IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2013/CLE/gen/00869

IN THE MATTER of property comprised of a Mortgage dated the 25th day of April, A.D., 2003 between Bobbie Shanell Ferguson (Borrower) and Kevin R. Ferguson (Guarantor) and Scotiabank (Bahamas) Limited (Mortgagee) of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 8954 at pages 392 to 411

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

BOBBIE SHANELL FERGUSON

KEVIN R. FERGUSON

Defendants

Before: The Honourable Madam Justice Simone Fitzcharles

Appearances: Ms Candice Hepburn for the Claimant

Mrs Romona Farquharson with Mr Samuel Taylor for the Second Defendant

14 September, 15 November, 4 December 2023, 24 July 2024

RULING

FITZCHARLES, J.

The Application

1. This is an application on a preliminary point brought by Mr Kevin Ferguson, the Second Defendant, to strike out the case of Gateway Ascendancy Ltd, the Claimant, for an

alleged failure to comply with **s 4(1)** of the **Homeowners Protection Act 2017** ("HPA") and for abuse of the process of the Court.

2. The point *in limine* was introduced before the commencement of the hearing of the substantive application of the Claimant brought by way of Originating Summons filed on 10 May 2013. That substantive application has been brought by the Claimant as a mortgagee who seeks judgment and an Order for vacant possession of the referenced property and to exercise a power of sale pursuant to an Indenture of Mortgage dated 25 April 2003 (the "Mortgage"). The Claimants seek such relief upon the occurrence of events of default on the part of Mrs Bobbie Shanell Ferguson, the First Defendant, as mortgagor and the Second Defendant as guarantor in the Mortgage.

3. On 30 May 2023 the Court gave directions for the filing of evidence and submissions and set the matter to commence on 14 September 2023. The Second Defendant relied upon his Affidavit filed on 5 December 2015, the Second Defendant's Point In Limine Submissions and the Second Defendant's Response to Plaintiff's Supplemental Submissions. The Claimant filed the Supplemental Affidavit of Tamika Thompson on 19 October 2023, proffered Skeleton Arguments and Supplemental Skeleton Arguments, and also relied upon the Affidavit of Kelvin Briggs filed on 10 May 2013.

Relevant Events

4. The facts in this matter are for the most part undisputed, except where the parties are at odds over whether the Second Defendant was aware of the demand letter served on the First Defendant on 12 November 2012 (Exhibit 'KB3' of the Affidavit of Kelvin Briggs). The facts salient to this application are set out below.

5. On 25 April 2003, Mrs Ferguson and Mr Ferguson, then a married couple, entered into the Mortgage with Scotiabank (Bahamas) Limited (the "Bank"). Mrs Ferguson was the Borrower or Mortgagor in the transaction and Mr Ferguson entered into the Mortgage as Guarantor. Mrs Ferguson borrowed the sum of $125,000 and agreed to repay the Bank the sum borrowed plus interest at the rate of 8.250%. Mr Ferguson conveyed the collateral under the mortgage, Lot 57 Mayfield Park Subdivision in Freeport, Grand Bahama with a duplex dwelling thereon. As Guarantor, Mr Ferguson agreed to repay the Borrower's debt in the event she defaulted on her loan obligation to the Bank. In his Affidavit, Mr Ferguson confirmed his understanding of this term.

6. After making some repayments towards the loan, Mrs Ferguson, the Mortgagor, defaulted. As at 5 April 2013 $7,777.87 in principal had been repaid leaving a balance of $120,827.48 due. As for interest, $91,086.67 had been repaid leaving a balance due of $6,275.35. In the time following, the Claimant's position has consistently been that both of the Defendants have failed to ensure that the Mortgage is brought up to date.

7. By letter dated 12 November 2012, Halsbury Chambers (then attorneys for the Bank) sent a demand for payment of the outstanding loan amounts to the Mortgagor. The letter, in addition to containing a demand for payment, set forth the total amount due

with an itemization of how the sum was comprised. It contained an explanation of the consequences of default and gave the Mortgagor a 14 day time period within which to pay. It set out requirements of the Bank for proof of current property and life insurance from the Mortgagor, the method by which payments were to be made and contact information for Counsel, should the Mortgagor wish to discuss the matter.

8. On 2 January 2013 Counsel for the Second Defendant, Messrs McDonald & Co wrote to Counsel for the Bank. On 9 January 2013, the Bank's attorney responded to the Mortgagor's Counsel stating that the Bank was prepared to meet with Mr Ferguson to discuss the matter. Names and contact details of relevant persons in the Bank were furnished to Mr Ferguson's Counsel for that purpose.

9. Some months later on 10 May 2013, the Bank filed its Originating Summons and thereby commenced proceedings against the Mortgagor and Guarantor for default in making mortgage payments. The Originating Summons was supported by the Affidavit of Kelvin Briggs (the "Briggs Affidavit") also filed on 10 May 2013. The Second Defendant avers that there is no evidence that the Briggs Affidavit was served on him. However, the Second Defendant made a one-time lump sum payment to the Bank of $10,000 towards the outstanding loan amount.

