COMMONWEALTH OF THE BAHAMAS **2014/CLE/gen/1872**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

IN THE MATTER of the property comprised in a Deed of Mortgage dated the 1st day of December 2004 and made between Timothy Francis Clarke as Borrower and Scotiabank (Bahamas) Limited as Lender and a Deed of Transfer dated the 22nd June 2020 made between Scotiabank (Bahamas) Limited of the one part and Gateway Ascendancy Ltd of the other part.

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

BETWEEN:

GATEWAY ASCENDANCY LTD.

Plaintiff

AND

TIMOTHY FRANCIS CLARKE

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Shanelle Smith Bethell and Attorney Candice Hepburn for the Plaintiff

Attorney Arthur Minns for the Defendant

Date of Hearing: 19th April 2022

DECISION

FACTUAL SUMMARY

1. On 1 December 2004, the Defendant Mr. Timothy Clarke was granted a mortgage loan by Scotiabank in the amount of $90,000.00 at an interest rate of 8.25% per annum. The

Defendant signed a Facility letter dated 19 November 2004 which set out the terms of the loan and a Promissory Note dated 8 August 2005. A default occurred, and a demand letter dated 23 July 2014 was sent to the Defendant demanding payment. The demand letter also warned the Defendant of the intention to exercise the power of sale should the debt not be satisfied. On 5 August 2014, the Defendant was served with a Notice of Default and Intention to Sell under the Mortgage document. The Plaintiff subsequently initiated these proceedings against the Defendant claiming the delivery up of possession of the mortgaged premises and the payment of the sum of $103,134.29 as of 17 September 2014, interest or in the alternative damages, and costs.

2. An Order was made in this matter by Justice Gomez filed on 27 May 2015 ("the Gomez Order) which contained two errors as the Order bore the incorrect date of 21 May 2015, when the matter was in fact heard the 20 May 2015, and also stated that the Defendant was present in Court, which was incorrect. There is no dispute by the Defendant as to liability. The Defendant alleges incomplete service of the originating documents by the Plaintiff which resulted in his absence at the hearing before Gomez J.

3. This ruling address three summonses filed by the parties to determine:

a. whether the Order filed 27 May 2015 should be set aside due to Counsel's failure to serve the Notice of Appointment to hear the Originating Summons and Notice of Adjourned Hearings.

b. whether the Plaintiff should be granted leave to amend the Order filed 27 May 2015 to reflect the correct hearing date and the non-appearance of the Defendant at the hearing.

c. whether the Defendant's summons of 6 August 2015 should be struck out on the grounds that it is scandalous, frivolous and vexatious and an abuse of processes.

d. whether Justice Gomez's Order should be enforced.

e. whether relief should be granted to the Defendant.

PROCEDURAL HISTORY

4. The procedural background of this matter is to some degree convoluted, however it is material to the issues which arise. These proceedings were commenced by way of Originating Summons and a supporting affidavit of Allan Butler which was filed on 14 November, 2014. A Memorandum and Notice of Appearance was entered on behalf of the Defendant on the 16th December, 2014 by Minns & Co.

5. On 17 December 2014, the Plaintiff filed an Affidavit of Service sworn by Simon Beneby attesting to the service of a *"duly filed"* copy of the Originating Summons and supporting

Affidavit on the Defendant at his residence being Lot #52 Murphy Town, Abaco, The Bahamas on the 4 December 2014. The Plaintiff then filed on that very date a Notice of Appointment to Hear Originating Summons. There is no affidavit of service accompanying the document and it is apparent to the Court through Affidavit evidence that the Defendant was not served this document until after the initial hearing. It has been revealed that the Originating Summons which was served on the Defendant was not a filed copy, therefore the Defendant claimed improper service. The Plaintiff then filed on 1 April 2015 an Affidavit of Service sworn by Roy Johnson attesting to service upon the Defendant on 4 March 2015 of a filed copy of the Originating Summons and the Affidavit of Allan Butler. A second Notice of Appointment to Hear Originating Summons was filed in the matter on 29 April 2015.

