

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2014/CLE/gen/01770

IN THE MATTER of an Indenture of Mortgage made the 1st day of October, A.D., 2007
BETWEEN Victor Perron Symonette and Judith Julia Symonette and Royal Bank of
Canada

AND IN THE MATTER of an Indenture of Mortgage made the 1st day of October A.D.,
2007 between Victor Perron Symonette and Judith Julia Symonette and Royal Bank of
Canada

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

BETWEEN

RBC ROYAL BANK (BAHAMAS) LIMITED

Plaintiff

AND

VICTOR PERRON SYMONETTE

First Defendant

AND

JUDITH JULIA SYMONETTE

Second Defendant

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2020/CLE/GEN/00205

IN THE MATTER OF THE LIMITATION ACT, CAP 83 SECTION 5(3)
AND IN THE MATTER OF A JUDGMENT OF THE SUPREME COURT DATED THE 1
JULY 2013 IN SUPREME COURT COMMON LAW ACTION 583 OF 2012.

BETWEEN

JUDITH JULIA SYMONETTE

Plaintiff

AND

RBC ROYAL BANK (BAHAMAS) LIMITED

(formerly "Royal Bank of Canada")

1st Defendant

VICTOR PERRON SYMONETTE

2nd Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Travette Pyfrom for Judith Julia Symonette

Audley Hanna Jr with Oluwafolakemi Swain for RBC Royal Bank
(Bahamas) Limited

Victor Perron Symonette, Pro Se

13 January 2022 and 7 March 2022

DECISION

WINDER, CJ

Judith Julia Symonette (Judith) seeks declaratory relief in an effort to prevent the RBC Royal Bank of Canada (RBC) from obtaining vacant possession of property situated at

Gladstone Road and for which RBC had extended a mortgage facility to her and her former husband, Victor Symonette (Victor).

Background

[1.] On 1 October 2007 RBC granted a loan facility to Victor and Judith (the Symonettes) which was secured by a mortgage over their matrimonial home situated at Lot #22 Gladstone Road. The loan facility also contained a credit card agreement.

[2.] In 2008 Judith commenced divorce proceedings against Victor. On 3 December 2009 Bain J made an Interim Order requiring Victor to continue to make the mortgage payments towards the matrimonial home. Sometime in 2011 the mortgage payments to RBC ceased to be made by either Victor or Judith.

[3.] In 2012 RBC commenced Supreme Court action CLE/gen/00583 (the 2012 action) against Judith and Victor for breach of the terms of the mortgage. On 17 May 2013 Registrar Donna Newton (as she then was) gave leave to RBC to enter judgment against the Symonettes. The Judgment, filed on 1 July 2013, was settled in the following terms:

Pursuant to the Order herein dated the 17th day of May AD 2013
IT IS ADJUDGED that [Victor] and [Judith], do pay [RBC] as follows:

As regards [the Symonettes] under the Loan

1. The sum of \$351,414.45;
2. Interest continuing to accrue on the said sum of \$351,414.45 from the 18th day of May AD 2013 until payment at the rate of 6.75 per centum per annum pursuant to the Civil Procedure (Award of Interest) Act, 1992;

...

Judith and Victor were served with the judgment in the 2012 action on 11 July 2013 and 25 July 2013 respectively.

[4.] On 28 October 2014 RBC commenced action CLE/gen/01770 of 2014 (the 2014 action) by Originating Summons against the Symonettes seeking vacant possession of the Gladstone Road property. The 2014 action was never served on the Symonettes. On

12 April 2019, RBC applied to the Court by ex parte summons to extend the validity of the Originating Summons and for service of the 2014 Originating Summons on Judith and to substitute service on Victor.

[5.] Judith opposes the application for the extension of the validity of the Originating Summons sought by RBC.

[6.] On 12 February 2020 Judith commenced action CLE/gen/00205 (Judith's action) by Originating Summons seeking declaratory relief against RBC. Victor was joined in the action. The Originating Summons in Judith's action is settled in the following terms:

Let THE PARTIES CONCERNED, attend before a judge in Chambers situate in the Supreme Court, Bank Lane, Nassau Bahamas on the ____ day of _____ 2020 at ____ o'clock in the _____ noon on the hearing of an application on the part of the Plaintiff for a declaration that:-

- (1) The judgment granted on the 1st July 2013 in Supreme Court common law action #583 of 2012 is, pursuant to section 5(3) of the Limitation Act (LA), statute barred;
- (2) Further that by reason of the effect of section 5(3) of the LA the 1st Defendant is not entitled to call for possession of Allotment No.22 of Gladstone Road Crown Land Allotment situate on the Eastern Side of Gladstone Road in the Western District of the Island of New Providence, the subject of a Mortgage dated the 1st October 2007 and made between the Plaintiff and the 1st Defendant in favour of the 2nd Defendant.
- (3) As to the extent of the Plaintiff's interest, both legal and beneficial in the property;
- (4) That the Plaintiff is vested of both the legal and beneficial interest in the property freed from the Defendant's mortgage.

