

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division**

**2014
CLE/gen/00407**

IN THE MATTER of an Indenture of Mortgage made on the 16th day of October, A.D., 2006 between Percy C. Burrows of the one part and Scotiabank (Bahamas) Limited of the other part and now of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 9884 at pages 125 to 141.

AND IN THE MATTER of the Conveyancing and Law of Property Act, Chapter 138 of the Statute Laws of The Bahamas.

BETWEEN

GATEWAY ASCENDANCY LTD

Plaintiff

AND

THE ESTATE OF THE LATE PERCY C. BURROWS

Defendant

Before: The Hon. Madam Justice J. Denise Lewis-Johnson

**Appearances: Cyd Ferguson for the Plaintiff
Alton McKenzie for the Defendant**

Hearing Date: 23 February 2022

Ruling Date: 31 May 2021

RULING

By Originating Summons filed 27 March 2014, pursuant to Order 77, Rule 1 of the Rules of the Supreme Court, ScotiaBank (Bahamas) Limited sought (i) an Order for vacant possession of the property subject to a Mortgage dated 16 October 2006 between ScotiaBank (Bahamas) Limited And Percy C. Burrows; and (ii) an Order that the Defendant pay all sums due and owing to the Plaintiff together with interest thereon. The action was stalled until the Plaintiff filed a Notice of Appointment to Hear the Originating Summons on 16 September 2020. At no time before did the Plaintiff apply to renew the 2014 Originating Summons.

Appointment to Hear the Originating Summons on 16 September 2020. At no time before did the Plaintiff apply to renew the 2014 Originating Summons.

An Order for Substituted Service was granted on 8 March 2021, the Defendant filed a Notice of Memorandum of Appearance on 19 April 2021. At this time, both parties filed pleadings to advance the matter before the Court.

The Defendant filed a Summons on 18 February 2022 for the Plaintiff's action to be struck out pursuant to Order 31A, Rule 20 (1)(b) and (c), Order 18 Rule 19 (a) (b) and (c), Order 31A, Rule 18(2)(i) and Order 33 Rule 6 of the Rules of the Supreme Court ("RSC") on the grounds that the action is frivolous, vexatious and an abuse of process of the Court as the action is statute-barred pursuant to Sections 32 and 34 of the Statute of Limitation Act, Chapter 83.

The Plaintiff maintains that the action was brought within the Limitation Period of twelve years as provided for by the Limitation Act and that the Defendant has entered an unconditional appearance in the matter and is unable to challenge the validity of the action.

Background Facts

1. On 18 October 2006 Percy Burrows secured a loan from Scotiabank (Bahamas) Limited ("ScotiaBank") in the amount of \$226,000.00. This was a refinanced mortgage from FINCO Bank Limited which was originally secured by way of a \$150,000.00 life insurance policy with Sunshine Insurance.
2. Mr. Burrows died on 11 October 2007. The last payment from Mr. Burrows was made 18 November 2007.
3. Mr. Burrows' wife informed ScotiaBank of his death and was informed by ScotiaBank that there was no insurance policy securing the mortgage.
4. A 'Notice of Declination of Claim' was issued on 12 June 2009 on the basis that Mr. Burrows was not eligible under the pre-existing condition clause. The claim also stated that Mr. Burrow's coverage had been postponed in 2007 for six (6) months.
5. On 21 December 2010 and 14 July 2011, Demand Letters were sent from the attorneys for ScotiaBank (Bahamas) Limited notifying Mr. Burrows of his default under the terms and conditions of the mortgage and cautioned him that legal proceedings would be commenced if the breach was not cured.