6. The Plaintiff wrote to the Defendant by letter dated 6 May 2015 enclosing the Notice of Appointment to Hear Originating Summons, and noted that the hearing was adjourned to 20 May 2015 before Justice Rodger Gomez. The Defendant was warned that if he failed to appear, the Plaintiff would be seeking vacant possession without further delay. The matter came on for hearing before Justice Gomez who vacant possession and judgment in the amount of $113,674.80 as at the 21 May 2015 together with interest at a rate of 6.75% until paid, and to pay the costs of this action. The Order stated that both the Plaintiff and Defendant's attorneys appeared in person.

7. The Defendant on 6 August 2015 filed a summons to set aside or vary the Order made by Justice Gomez. The reasons given were that the Plaintiff had failed to serve the Notice of Appointment to hear the Originating Summons and/or any Notice of Adjourned Hearing on the Defendant in this matter in accordance with the Rules of the Supreme Court. The Affidavit in support of this application was filed 29 September 2015. Meanwhile, the Plaintiff proceeded to file a Praecipe for Writ of Possession on 21 August 2015. On 28 August 2015, the Plaintiff filed an Affidavit of Roy Johnson attesting to service of the Order of Gomez J on the Defendant on the 22 July 2015, almost 2 months after the Order was made.

8. The Defendant then filed an Affidavit on 29 September 2015 averring that the two documents served on him by the Police officer in December 2014 (the Originating Summons and Affidavit of Allan Butler) did not bear the Supreme Court stamp or date on them. The Plaintiff's attorney undertook to re-serve the documents once they were properly stamped by the Supreme Court Registry. The Defendant further averred that he nor his attorney was served with the Notice of Appointment to hear the Originating Summons until 8 May 2015 which was two days after the initial hearing before Justice Gomez. At this time, the Defendant also acknowledged receipt of the letter sent by the Plaintiff giving notice of the adjourned hearing date set for 20 May 2015. The Defendant further avers that he was of the opinion the parties had reached an agreement, and was blindsided by the Plaintiff's attempts to continue the matter before the Court and to include in the Order of 27 May 2015 that his attorney was present in Court when the Order was made. This

Affidavit along with the Summons and a letter were served on the Plaintiff on 29 September 2015 according to the Affidavit of Service of Fredia Falconer filed 20 October 2015 by the Defendant.

9. On the 27 October 2015 the Plaintiff filed a Writ of Possession based on Justice Gomez's Order for the Defendant to give up possession of Lot #52 Murphy Town, Abaco. The Plaintiff also filed a Summons on 7 December 2017 to strike out the Defendant's summons filed 6 August 2015 on the grounds that it is scandalous, frivolous or vexatious and otherwise an abuse of process. This summons was supported by an Affidavit of Joseph Albury averring that the Defendant was served with the Originating Summons and Notice of Appointment to hear the Originating Summons. However, due to an error in filing, the document that the Defendant received was inadvertently not stamped by the Supreme Court Registry. Albury also averred that the Defendant refused to move the matter along after filing their Summons in the matter and consequently there has been an inherent delay on their part.

10. The matter sat dormant until the Plaintiff took out an ex-parte Summons on 22 May 2018 to renew the Writ of Possession with a supporting affidavit of Joseph Albury. On 19 February 2019, the Plaintiff filed a Summons supported by an affidavit of Shanelle Bethell to amend the order of Justice Gomez pursuant to Order 20 Rule 10 of the Rules of the Supreme Court. In the affidavit, Shanelle Bethell averred that an unfiled copy of the Originating Summons was inadvertently served on the Defendant and was later re-served on 4 March, 2015. The deponent averred that the Defendant did not appear at the adjourned hearing on 20 May 2015 despite being advised of the date of the hearing. It was further averred that an order for vacant possession and judgment was granted at that hearing, however, the order incorrectly stated that the Defendant was present and that the hearing was on 21 May 2015 when in fact it was on 20 May 2015. For these reasons, the Plaintiff applied for the order to be amended to reflect these circumstances.