[7.] Judith's evidence in support of her Originating Summons is found in her affidavit filed 19 February 2020, which provides, in part:

...

5. [RBC] in the 2012 action obtained in a Money Lending action against me and [Victor].
6. The judgment was obtained on an application by summons filed on the 21st June 2012 pursuant to Order 73 of the Supreme Court Rules.
7. The application was heard on the 17th May 2013 and an order made that the Defendants do pay the Plaintiff the sum of \$351,414.45 together with interest at the full rate of 6.75% continuing until payment of the judgment and costs.
8. The security for the loan was a mortgage over Lot #22 Gladstone Road Allotment which is jointly owned by me and [Victor].
9. The mortgage is dated the 1 October 2007.
10. In 2008 I petitioned the family court for a divorce in Fam/div/543 of 2008.
11. By Interim order made on the 3rd December 2009 Justice Rhonda Bain ordered among other things:-
 - “5. The Respondent to continue to pay the mortgage for matrimonial home with Royal Bank of Canada.”
12. [Victor] failed to comply with the order of the court with the result that the loan payments fell into arrears.
13. The bank was served with a copy of the Interim order in December 2009 but despite repeated request by me, in or around March 2011, to meet with the bank, the bank never accommodated me.
14. Between 2011 and the date of the filing of the 2012 action I heard nothing from the bank.
15. In February 2019 I received a phone call from Dionne Stubbs, a representative of the bank who informed me that the bank intended to exercise its power under the mortgage to sell the property. I was also informed that the bank had obtained a judgment against me.
16. About one month after, on the 6th March 2019 I was served with a letter sent on behalf of [RBC], ordering me to vacate the premises within 15 days and to take all my belongings with me.
17. I am advised by my attorneys that the judgment on which the [RBC] seeks to rely is more than 6 years old and as such is under the Limitation Act, statute barred.
18. Consequently, I am seeking several declarations as to my rights in the property which was the security for the loan. I am advised that until the court declares the property freed of the mortgage the property will continue to appear encumbered by the 1st Defendant's mortgage.
19. In the above premises I am requesting that the court grant the declarations sought so as to permit me to deal with the property freed from [RBC's] interest.

...

[8.] RBC filed the affidavit of Dennise Newton on 22 December 2021, in which she deposes the following with regard to the 2014 action to extend the validity of their originating application (in part):

...

3. I make this Affidavit in support of the Plaintiff's application by way of ex parte Summons filed herein on 12th April, A.D., 2019, seeking an Order pursuant to Order 7 rule 6 of the Rules of the Supreme Court that the validity of the Originating Summons issued be extended and for an Order pursuant to Order 61 rule 4 of the Rules of the Supreme Court for leave to serve the said Originating Summons on the First Defendant by publication of an advertisement in the Nassau Guardian and the Tribune newspapers.
4. By Writ of Summons filed in Supreme Court Action 2012/CLE/gen/00583 (the "first Action") the Plaintiff herein commenced an action against the Defendants seeking Judgment against the Defendants herein for sums due and owing to the Plaintiff pursuant to a Mortgaged (sic) dated 1st October, 2007 entered into between the Plaintiff and the Defendants. The Order and Judgment were obtained on 17th May, 2013, filed on 1st July, 2013 and served on the 1st and 2nd Defendant on 25th and 11th July, 2013 respectively.
...
5. Subsequent to obtaining the aforementioned Order and Judgment, we were instructed by the Plaintiff to apply for an Order for Vacant Possession. We therefore filed the Originating Summons herein on 28th October, 2014. The Originating Summons was thereafter issued for service to a Police Officer, Mr. Stan Davis, on 26th February, 2015.
6. Subsequent to our instructions to Mr. Davis, we followed up with Mr. Davis in the usual manner, by way of several email messages between 3rd November, 2015 and up to 21st November, 2019 to confirm whether the Defendants had been served, and for the details of service or attempted service. To date we have not received any information in connection with service or attempts at service from Mr. Davis. ...
7. By her affidavit filed in Supreme Court Action 2012/CLE/gen/00583 on 21st March, 2019, the 2nd Defendant confirmed that she was not served with the Originating Summons. ...
8. As a result of Mr. Davis' failure to serve and/or confirm the details of attempts at service, we were instructed by the Plaintiff to seek an Order of the Court extending the validity of the aforementioned Originating Summons. The same was done by way of ex parte Summons filed herein on 12th April, 2019. However, before we were able to carry out these instructions, there was an application on the part of the 2nd Defendant to strike out the Judgment entered in the first Action. Thereafter, the 2nd Defendant commenced a third Action seeking various reliefs in connection with this matter.