10. Following this, it appears that at some point between 2013 and the end of 2015, the Bank released the salary deduction payment of the First Defendant Mortgagor's salary. The Second Defendant complained that he was not made aware of this until after it was done. Further, Mr Ferguson stated that when he enquired of the Claimant how it could be done without a court order, personnel of the Claimant explained that he was not the Borrower so they could not provide that information to him. The Claimant, on the other hand, stated that they did not require a court order to release the Borrower's salary from deduction. Moreover, the Claimant believed that Mr Ferguson knew about the release of his wife's salary deduction and her default in paying. There were numerous discussions to settle the matter which bore no fruit.

11. On 11 March 2014, Mr Ferguson and Mrs Ferguson filed a Summons supported by their joint Affidavit to have the file of this matter transferred to the Northern Region on the grounds that the Northern Region was the place of their residence and of the mortgaged property.

12. The Bank, on 6 July 2016, renegotiated the payment of the loan with the Mortgagor and the Guarantor, which both the First Defendant Mortgagor and the Second Defendant Guarantor signed in agreement.

13. On 31 October 2016 the Bank assigned and transferred the Mortgage to Gateway Financial Ltd by Deed of Transfer.

14. On 2 November 2016 Counsel for Mr Ferguson again wrote to Counsel for the Claimant requesting more time for Mr Ferguson to pay off the loan and explaining that he expected to receive payments from the Ministry of Works which exceeded the amount

due and owing under the Mortgage. The Claimant at that time refrained from taking further action.

15. On 19 February 2018, Gateway Financial Ltd assigned and transferred the Mortgage to Gateway Ascendancy Ltd. by Deed of Transfer. On 18 June 2021 the Claimant filed a Notice of Intention to Proceed after the expiration of 1 month. Mr Ferguson avers that there is no evidence that he was served with this Notice.

16. The Claimant obtained leave to amend its Originating Summons to reflect the name of Gateway Ascendancy Ltd as Claimant in place of Scotiabank (Bahamas) Limited. The Claimant filed its Amended Originating Summons on 19 July 2021 and served the same on the Second Defendant Guarantor personally on 9 September 2021. Resultantly, Mr Ferguson, who was then represented by Messrs RA Farquharson & Co, entered a regular Memorandum of Appearance and Notice of Appearance on 01 October 2021.

17. The Amended Originating Summons was served on the First Defendant Mortgagor, with the leave of the Court, by substituted service, as between July and September 2021 the Claimant learned that Mrs Ferguson had relocated from Freeport, Grand Bahama to West Palm Beach, Florida, USA. Mrs Ferguson has not participated in this application.

Issues

18. The disposal of this application required the Court to consider three primary issues, namely –

    (1) whether the Claimant was required to comply with **s. 4(1)** of the **HPA** and failed to do so with the result that this action ought to be struck out;

    (2) whether the action ought to be struck out on the basis that Claimant has abused the process of the Court in failing to serve a notice pursuant to **HPA s 4(1)** and a Notice of Intention to Proceed on the Second Defendant; and

    (3) whether costs ought to be awarded to the Second Defendant.

Second Defendant's Submissions

19. The Second Defendant pursues his preliminary point to strike out this claim and recover costs on the strength of the following arguments:

    (1) contrary to **s. 4(1)** of the **HPA**, the Claimant failed to personally serve the Defendants with a notice stating the matters set out in that provision, before it instituted legal proceedings against the Defendants for default of payment;

    (2) the Claimant abused the process of the Court and did not have "clean hands" in that it by-passed **HPA s 4(1)** and in so doing failed to provide notice of its intention to commence legal proceedings against the Mortgagor;

(3) when the Amended Writ was filed it "practically started this matter afresh" with a new Claimant, and as such, the Claimant Mortgagee ought to have served a new demand letter upon the Second Defendant Guarantor which complied with s 4(1);

(4) albeit this action was commenced in 2013 and the **HPA** came into force years later, the HPA must be applied retrospectively in this case because –

(i) it is a procedural statute which, in accordance with the law, applies to all actions whether commenced before or after the passing of the statute;

(ii) there is no express provision in the **HPA** which supports an interpretation that it only applies to mortgages after the commencement of the statute;

(iii) where, as in this case, the **HPA** is silent as to its retrospectivity or otherwise, the Court ought to apply principles of fairness in construing such a provision and find it is unfair the Mortgagee did not notify the Second Defendant of their intention to commence legal proceedings against him;

(5) the Claimant failed to comply with **Order 3 Rule 5** of the Rules of the Supreme Court and did not have "clean hands" as it did not serve the Second Defendant with a Notice of Intention to Proceed after a year or more had elapsed since the Claimant had taken a step in the action;

(6) the Claimant has wasted the Court's time and abused the process of the Court by bringing this action, and as such, should pay the Second Defendant's costs.