11. The Defendant then filed an affidavit of Cachline Etienne on 22 February 2019. The affidavit exhibited documents that the deponent stated *"spoke for themselves"*. There was exhibited an undated email by the Plaintiff's attorney stating that the Plaintiff agreed to a lump sum payment of $10,000.00 and regular monthly payments of $1,100.00 by the Defendant and requesting payment of the same. A copy of a manager's cheque made out to the Plaintiff's attorney's firm in the amount of $10,000.00 was also exhibited. In response, the Plaintiff filed an Affidavit of Shanelle Bethell on 13 March 2019 averring that the email requesting the lump sum payment was sent on 20 October 2016 after the Defendant sought leniency from the Plaintiff in an attempt to save his home. The deponent alluded to the numerous requests by the Plaintiff to have the Defendant make payments but to no avail. Hence, in or about August 2018, the Plaintiff by Summons sought a hearing date for the Defendant's summons to be struck out. The deponent also averred that after being served with the Summons, the Defendant once again attempted to make a proposal for the payment of the mortgage loan. However, the Plaintiff advised that they were willing

to accept the arrears payment but the application to strike out the Defendant's summons would still proceed and that the Plaintiff would be exercising their right to Vacant Possession and Judgment.

12. The Plaintiff then filed a Praecipe for Writ of Possession on 6 August 2019 for Scotiabank (Bahamas) Ltd. to have possession of the property. There were a series of adjournments in the matter for the hearing of the Plaintiff's summons to strike out the Defendant's summons. On 12 May, 2021, the Plaintiff filed a summons to amend the originating process and enforce the judgment or order pursuant to Order 15 Rule 8(2) of the Rules of the Supreme Court. This was accompanied by an Affidavit of Angelique Dennis averring that Scotiabank (Bahamas) Ltd. transferred the property and all benefits of the mortgage to Gateway Ascendancy Ltd by Deed of Transfer dated 22 June 2020. The deponent in this regard sought to amend the parties in the action to reflect this change, making Gateway Ascendancy Ltd. the Plaintiff and for Gateway Ascendancy Ltd. to enforce the Gomez Order. On 27 October 2021 the Plaintiff filed an Amended Originating Summons to remove Scotiabank (Bahamas) Ltd. as the Plaintiff and replace that company with Gateway Ascendancy Ltd.

PLAINTIFF'S CASE

13. The Plaintiff contends that the Defendant's summons to set aside the Gomez Order should be struck out on the grounds that it is scandalous, frivolous and vexatious and an abuse of the process under Order 18 Rule 19 of the Rules of the Supreme Court. The Plaintiff asserts that once the order was made and perfected, the Court became *functus officio* and uses the language of Justice Charles in ***Finance Corporation of The Bahamas Limited v Phillip Arlington Mitchell and Brenda Mae Mitchell 2009/CLE/gen/01398*** that at that stage "there are no further functions which [the] court had the power to exercise as it relates to the terms or effect of the order". The Plaintiff acknowledges the errors made in the Order but submits that these errors are clerical mistakes which may be corrected at any time by the Registrar pursuant to Order 20 Rule 10 of the Rules without having the Order set aside. Further, it is the Plaintiff's contention that the Defendant had an avenue of recourse to the Court of Appeal to appeal the Order made and had failed to do so. As a result, the Plaintiff submits that the Defendant is being a vexatious litigant by attempting to delay the Plaintiff's right to Vacant Possession and Judgment and is attempting to rely on clerical errors in the perfected Order to circumvent the laws of The Bahamas. The Plaintiff finally submitted that the Order filed 27 May 2015 be amended to correctly reflect the Order pronounced by Justice Gomez.

DEFENDANT'S CASE

14. The Defendant seeks to have the Gomez Order set aside for a number of reasons. He submits that the Plaintiff made false representations to the Court that the Defendant was present at the hearing on 20 May 2015 to obtain the Order made therein. The Defendant

asserts that there must be a determination by the Court whether the representation made was in fact a false representation or a clerical error. The Defendant interprets Order 20 Rule 10 of the Rules to be a permissive provision and not a mandatory or automatic one. Therefore, because the statute states that accidental slips or omissions *may,* and not *must,* be corrected by the Registrar, the proposed amendment must be tested by evidence. The Defendant bases his arguments on the nonexistence of Justice Gomez's notes on the court file to ascertain exactly what occurred or what was stated in Court on 20 May 2015 in the absence of the Defendant. The Defendant further submits that the payment of $10,000.00 made to the Plaintiff must be duly recorded and reflected in any Order made by the Court and that the Plaintiff must accurately show the amount advanced, the amount of repayments and the amount remaining under the mortgage. The Defendant relies on the Court of Appeal case of ***Christison Deleveaux and Marilyn Deleveaux v The Bank of The Bahamas Limited SCCivApp No. 81 of 2018*** to assert that the Plaintiff is duty bound by Order 77 of the Rules to reflect all payments made by the Defendant.