9. At a Case Management Conference on 22nd October, 2021, we were directed to proceed with the application herein, so that the Court might effectively address all issues relating to the matters between the parties.
10. The current sums due and owing to the Plaintiff by the Defendants as at 20th December, 2021 is \$551,584.00. The last payment on account by the Defendants was made on 18th January, 2011 in the sum of 2,892.73. In the circumstances, the action herein being pursuant to an instrument under seal, the relevant limitation period is twelve years from the last payment date, being 18th January, 2023. ...
11. In the circumstance, the Plaintiff craves the indulgence of the Court in exercising its discretion, pursuant to Order 7 rule 6 of the Rules of the Supreme Court and pursuant to its inherent jurisdiction, to extend the validity of the Originating Summons herein to 18th January, 2023. The Plaintiff further seeks an Order granting leave, pursuant to Order 61 rule 4 of the Rules of the Supreme Court, that the Originating Summons be served on the Defendants by publication of notice in the Tribune and in the Nassau Guardian on one occasion at an interval of seven days.

...

Judith's submissions

[9.] Judith submits that the judgment obtained by RBC on 1 July 2013 is statute barred. Notwithstanding this contention, it is accepted that when the judgment was rendered, it was done within the relevant limitation period pursuant to section 32 Limitation Act. It is also undisputed that RBC filed the 2014 action for vacant possession of the Gladstone Road home site within the relevant time frame under the Limitation Act. Judith contends that RBC failed within the same relevant period per section 5(3) Limitation Act to file enforcement proceedings. She says that the judgment should have been enforced on or before 18 May 2019 and RBC is without excuse for not enforcing the judgment as it had Judith's address and her contacts at all times.

[10.] The case of *Lowsley and Another v Forbes (Trading as L.E. Design Services) [1998] All ER (D) 382*, is advanced in support of Judith's case that section 5(3) Limitation Act prohibits RBC from gaining judgment in this matter. *Lowsley*, an authority from the UK House of Lords considered Section 24 Limitation Act, which is reflective of Section 5(3) Limitation Act. According to Lord Lloyd:

The Limitation Act 1980 continues to give rise to questions of some difficulty. Section 24 provides:

“(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.”

The word “action” as defined by section 24(1) bars execution of a judgment after six years, or whether it only bars the bringing of a fresh action on the judgment. If the answer is, as the plaintiffs contend, that it only bars a fresh action, the second question is whether, when a judgment is executed after six years, interest on the judgment is limited under section 24(2) to a period of six years before the date of execution. Tuckey J. answered the first question in favour of the plaintiffs, and the second question in favour of the defendant. The Court of Appeal agreed with the judge on the first question but disagreed on the second.

“Action” in section 24(1) means a fresh action, and does not include proceedings by way of execution. It is unfortunate that the decisive point in the case did not emerge until the very end of the hearing. But having considered the point in the light of Mr. Hockman’s written submissions, I am not left in any doubt as to the correct answer. I would therefore uphold the Court of Appeal on the first point, albeit for different reasons.

There would seem to be no reason why the relevant words in section 24(2) “no arrears of interest...shall be recovered” should not be given their ordinary meaning, so as to bar execution after six years in respect of all judgments. It is what the words say. “Recovered” has a broad meaning. It is not confined to recovery by fresh action.

But the Court of Appeal has held that the limitation to six years interest on judgments applies only in a case of actions on judgments, and not to execution of judgments generally. In support of this construction, the Court of Appeal relied strongly on the fact that subsections 1 and 2 were part of the same sentence, joined only by a comma, when they were enacted as section 2(4) of the Act of 1939. If the first half of the sentence is confined to action on judgments, Parliament must have intended that the second half of the sentence should be similarly confined. But in my view this does not follow as a matter of language. “Any judgment” in the first half of the sentence means, quite literally, any judgment. There is no warrant for limiting “interest in respect of any judgment debt” in the second half of the sentence to interest in respect of a judgment in an action on a judgment, even if one could think of any good reason why Parliament should so have provided.