6. On or about 27 March 2014, ScotiaBank sought vacant possession of the property the by way of an Originating Summons issued in the Supreme Court of The Bahamas and supported by Affidavit of Kelvin Briggs which was filed on the same date.
7. On or about 20 May 2016, ScotiaBank wrote to the deceased informing him that effective 5 May 2016, the ownership of the mortgage loan being loan No.00001666542 had been sold and assigned to Gateway Financial Limited.
8. On or about 19 June 2019, three years after selling the sale of the mortgage loan to Gateway Financial Limited, Gateway Ascendancy Limited issued a Summons in the Supreme Court of The Bahamas seeking to remove ScotiaBank as a party to the action and to be added in their place.
9. The Plaintiff's 2014 Originating Summons was never renewed before filing a Notice of Appointment to hear the Originating Summons was filed 16 September 2020. An Order for Substituted Service was granted on the 8 March 2021.
10. The Defendant then filed the following documents:
 - [1] Notice of Memorandum of Appearance filed 19 April 2021
 - [2] Notice to Produce filed 3 May 2021
 - [3] Affidavit in Support of Summons and Notice to Produce filed 3 May 2021
 - [4] Writ of Summons filed 9 October 2020 between Keshiene Burrows and Gateway Financial and ScotiaBank (Bahamas) Limited - 2020/CLE/gen/
 - [5] Writ of Summons filed 24 April 2012 between Keshiene Burrrows and Sagicor Life Inc. (aka Sagicor) - 2012/CLE/gen/00552
 - [6] Affidavit in Support of Summons and Notice to Produce filed 20 April 2021
 - [7] Summons filed 9 July 2021
 - [8] Defendant's Affidavit in Response and Counterclaim pursuant to Order 28 Rule 7 and Order 15 Rule 3 of The Rules of the Supreme Court filed 9 July 2021.

Issues

11. Whether at the time of entering an unconditional appearance in a matter, a party waives their right to object to any irregularity in the proceedings that exist prior to the filing the unconditional appearance.
12. Whether the action is statute barred pursuant to Section 32 and 34 of the Limitation Act in that the Originating Summons was filed seven years after the death of the Defendant.

The Law

13. **Section 32 of The Limitation Act** deals with the limitation period to recover any principal sum of money. It provides:

“32. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued.

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiry of six years from the date on which the interest became due:

Provided that —

(a) where a prior mortgagee or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, that encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrances or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued. [Emphasis added]”

14. **Section 34 Limitation Act** speaks to the limitation period for claiming personal estate of a deceased person. The Section provides:

“34. Subject to subsections (1) and (2) of section 33, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiry of twelve years from the date when the right to receive the same accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiry of six years from the date on which the interest became due.” [Emphasis added]

15. The Application to strike out is made pursuant to **Order 18 Rule 19(1) of the Rules of the Supreme Court (“RSC”)**. **Order 18, Rule 19 (1)** states:

“19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

- (a) it discloses no reasonable cause of action or defence, as the case may be; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

16. **Order 2 Rule 1 of the Rules of the Supreme Court** states:

“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]

Plaintiff’s Submissions

17. The Plaintiff acknowledged the irregularities in their lack of service and failure to renew the 2014 Originating Summons.

18. The Plaintiff’s argues that the Defendant, by the filing an unconditional Memorandum of Appearance and other pleadings in the matter has waived the right to object to any irregularity on the basis that the filing of each pleading forms a ‘fresh step’.

19. Support was cited by Counsel from The 1979 English Supreme Court Rules at paragraph 12/8/2 which expresses:

“The application must be made before entering an unconditional appearance. After unconditional appearance it is too late to object to any irregularity in the issue or service of the writ or notice of the writ of which the Defendant had knowledge, for appearance is a “fresh step” within Order 2 Rule 2 (1).”
[Emphasis Added]

20. The 1979 Rules of the Supreme Court 1979 (12/7/4) goes further:

“A conditional appearance is, although expressed to be “conditional”, nevertheless a complete appearance to the action for all purposes subject only to the right reserved by the Defendant to apply to set aside the writ or service, and moreover it is a voluntary appearance and may thus amount to a submission to the jurisdiction.” [Emphasis Added]

21. The Plaintiff further relied on **Order 2 Rule 1 of the RSC** to substantiate the claim that even if an error or irregularity has occurred, the Court has the discretion to cure any defect once it causes no grave injustice to either party. The Rule states:

22. Justice Winder in **Blue Planet Group Limited v Downie; Downie v. Blue Planet Group Limited [2019] 1 BHS J. No. 14** expressed:

“It is now well settled law that Order 2 of the RSC effectively eliminates the concept of a nullity and any defect in proceedings is an irregularity which is capable of being rectified by the Court.”