15. The Defendant also asserts that the communication between himself and counsel for the Plaintiff regarding the payment of $10,000.00 and monthly payments to be made thereafter amounted to a contract, and that the Plaintiff was in breach of the same. The Defendant also raises the assertion that there appears to be a conflict between the law and equity in this matter and that equity should prevail. The Defendant invited the Court to exercise its discretion under section 6(1)(a),(b) and (c) of the Homeowners Protection Act, 2017 to grant relief to the Defendant and allow him to bring his arrears current.

LAW & ANALYSIS

16. There are provisions under the Rules of the Supreme Court that a Defendant can invoke to obtain some relief due to his absence at a hearing in which an order has been made. This includes having the order set aside even after it has been perfected. In ***Family Guardian Insurance Company Limited v Dixon [2014] 1 BHS J. No. 39***, Winder J examined this in relation to possession orders. The facts of that case bear many similarities to the one at hand in that the court made an Order for vacant possession of the mortgaged property in the absence of the Defendant. In ***Dixon***, the Defendant also attributed her absence to the improper service of originating documents and affidavits filed in the matter by the Plaintiff. The Court had to determine whether the court had the jurisdiction to set aside the Order and if so, the circumstances in which it may do so and whether that case qualified for the exercise of such power.

17. The Plaintiff made a preliminary objection as to the jurisdiction of the Court to set aside a perfected Order of the Court in her submissions. Counsel argued that the only recourse available to the Defendant is to appeal the decision of the Judge that made the Order. It is stated at paragraphs 10 and 11:

> "10. Counsel for the plaintiff made the preliminary objection as to the jurisdiction of the court to entertain an application by the defendant to set

aside an Order made by the Court, which has already been perfected. She argued that the only recourse was to have appealed the decision of Isaacs J, as:

a) by virtue of the Order, all issues with respect to whether the Plaintiff is entitled to vacant possession of the subject property have already been determined by the Court. She relies on the case of Fisher v. Minister of Public Safety and Immigration 1996 BHS J. No. 105 and Henderson v. Henderson (1843) 3 Hare 100.

b) the court is functus officio in relation to matters relative to the Possession Order. She relied on the decision in Allure (Bahamas) Limited v. North Andros Assets Limited and others [2009] 4 BHS J No. 38; Imperial Life Assurance Company of Canada v. Hanna (2012) 3 BHS J. No. 58 and an extract from Halsbury's Laws of England 3rd ed. Vol. 22 paras 1665 and 1666.

11. Counsel for the plaintiff argued extensively in her submission that there is no jurisdiction to set aside or revisit the decision of Isaacs J. She examined the line of authorities which posits that "[a]s a general rule, except by way of appeal, no court, judge, or master has the power to rehear, review, alter or vary any judgment or order after it has been entered or drawn up, respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order." Halsbury's Laws of England 3rd ed. Vol. 22 paras 1665."

18. The Court has a limited jurisdiction to reopen a perfected order. Any challenges to the order must be made by way of appeal. As an example, the Defendant in ***Bank of The Bahamas v Bosfield [2003] BHS J. No 153*** in a mortgage matter was served with the originating documents and the matter was set down for hearing. Counsel for the Plaintiff and the Defendant appeared before the Judge and the matter was subsequently adjourned. Both attorneys had a different recollection as to the adjourned date of the hearing. The Plaintiff appeared on the date of 11 June 2002 and there was no appearance by the Defendant. At this hearing the Court granted the Order of possession in the absence of the Defendant. On 11 July 2002 the Defendant appeared before the Court however there was no hearing on this date. The Defendant after being served with the Order made application via Summons to have the Order vacated asserting there was no notice of the adjourned date. This application was dismissed. The Defendant resorted to appeal the Order.

