd. [1953] 2 Q.B. 393.
> [9] Since it was an irregularity the non-compliance with the Rule could be waived by the defendants taking a fresh step in the action after becoming aware of the irregularity. Such steps were in fact taken by the swearing and filing of the first defendant's longer affidavit of 23rd June, 1995 and by the application in paragraph 3 of the defendant's summons, both of which seek to deal with the substantive matters in issue between the parties.

[14.] A notice of appointment was entered for the Defendant on 17 March 2016 by Attorney Bradley Cooper. Regardless of whether the notice of appointment was served on the Plaintiff or not, this must mean that the Defendant, was at the very least, aware of the existence of the action at that time. If, as the Defendant contends, he was not served, he must be taken to have been aware that the proceedings would have been irregular. It

would take another 5 years until he seeks to raise the issue of an irregularity. Respectfully, this issue of an irregularity is not raised before he seeks to challenge the Writ of Possession and pursue an injunction prohibiting the Bank and the Provost Marshal from executing upon the Writ of Possession.

[15.] According to the dicta of Crane-Scott JA, in *Hanna v Lausten*, I am expressly prohibited by Order 2 rule 2(1) from treating with any allegations that the failure to serve the proceedings was a nullity or that the proceedings should be set aside for irregularity. This prohibition is due firstly, to the inordinately unreasonable period (at least 5 years) since the Defendant must have been aware of the proceedings; and secondly, due to the 'fresh step' taken in the proceedings after becoming aware of the irregularity.

[16.] In all the circumstances therefore I am satisfied that the Defendant has waived the right to object to any failure of the Plaintiff to serve the originating process.

Dated this 3rd day of May 2022

Ian R. Winder
Justice