He further noted that the Court Shall,

“... regard every omission or mistake as an irregularity which the court can and should rectify so long as it can do so without injustice.” [Emphasis Added]

23. The Plaintiff contends that since the filing of the Originating Summons in 2014, the defendant has not only entered an unconditional appearance on 19 April 2021 by filing a Memorandum of Appearance, but has thereafter filed five new documents progressing the matter further. Therefore, it is the Plaintiff’s position that the Defendant has taken six new and fresh steps in the current proceedings.

24. The Plaintiff further rejects any notion that the Defendant was not served or unaware of the proceedings. The Plaintiff submits that the Defendant has proven to be aware of the breach of covenant to pay and of these proceedings based on (i) the Defendant’s Affidavit filed 3 May 2021, (ii) the Defendant’s two Supreme Court actions filed and never served against Gateway

Financial Ltd and Sagicor Life Inc. after the death of Mr. Burrows and (iii) the notification of the breach of covenant for Mortgage dated 16 October 2006.

25. The Plaintiff therefore submits that the absence of the Affidavit of Service on the file is a mere irregularity that was cured by the Defendant taking multiple “fresh steps” in these proceedings
26. Additionally, the Plaintiff relies on Section 32 and 34 of the Limitation Act to substantiate its position that the action is not statute-barred. The Sections provide that no money lending action shall be brought against a Defendant or a personal estate of a deceased person after the expiration of 12 years from the date when the right to receive the same occurs. As the last payment was made 18 November 2007, the Plaintiff contends that they are within the allotted limitation period due to filing the Originating Summons in March 2014, some seven years after the right to receive the money occurred.

Defendant’s Submission

27. The Defendant’s contends that the action taken out by the Plaintiff is statute barred pursuant to **Section 32 and 34 of the Statute of Limitations Act, Chapter 83** and pursuant to the Rules of The Supreme Court in that the Originating Summons was filed seven years after the death of the deceased and that his estate was never properly served.
28. The Defendant states that pursuant to the **Order 6 Rule 7 RSC**, an Originating Summons is valid for 12 months. By virtue of **Order 6 Rule 7** the Court is given the power to extend the validity of the Writ. **Order 7** states:

“7. (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Where a writ has not been served on a Defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

(3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp showing the period for which the validity of the writ has been so extended.

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.”

29. The Defendant further cited Order 7 Rule 6 which directs that:

“6. Order 6, rule 7, shall apply in relation to an originating summons as it applies in relation to a writ.”

30. It is asserted by the Defendant that the issue in the present matter is that the Plaintiff has not made an application since the expiry initially occurred to extend the validity of the Originating Summons. Nonetheless, the Defendant asserts that despite this defect, even if an application was made to extend the validity of the Originating Summons, the Court in exercising its discretion must do so only if “there is a sufficiently good reason to”, which is doubted by the Defendant.

31. The Defendant relied on the judgment in **Kleinwork Benson Ltd. v. Barbak Ltd (Myrto) (No3) [1987] AC 597** where in that case the Applicants were applying to extend the process after the expiry of the Writ and passage of limitation. The Court per Lord Brandon determined there to be three categories where the court can apply its discretion to extend the Writ. Lord Brandon stated:

“My Lords, there are three main categories of cases in which, on an application for extension of the validity of a writ, questions of limitation of action may arise, all being cases in which the writ has been issued before the relevant period of limitation, that is to say the period applicable to the cause of action on which the claim made by the writ is founded, has expired. Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired. In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so, the defendant will not be able to rely on a defence of limitation. In category (1) cases, but not category (2) cases, it is also possible for the plaintiff, before the original writ ceases to be valid, to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) cases

nor category (2) cases, therefore, can it properly be said that, at the time when the application for extension is made, a defendant who has not been served has an accrued right of limitation. In category (3) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (3) cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation.