19. In relation to the Defendant's claims of not being aware of the proceedings, and/or inadequately served originating documents, the Court considered a number of instances in which the court might reconsider an application as an exception to the rule. This exception operates outside of the appeal process, but is not applicable to matters commenced by originating summons or mortgage matters. The court in ***Dixon*** stated at paragraphs 13 -15:

"13. The defendant did not attend at the hearing on 14 March 2011. The defendant says she was unaware of the proceedings and the plaintiff asserts she was duly served and notified of the hearing. The Rules of the Supreme Court provide numerous exceptions and circumstances which give a discretion to the Court to reconsider an application where it was made in the absence of a party. Such exceptions operate outside of the scope of the authorities cited by the plaintiff. See ***Greg Bowe v. Long Island Breeze et al.*** SCCiv. App No. 148 of 2012 (unreported).

14. Examples of these exceptions include: Order 14 rule 11 (summary judgment); Order 24 rule 17 (orders for discovery and inspection); Order 26 rule 8 (order for interrogatories); Order 32 rule 5 (applications and proceedings in chambers); Order 35 rule 2 (orders and judgments made after a trial where one party does not appear).

15. Order 32 rule 5 is inapplicable as the application before Isaacs J was not by Summons and the Order had been perfected prior to the application to set aside being made. Additionally, Order 35 rule 2 is inapplicable as the hearing before Isaacs J was not a trial and the history of the rule suggest it is limited to Writ actions. In any event the application was not pursued within seven days as required by Order 35 rule 2. Nothing in Order 28 (relating to Originating Summons procedure) or Order 77 (relating to mortgage actions) provides for any similar example and discretion to revisit an order made in the absence of a party."

20. The Court however posited that there was still a possibility that the Order could be set aside on the ground of irregularity. If the Plaintiff failed to notify the Defendant of the existence of the proceedings or when it was to take place prior to the making of the Possession order, this could amount to an irregularity. Although in this instant case irregularity is not pleaded or raised by the Defendant, the Court must take cognizance of the fact that in mortgage actions, the Rules require the proper service of the proceedings on the Defendant prior to the making of the possession order pursuant to Order 77. In ***Dixon***, the Court stated at paragraphs 19 and 20 that:

"19. Therefore, if the Possession Order was obtained without advising the defendant of either the existence of the proceedings or of the date when the hearing was to take place, those proceedings must be irregular. See: Graham v. Dillon 2004 Supreme Court of Jamaica No CLG 027/2002 (unreported) and Craig v. Kanssen [1943] 1 KB 256.

20. I find therefore that the Court has the power to set aside the Possession Order under Order 2 rule 2 in the appropriate case. To succeed on an application for setting aside of proceedings under Order 2 rule 2 the defendant must demonstrate: (1) the occurrence of the irregularity; (2) the identification of the irregularity in the Summons; (3) prompt action by the applicant; and (4) no next steps prior to applying for the setting aside."

21. In ***Craig v. Kanssen*** supra, per Lord Greene MR, "[A] person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it." The appellant in that case was the subject of an Order, which was procured without proper service of the originating process.

22. In the instant case, the Defendant was served with a copy of the Originating Summons and Affidavit in support asserting claims and prompting him to enter an appearance in the matter, with which the Defendant complied from 16 December 2014. The Defendant then brought to the Plaintiff's attention that the document was unfiled. The Plaintiff sought to rectify this by re-serving the Defendant with the Originating Summons on 4 March 2015, two months before the Order of possession was made. The Defendant filed a Summons and Affidavit seeking to have the order set aside by highlighting the improper service of the Originating Summons and the failure to serve the Notice of Appointment to hear the Originating Summons and any Notice of Hearing by the Plaintiff. This Summons and Affidavit prepared by the Defendant was filed two and four months respectively *after* the Order of Possession was made. The Affidavit acknowledged that a letter dated the 6 May 2015 was sent by the Plaintiff to the Defendant advising of the adjourned hearing date of 20 May 2015. The Defendant highlighted the fact that the Notice of Appointment to hear the Originating Summons was sent after the initial hearing date and there was no Notice of Adjourned Hearing served on the Defendant. The Defendant however, did not highlight the fact that his attorney was in communication with the Plaintiff's attorney on 4 May, 2015 two days before the initial hearing date. While the contents of the conversation cannot be verified, the Plaintiff alleges in the Affidavit of Shannelle Bethell filed 19 February 2019 that the Defendant's attorney was advised of the initial hearing date of 6 May 2015 and communicated his unavailability. In this Affidavit, the Plaintiff's attorney exhibited an email communication dated 4 May 2015 between herself and the Defendant's attorney with attachments of the Defendant's account statement. The assertions of Counsel for the Plaintiff has not been denied by the Defendant.