So as to the second question I prefer the decision of Tuckey J., who held that section 24(2) limits recovery by way of execution on all judgments to a period of six years, including the judgment in this case.”

[11.] *Lowsley* was followed in the English Court of Appeal case of *Patel v Singh* 2002 EWCA Civ 1938.

[12.] Further, in her submissions, Judith complains of the unexplained delay in enforcing the judgment:

“11. The Affidavit of the 1st Defendant acknowledged that it did not seek to enforce its judgment within the 6 years limitation period. There is no explanation for the delay in applying to enforce the judgment. It is submitted that on the authority of *Lowsley and Patel* the failure of the judgment creditor to enforce is itself sufficient to grant the Plaintiff the orders sought.”

[13.] Judith also advances an alternative position, in the event the Court does not find favor in the limitation point. Judith contends that the claim is *Res Judicata*. She contends that RBC’s submission, that the 2012 action did not seek an Order for possession, is untenable. She says that RBC will have to rely on the judgment in the 2012 action to prove its claim, which presupposes that the judgment is enforceable. Judith relies on the UK Supreme Court case of *Virgin Atlantic Ltd v Zodiac Seats UK Limited [2013] UKSC 46*. At paragraph 16 of the decision:

“16. The bank has argued that the issue of the judgment is of no consequence and that the bank has filed an action which it has not served by which the bank seeks an order for possession. Cause of action estoppel applies and the bank is absolutely barred from attempting to apply in the purported Second action for an order which it ought to have obtained in the First action. Further and alternatively the bank’s cause of action has been extinguished as a result of the judgment handed down in the First action. Following the reasoning in *Virgin* the principle of merger applies; the bank’s rights are whatever rights it can pursue on the judgment.”

[14.] Judith submits that RBC cannot in the circumstances maintain an action for possession of the Gladstone Road home site as it can no longer comply with the Rules of the Supreme Court, since the debt is statute barred. The case of *National Westminster Bank Plc v Ashe [2008] EWCA Civ 55*, she says, affirms this position, that is, if a mortgage debt is statute barred then RBC can no longer sue for possession:-

"97. This decision of Buckley J reported at [1960] 1 WLR 1097 and a passage in his judgment at page 1102 has been treated by some as authority for the proposition that once the mortgagee's right to recover the principal sum is statute barred, he loses his status as mortgagee and "He can no longer sue for possession or for foreclosure, nor can he redeem a prior mortgage." See Cheshire & Burn's Modern Law of Real Property (17th Ed) at page 764. I can see the force of this if there is no longer any enforceable debt to be secured."

[15.] Judith complains that the application to extend the validity of the Originating Summons was made 5 years after the Originating Summons was filed. She submits that the Court will not exercise its discretion to extend when to do so will deprive her of the benefit of limitation. Further, RBC must satisfy the Court that there is good or sufficient reasons to justify exercising its discretion to extend the validity of the Originating Summons.

RBC's submissions

[16.] RBC contends that as no application was made for vacant possession in the 2012 action against Judith and Victor it commenced the 2014 action. It was conceded that the application was not served on the Symonettes and an application was not made to extend the validity of the Originating Summons until 12 April 2019. They say that under clause 2 of the Mortgage Judith has conveyed her legal interest in the properties to the Bank, subject only to the right of redemption upon the satisfaction of the mortgage payments. The mortgage has not been satisfied and the Bank as legal and beneficial owner has the right under the Indenture of Mortgage inclusive of the rights to possess and sell the property. Further, Clause 6(5) of the mortgage agreement provides to the Bank the statutory power of sale over the property was and remains exercisable once the sum due and owing to the Bank was outstanding.

[17.] RBC says that Judith's claim that the judgment in the First Action is statute-barred, is of no consequence for the purpose of the Bank's exercise of its Power of Sale under the Mortgages or its right to demand possession of the mortgaged properties. RBC also

argues that the relevant limitation period is 12 years from the date of last payment or acknowledgement of the debt and the last payment by the mortgagors was made on 18 January, 2011 in the sum of \$2,892.73.