It would not be right, however, to regard the question whether, at the time of the application for extension, a defendant on whom a writ has not been served has an accrued right of limitation as the only significant factor in relation to such extension. For, even in category (1) cases and category (2) cases, where there is no such accrued right, the effect of an extension may still enable a plaintiff to serve a writ, which was issued before the relevant period of limitation expired, more than 12 months after the expiry of that period. This necessarily involves a departure, in favour of a plaintiff, from the general rule on which a defendant is entitled to rely that a writ against him, if it is to be effective, must be issued before the relevant period of limitation has expired and must be served on him within 12 months of its issue.

My Lords, there is a considerable body of authority on the principles to be applied by the court where, on an application for the extension of the validity (in which I include the renewal) of a writ, questions of limitation are involved. I do not think that it is necessary for me to examine the whole of this body of authority in detail, but it will be helpful if I refer to the statements of principle which are to be found in the more important reported cases.”

32. Additionally, it is submitted that when the Defendant appeared at the 21 April 2021 hearing before Acting Justice Tara Cooper-Burnside, the Defendant appeared Pro Se and notified the Court of the intention to appear conditionally. The court made directions and it is upon these directions the Defendant claims to have entered the Notice and Memorandum of Appearance upon.
33. The Defendant argues that the Originating Summons cannot be cured at this late stage, since the failure to extend the writ before the passing of the limitation period is not a mere “irregularity”.
34. Moreover, the Defendant argues that the Plaintiff is not permitted to bring an action to recover arrears of interest payable in respect of any sum of money secured by a mortgage after the expiry of six years from the date on which the interest became due. As Mr. Burrows died in October

2007 and the Originating Summons was not filed until 2014, seven years had elapsed after the death of Mr. Burrows before the Plaintiff commenced the action.

35. The Defendant wishes for the case to be struck out on account of the expiry of the limitations period and that the claim is frivolous and vexatious. The Defendant referred the court to the ruling of Justice Ian Winder in **Shepherd v. The Attorney-General of The Bahamas and other – [2018] 1 BHS J. No 6**. That case concerned an application of the Plaintiff for the extension of the validity of the Writ after the expiry of the 12-month limitation period in accordance with Section 12 of the Limitation Act. Justice Winder used the rule from **Ronex Properties Ltd. V. John Laing Construction Ltd. [1983] Q.B. 398 at 404** per Donaldson, L.J., to elucidate the point, he said:

“when dealing with the issue of whether or not a defence under the Limitation Act had to be pleaded, he stated:

“... The matter is not in fact free from authority. It was considered in *Riches v. Director of Public Prosecutions* ... in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out ... Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.” [Emphasis Mine]

Riches and Ronex Properties were cited with approval by Sawyer J (as she then was) in the Bahamian Supreme Court case of *Girten v. Andreu* [1998] BHS J. No. 164.

9 The court is therefore empowered, in appropriate cases, to strike out actions where the Limitation Act applies.”

36. The Defendant submits that in the absence of proof of service, that the entire action should be dismissed without prejudice and with cost to the defendant.

Decision

37. The Plaintiff's Originating Summons was filed on 27 March 2014. Pursuant to **Order 6 Rule 7 of the Rules of the Supreme Court** service would have to be effected within 12 months. The

chronology of the pleadings demonstrate that an application was never filed to extend the validity of the Originating Summons.