23. The Rules pursuant to Order 77 Rule 3(2) require that the Plaintiff serve a copy of the Notice to hear the Originating Summons on the Defendant four clear days before the first hearing. The Plaintiff, according to the letter dated 6 May 2015 enclosed the Notice to the Defendant only after having received an adjourned date in the matter scheduled for 20 May 2015. Although the Plaintiff alleges that they only had sight of the Defendant's Notice and Memorandum of Appearance on 4 May 2015, there was time to file and serve the Notice to hear the Originating Summons before the hearing, albeit it was not in compliance with Rule 3(2) and was likely to be adjourned. At the very least, the Defendant would have had formal notice of the hearing in advance.

24. The Plaintiff is also required by Order 77 Rule 3(4) to serve a Notice for the adjourned hearing. The Plaintiff did not enclose a Notice of Adjourned Hearing in the letter regarding the 20 May 2015 date. Although to say the least the Defendant was made aware of the adjourned date via the letter, this form of notice was improper. The Plaintiff had sufficient time before the adjourned hearing to have the Notice of Adjourned Hearing filed and served on the Defendant and failed to do so. Therefore, I find that the failure by the Plaintiff to serve the Defendant in compliance with the Rules amounted to an irregularity.

25. The Court in ***Dixon*** suggests that in order for an Order to be set aside for an irregularity, the Defendant must demonstrate "(1) the occurrence of the irregularity; (2) the identification of the irregularity in the Summons; (3) prompt action by the applicant; and (4) no next steps prior to applying for the setting aside". The Defendant highlighted the irregularity in the Affidavit, identified the irregularity in the Summons, and took no steps before applying for the same. However the Defendant, having been given informal notice of the adjourned hearing date, had an opportunity to make an application to the Court for improper service or failure of service in advance of the hearing on 20 May, 2015. The Defendant took no steps to have the irregularities adjudicated upon and failed to attend Court to even make the application on the adjourned hearing date. Although the notice was informal, had the Defendant attended Court and made representations as to the lack of service, there could have been a change in the circumstances resulting in the Court not granting the Order. In fact, the Defendant did not file a Summons in this regard until almost three months *after* the Order was made. I do not consider this to be prompt action by the Defendant in this matter (see ***Singh v Atombrook Ltd. [1989] 1 All ER 385 CA***). The Court has a duty to ensure the fair disposal of any matter or application made to it.

26. Moreover, I find that the Defendant's summons was defective in that it did not state the jurisdiction of the Court intended to be invoked. The Defendant at no time specified that he was moving the Court on an irregularity, and was seeking to have the matter set aside pursuant to Order 2 Rule 2. Additionally, the Defendant filed the Summons in 2015, but took no steps in the matter after the filing of the Summons to have it adjudicated, until confronted years later with the prospect of the Order being enforced. For these reasons, I dismiss the Defendant's summons and decline to find that the Order should be set aside.

27. The Defendant also sought in the alternative to have the Order varied for the lack of service. The Court is generally restrained from reopening or varying an Order that has been perfected. The Court may only do so under the slip rule where there are clerical mistakes which the Court must correct to properly reflect the intention of the Court. I do not find that the lack of service can amount to a clerical error to justify a variation of the order.

Slip rule

28. Pursuant to Order 20 Rule 10 of the Rules "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar." This provision is similar to the provision in the English Civil Procedure Rules 2000. In ***Saint Christopher Club Condominiums v St. Christopher Club Ltd and others [2008] ECSC J0115-2***,

Rawlings JA cited the commentary in the White Book 2007 to determine what constitutes an accidental slip or omission. It is stated that:

> "The so-called "slip rule" is one of the most widely known but misunderstood rules. The rule applies only to "an accidental slip or omission in a judgment or order". Essentially it is there to do no more than correct typographical errors (e.g. where the order says claimant when it means defendant; where it says 70 days instead of seven; where it says "January 2001" instead of "January 2002". Of course, such errors ought not to occur in important documents like a court order but they are regrettably common). ... the rule is limited to genuine slips and cannot be used to correct an error of substance nor in an attempt to get the court to add to its original order (e.g. to add a money judgment where none was sought, and none was given at the trial). ... The slip rule cannot be used to enable the court to have second thoughts or to add to its original order (see para.4.2.1 above). A judge does have the power to recall his order before it is issued but not afterwards. Once the order is drawn up, judicial mistakes have to be corrected by an appellate court. However, the court has an inherent jurisdiction to vary its own order to make the meaning and intention of the court clear and can use the slip rule to amend an order to give effect to the intention of the court..."