[18.] RBC also submits that Judith's matter has been disposed of as judgment was already entered against her. The Court is functus officio in the circumstances and they rely on *Swart and others v Metaxides (In his capacity and as a representative of six others) and another [2017] 2 BHS J. No.10* which cites *Highway Customs Warehouse Ltd. v The Queen 2007 TCC 715*). RBC's entitlement to judgment has not been appealed, as such this court has no power to exercise in relation to the Orders.

[19.] RBC says that Judith's reliance on the case of *Perfect Luck Investments Limited and another v CTF BM Holding Ltd. and another [2017] 2 BHS J. No. 122*, is misplaced as:-

- (i) the jurisdiction of this court has been exhausted making this court functus officio in this matter;
- (ii) it is trite that the limitation is not a bar to a cause of action, but may be a bar to relief if it is sought as a defence. Limitation is a shield, not a sword as per *Sweeting v Sewell [1987] BHS J. No. 96* and *Ferguson v Canter and another [2006] 2 BHS J. No. 185*). Judith is not at liberty to bring an action against RBC that the Judgment is statute barred. Her action would not arise unless or until RBC applies for a Writ of Execution and/or applies for leave to issue a Writ of Execution pursuant to Order 46 rule 2 (1) or executes the judgment. It is only at this time that Judith can then raise Limitation as a defence, which would be the appropriate course;
- (iii) Section 5(3) LA does not 'substantively' apply to RBC and Judith as the relationship between mortgagor and mortgagee is defined by the express provisions in the mortgage with respect to payments, the mortgage instruments being under seal containing a limitation of 12 years (LA 5(2)). The Mortgage Loan Agreement is incorporated into the mortgage and a 12 year enforcement period arguably attaches so that leave to extend beyond 6 years as contemplated by Order 46 rule 2 RSC may be considered.
- (iv) The case of *Perfect Luck* is distinguished from the instant action as the vendor/purchaser summons in that case was binding on those parties and forms no general legal precedent.

Analysis & Conclusion

[20.] There are before me two applications which are being advanced:

- (1) The Application of RBC to extend the validity of the Originating Summons filed herein in the 2014 action; and
- (2) The claim for declaratory relief in Judith's action.

[21.] RBC commenced the 2014 action by Originating Summons since 2014. The unchallenged evidence is that that Originating Summons was not served. That originating process expired after 12 months of not being served. RBC applied, by ex parte summons on 12 April 2019 to extend the validity of the Originating Summons. No effort was made to set the application down for hearing until the matter was raised during the course of Judith seeking to pursue relief in Judith's action. On 22 October 2021 I directed RBC to proceed with this application which I heard inter partes.

[22.] Order 6 Rule 7 of the RSC provides:

(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 the 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 serve so as to extend the validity of that other writ until the expiration of the period specified in the order.

[23.] Order 3 Rule 4 of the RSC provides:

(1)The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act in any proceedings.

(2)The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3)The period within which a person is required by these Rules, or by any other order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

[24.] In the case of *Farmer and others v. The Personal Representative of the late Gemason Alexander Smith, deceased* [2010] 3 BHS J No. 96, Chief Justice Sir Michael Barnett (as he then was) provides an instructive discussion on the issues concerning the issue of the extension of the validity of originating processes. At paragraphs 13-19 of the decision he stated:

[13.] In the present case, the 12 month period after the issue of the Writ was 16th December, 2008. This ex parte application to extend the validity of the Writ was not made until 8th October, 2010.

[14.] The question as to the Court's powers to extend the time for service of proceedings has been the subject of judicial consideration in a number of cases. In *Singh v Dupont Haper Foundries Ltd* [1994] 2 All E.R. 889 Farquarson LJ after considering a number of earlier decisions of the English Court of Appeal said:

It is difficult to reconcile the authorities cited above but the following propositions should be applied: (1) where a litigant seeks an extension of the validity of a writ the provision of R.S.C., Ord. 6, r. 8 will apply; (2) an application under that rule must be made during the validity of the writ, i.e. four months in the usual case, or during the four months next following; (3) only one extension of time can be granted on a particular application and that must be for a period not exceeding four months; (4) if the litigant has not conformed with the requirements of the rule he cannot be granted relief under Ord. 6, r. 8; and (5) in exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the writ under the provisions of R.S.C., Ord. 2, r. 1 and Ord. 3, r. 5.

Before the court will extend the validity of the writ the applicant must show that there is good reason for such an extension, and where appropriate provide a satisfactory explanation for the failure to apply during the period of the original validity. See *Kleinwort Benson Ltd v. Barbrak Ltd* [1987] A.C. 597.