38. Notwithstanding the error on behalf of the Plaintiff to effect service within 12 months, an Order to effect Substituted Service on the Defendant was granted 8 March 2021. Thereafter, the Defendant filed a Notice and Memorandum of Appearance on 19 April 2021. The Defendant filed additional pleadings as listed above thereby progressing the action, until the Summons to Strike Out filed 9 July 2021.
39. The Defendant asserts that at the 21 April 2021 hearing before Acting Justice Tara Cooper Burnside, the Defendant notified the Court of the intention to appear conditionally. It was due to the directions made by the court directly after that the Defendant entered the Notice and Memorandum of Appearance. However, while the Defendant makes these assertions, there is no evidence before the court indicating that the then Acting Justice directed the Defendant to enter an unconditional appearance.
40. I refer to **Order 12 Rule 6 of the RSC** speaks to a conditional and unconditional appearance. The rule states:

“6. (1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action. (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.”

41. In **Tiffany Glass Ltd. v. F Plan Ltd (1979) 31 WIR 470**, Kelsick JA held:

“Entry of an unconditional appearance to a defective writ waives any objection to the jurisdiction of the court as well as any irregularity in the commencement of the proceedings. So also does any fresh step taken, with the knowledge of the irregularity, with a view to defending the action on its merits. See the note to Order 2, rule 2, in the Supreme Court Practice 1979, page 10, and the cases there cited. In my judgment the failure to comply with Order 6, rule 2(1)(c), was an irregularity which was waived by the Defendant when it entered an unconditional appearance to the writ.”

42. Moreover, in the case of **Peter and another v Ahmed Maheer Abouelenin [2008] 2 BHS J. No. 25**, the judgment of Evans J, as he then was, lays out the appropriate course of action to take if a Defendant wishes to raise an objection to the jurisdiction of the court. He states:

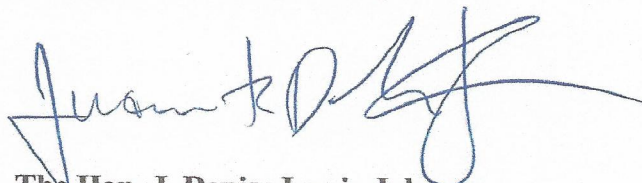
“21 It seems clear from the rules that a defendant wishing to raise an objection to the jurisdiction of the court should do so before entering an appearance or after having obtained leave to enter an unconditional appearance and then within the time limited for making such application, usually fourteen (14) days, failing which he is deemed to have submitted to the jurisdiction.”

43. This is not an application for an extension of a writ as advanced by the Defendant, the issue before this court is not whether the Writ should be renewed and the considerations related thereto. The issue before this court is whether the failure to renew the Originating Summons and the failure to serve it within the statutory period, (both irregularities) are reasons for the action to be struck out and whether the actions of the Defendants waives the irregularities – has the Defendant taken fresh steps and thus waived the irregularities and submitted to the jurisdiction of the Court.
44. Based on the Defendant’s participation in the proceedings, it is my opinion that the filing of the Notice and Memorandum of Appearance, along with the filing other pleadings by the Defendant each formed a ‘fresh step’ in the proceedings which subsequently waived the irregularities of the Plaintiff. Had the Defendant filed a conditional appearance and an application to strike out this action, the outcome would have been different. Subsequently, at this stage the Defendant has submitted to the jurisdiction of the Court.
45. The Court accepts that the last payment on the mortgage was made on 18 November 2007, it was only after that date when the Defendant failed to make a payment, that the principal became due and owing. The Originating Summons was filed on 27 March 2014 well within the twelve year limitation period as per Section 32 of The Limitation Act, for actions to recover principal sums secured by a mortgage. This action is therefore not statute barred as to recovery of the principal sums owed under the mortgage.

Costs

46. The Defendant shall pay the Plaintiff’s costs, to be taxed if not agreed.

Dated this 31st day of May 2022



The Hon. J. Denise Lewis-Johnson