29. In ***Darville v Treco and other [2008] 1 BHS J No. 3*** at paragraph 19 the court stated:

> "If however an accidental mistake has been made an amendment can be made under the slip rule to correct it and as stated by Lord Macnaughten in Hutton v Harris [1892] AC 547 at page 564 "...lapse of time has nothing to do with the question" provided however the court has a discretion not to correct its judgment under this rule in cases where the rights of third parties have intervened and in cases where it would be inequitable to do so . In Hutton v Harris Lord Watson referring to accidental slips stated at page 560:
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> "...When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record to bring it in harmony with the order which the judge obviously meant to pronounce..."

30. I am satisfied that the Order pronounced by Justice Gomez on 20 May 2015 contains errors which are subject to the court's jurisdiction under the slip rule to amend to correctly reflect the Court's intention. The Order states that the matter was heard on the 21 May 2015, when in fact it was heard on the 20 May 2015. Further, the Defendant was not present at the 20 May 2015 hearing and never made representations to the Court on that date. The Defendant posits speculations as to what might have transpired during the hearing in an attempt to imply some malice on behalf of the Plaintiff in making false representations to the Court. The difficulty with this is that Gomez J would clearly have been aware of who was before him. The Plaintiff asserts that these errors were drafting errors

and made provision to have the Order amended to reflect the same. I find likewise. Therefore, I accede to the Plaintiff's Summons filed on 19 February 2019 and grant leave to amend the Order to correctly reflect the date of the hearing and that the Defendant was not present in Court.

Striking out

31. The Plaintiff seeks to have the Defendant's summons struck out pursuant to Order 18 Rule 19/Order 31A Rule 20 of the Rules which respectively provides that:

> "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."

> "O 31 R20. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court —
> (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;
> (b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;
> (c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
> (d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."

32. It is to be noted that striking out is a summary process that is to be used sparingly, and is reserved only for those cases which are irremediably bad on the face of the pleadings. According to Order 1 Rule 4 the word *"pleading does not include a petition, summons or preliminary act."* The wording of the Act makes it clear that one cannot apply to have a Summons struck out under Order 18 Rule 19. This was confirmed in the case of ***Farrington and another v Island Hotel Company Limited [2009] 2 BHS J. No. 20.*** In this case the Defendant appealed an Order made by a Registrar dismissing a Summons for want of prosecution. It was stated by Isaacs J that:

"3. There does not appear in the Rules of the Supreme Court (R.S.C.) any express or discretionary power to strike out a Summons for want of prosecution.

4 The power to strike out for want of prosecution under the rules relate to actions or pleadings. Actions can be struck out under 0.19 r.1 for default in filing a statement of claim; under 0.25 r.1(4) for default in taking out a summons for directions; under 0.34 r.2(2) for default in setting down a trial for hearing. There is also an inherent jurisdiction in the Supreme Court to strike out an action for want of prosecution (see Harvey Don Cooke v Sun International Bahamas Ltd. Civil Appeal No. 95 of 1999.

5 With regard to pleadings 0.18 r.19(1) empowers the court to strike out statements of claim or defences on the following grounds.."

33. It is unfortunate that Counsel has made an application before the Court by Summons filed 7 December 2017 to have the Defendant's Summons struck out pursuant to Order 18 Rule 19 and Order 31A Rule 20 where there lies no such power of the Court to do so. This application is obviously unsustainable. In the circumstances therefore, this Summons is dismissed.

Enforcement of the order

34. Pursuant to Order 45 Rule 3:

"3. (1) Subject to the provisions of these Rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means, that is to say —

(a) writ of possession;
(b) in a case in which rule 5 applies, an order of committal;
(c) in such a case, writ of sequestration.

(2) 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.

(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled."