[15.] This analysis of the law was followed by the English Court in *Blanksby v Turner* [1995] PIQR 275 and the fifth proposition expressly approved in *Kelliher v E.H. Savill Engineering Ltd.* [1994] PIQR 387.

[16.] A recent example of the power of the Court extending a Writ after the initial period had elapsed, was the decision in the Hong Kong case of *Bank of China v*

Chen Jiaren [2009] 3 HKLRD 163 where the writ was renewed five years after it had been expired under the Hong Kong equivalent of Order 3 Rule 5.

[17.] I am satisfied that I have the jurisdiction to extend the validity of the Writ under Order 3 Rule 5.

[18.] I turn to the question whether in the circumstances of this case I should exercise my jurisdiction to do so.

[19.] As this is an ex parte application and I have not had the benefit of opposing argument, I will be limited in my comments. In my view ex facie, the real defendant in this action is the insurer Security and General. They were always aware of the existence of this claim and according to the Plaintiffs accepted liability. When the Writ was issued they were told that the Plaintiffs would not take any further steps whilst negotiations were being conducted. There is no evidence that they disagreed with this approach and the Plaintiffs by the insurers conduct were lulled into inaction. There is no prejudice to the insurers, the virtual Defendants, if I were to extend the period for service of the Writ to the 31st July, 2011.

[25.] The reasons advanced by RBC for its failure to serve the Originating Summons within the 12 months period is to be found in the affidavit of Dennise Newton at paragraphs 5 and 6, where she states:

5. Subsequent to obtaining the aforementioned Order and Judgment we were instructed by the Plaintiff to apply for an Order for Vacant Possession. We therefore filed the Originating Summons herein on 28 October 2014. The Originating Summons was thereafter issued for service to a Police Officer Mr Stan Davis on 26 February 2015.
6. Subsequent to our instructions to Mr. Davis, we followed up with Mr Davis in the usual manner, by way of several email messages between 3rd November 2015 up to 21 November 2019 to confirm whether the Defendants had been served, and for the details of service or attempted service. To date we have not received any information in connection with service or attempts at service from Mr Davis.

[26.] I have considered the affidavit evidence and I am satisfied that there is no good reason advanced for the failure to serve the Originating Summons within the period of validity or to have waited 5 years to make the extension application or not to have advanced the application within a further 2 years. The fact that the server that was used was not located does not seem to me to be sufficient reason in the circumstances to justify the length of the delays. There was no explanation offered as to why another process server could not have been identified and/or substituted service effected with leave of the Court within a reasonable timeframe. Having the validity of the Originating Summons

extended is not a right and is subject to the exercise of the Court's discretion which must be exercised reasonably.

[27.] In the circumstances I refuse the application of RBC for an extension of the validity of the Originating Summons

[28.] The declaratory relief, as is being sought by Judith is pursued under the discretionary power of the Court. In the case of *Messier-Dowty Ltd v Sabena SA (No 2) 1 All ER 275*, Lord Woolf MR stated that when deciding whether declaratory relief should be granted the Court must consider whether it is appropriate to do so bearing in mind: (i) the justice of it to both plaintiff and defendant in a matter, (ii) whether the declaration would serve a useful purpose and (iii) any special reasons for or against the declaration(s) per Neuberger J in *Financial Services Authority v Rourke (t/a- J E Rourke & Co) [2001] EWHC 704 (Ch), [2001] All ER (D) 266 (Oct)*.

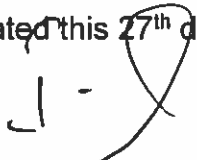
[29.] While I accept that there may be viable arguments by Judith both under the Limitation Act and under the plea of Res Judicata, I agree with RBC that those arguments are designed to be used as a shield for protection rather than in an offensive manner, as a sword, as Judith proposes. According to Smith JA in the Court of Appeal decision in *Sweeting v Sewell [1987] BHS J. No. 96* albeit in a different context:

[T]he Limitation Acts are used as a shield, not a sword; it is not incumbent on a plaintiff claiming ownership by adverse possession to plead the statutes.

[30.] In as much as the grant of declaratory relief is discretionary I will not exercise my discretion in favor of Judith. Her arguments are best kept for her protection in the event there is a proper attempt to enforce the July 2012 judgment.

[31.] I will hear the parties as to the appropriate Order for costs in the circumstances.

Dated this 27th day of June 2023


Sir Ian Winder
Chief Justice