35. The Plaintiff has been granted an Order for Possession in this matter since 2015 and is entitled to the fruits of their judgment. There has been no appeal of the Order made by the Defendant, and the application to have the order set aside is dismissed. There is no denial by the Defendant of a debt owed. However, the Defendant requests that there be a proper accounting to reflect a lump

sum payment of $10,000.00 on the account. In the Submissions, the Defendant attempted to raise the argument that the agreement to pay the lump sum was a valid contract between the Plaintiff and the Defendant. There is no evidence of such a contract before this Court. From the correspondence between the parties in the Affidavit of Shanelle Bethell, there was an agreement for the Defendant to make a lump sum payment and future monthly payments of $1,100.00. The Defendant asserts that he was under the belief this agreement would have terminated the legal proceedings in the matter. The Defendant made the lump sum payment in 2017 but did not follow up with any other monthly payments. Thus, even if the agreement was relied upon by the Defendant, he failed to uphold his end of the bargain by making the monthly payments thereafter. In 2018, the Defendant made further representations to the Plaintiff through his Counsel that he would pay the loan in full and needed some time to do so. It is indicated in an email (attached to the Affidavit of Shannelle Bethell) dated 11 April 2018 from the Plaintiff to the Defendant that the Plaintiff intended to exercise its right to vacant possession and judgment even after the lump sum payment was made. The Plaintiff made subsequent attempts to update the Defendant on the outstanding amounts owed and highlight the numerous promises by the Defendant to pay but to no avail.

36. What must also be noted is the contents of paragraph 22 of the mortgage document, which reads as follows:
"This Indenture constitutes the entire understanding between the parties and none of its terms conditions or provisions may be amended varied altered or otherwise modified unless such amendment variation alteration or modification is in writing and duly signed by all parties."
This clause makes clear that any such arrangements for forbearance as are alluded to by the Defendant could not alter the actual contract between the parties so as to disentitle the Plaintiff from the right to enforce the security.

37. It appears that the Defendant has merely been buying time in this matter, and the Plaintiff has been gracious enough to allow them to do so. The Plaintiff expressly informed the Defendant of their intent to continue with litigation in the matter despite the lump sum payment being made. This is the right of the Plaintiff as they are entitled to the debt owed and may still collect on arrears. The Defendant's attempts to settle the account or make future payments were sporadic at best. Hence, there are no bars against the Plaintiff enforcing the judgment.

Relief to defendant

38. The Defendant invited the Court in the Submissions to have regard to section 6 (1) (a),(b) and (c) of the Home Owner's Protection Act, 2017 to grant him relief in the circumstances. Section 6 (1) of the Act provides that:

> "Where a mortgagee institutes proceedings before the Court as set out in section 4, the Court may exercise any of the powers conferred on it by subsection (2) if it appears to the Court that, in the event of its exercising those powers, the mortgagor is likely within six months, to be able to –

(a) pay principal and accrued interest at a specified time;
(b) remedy a default consisting of breach of any other obligation arising under or by virtue of the mortgage; or
(c) pay arrears.

39. Section 6(1) allows the Court in its discretion to enable a defaulting party to satisfy their loan, remedy a breach or make their account current if it appears to the Court that they are likely to do so within six months. The Defendant in his Submissions stated that he is desirous of bringing the arrears current. He also alludes to the fact that his elderly mother and wife resides with him, he has experienced damage to his home in hurricane Dorian and the tragic loss of his son. The Defendant also states that the Order would put him and his family "out on the streets".

40. The difficulty with the request of the Defendant is that the Homeowners Protection Act applies where proceedings are instituted as set out in section 4 of the Act. At the time of the institution of the instant proceedings, and indeed the making of the Order by Gomez J, the Homeowners Protection Act did not exist.

41. It is evident that the Defendant has not made preparations to relocate himself since the Order was granted in 2015 almost 8 years ago. There have been many delays on the part of the Defendant in seeking to bring the arrears current, which I find is prejudicial to the Plaintiff, and fatal to any request for relief pursuant to the Home Owners Protection Act, even if that Act applied. While I sympathize with the hardships of the Defendant, I am not satisfied that the Defendant is able to bring the arrears current in this matter warranting such relief.

CONCLUSION

42. I therefore conclude that the Order pronounced by Justice Gomez on 20 May 2015 stands subject to the amendments aforementioned. I will hear the parties with respect to costs.

Dated this 26th day of April A.D., 2023

Neil Brathwaite

Justice