20. The Second Defendant relies upon **s 4(1)** and **s 3** of the **HPA**, **Part 26.3(1)(a)**, **Part 71.3** and **Part 71.6** of the **Supreme Court Civil Procedure Rules 2022** ("**CPR**"), ***RBC Royal Bank (Bahamas) Limited v Lawson H Hall and Rhonda Hall*** 2020/CLE/gen/000236, ***Hunter v Chief Constable of the West Midlands Police*** [1982] AC 529, ***Wright v Hale*** (1860) 158 ER 94, ***Satish Daryanani v Leon Griffin*** 2020/CLE/gen/000594/BS 2022 SC 013.

Claimant's Riposte

21. The Claimant resists the application chiefly on the following grounds:

(1) the **HPA** came into force years after this action was brought. **S. 4(1)** of the **HPA** is not to be applied retrospectively as Parliament did not intend that mortgagees in the midst of a Supreme Court action be prejudiced by such a construction (and see HPA s. 23);

(2) the filing of the Amended Originating Summons in 2021 did not usher in a new claim or action which could trigger any new requirement to comply with s. 4(1). The Claimant made the amendment as an assignee of the interest of the Bank, which

was affected by Order 15 Rule 8 of the Rules of the Supreme Court to carry on the action as if the assignee Claimant had been substituted for the Bank;

(3) Clause 5 of the Mortgage specifically stated that the loaned sums would become payable whether or not demand was made by the mortgagee, but in any event a demand letter was sent to the First Defendant.

(4) On the evidence, the Second Defendant guarantor was aware of the demand letter: (i) a few months prior to the commencement of this action, the Second Defendant by way of his attorney-at-law communicated with the Bank about paying the outstanding loan amount; and (ii) there is evidence that when the First Defendant was served with the demand letter by the Claimant, she was in communication with the Second Defendant as they swore a joint affidavit after that date in support of moving the matter to Freeport, Grand Bahama where both Defendants resided;

(5) The Second Defendant's excuse that he did not pay the loan because he wanted to find out why his wife's salary was released is no valid reason why he, as Guarantor, should not pay the mortgage. A mortgagor may change employment and/or change locations resulting in a deduction release. However, the Claimant has clearly not released the First Defendant from her obligation to pay off the loan as she has been sued also;

(6) The Guarantor has acknowledged and confirmed that he was obligated to pay the mortgage if the First Defendant defaulted on the loan payments. As such it would be unjust to deny the Claimant its right to judgment and vacant possession, a right with which courts are reluctant to interfere. Further, the Guarantor, who has been in default for over 10 years and has constantly sought to delay the Claimant's rights on default, does not come to the Court with 'clean hands'.

22. The Claimant relied upon ***Citibank NA v Major*** [2001] BHS J No. 6, ***Moschi v Lep Air Services Ltd and anor.*** [1972] 2 All ER 393, **s. 20** of the **Law of Property Act**, Chapter 170, RSC **Order 15 rule 8** and the **Overriding Objective** of the **CPR**.

Law and Discussion

23. This preliminary point is brought pursuant to the strike out provisions of the **CPR**. **Part 26.3** of the **CPR** provides –

> **"26.3 Sanctions – striking out statement of case**
>
> (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that –
>
> (a) There has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;

(b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) The statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings…". [Emphasis added].

24. As noted in the rubric under **Part 26.3** of the **CPR**, this rule does not displace the Court's inherent jurisdiction to strike out proceedings on the ground of abuse of process.

25. The provision which the Second Defendant argues the Claimant has breached is s 4(1) of the HPA. ***Part II, s. 4(1)*** of the HPA provides -

"PROTECTION FOR MORTGAGORS WHEN MORTGAGEE INSTITUTES COURT PROCEEDINGS

"4. Obligation of mortgagee to give notice prior to instituting Court Proceedings.

(1) Where a mortgagor is in breach of the mortgage agreement, the mortgagee shall not institute proceedings before the Court in respect of the breach unless there has been served upon the mortgagor either personally or by registered post at least thirty days prior to instituting such proceedings a notice in writing stating –

(a) The nature of the breach of any covenant of the mortgage;

(b) The amount of arrears the mortgagor owes, if any, as well as all sums due under the mortgage;

(c) The amount of any administrative or other costs, including any property tax and insurance costs, necessarily incurred by the mortgagee and chargeable to the mortgagor;

(d) The actions the mortgagor must take by a stated time to cure the breach and avoid foreclosure and sale of the mortgaged property;

(e) The rights of the mortgagor under this Act including the right to apply to the Court for relief;

(f) The willingness of the mortgagee to discuss the breach with the mortgagor, with a view to entering into an agreement with the mortgagor regarding redress thereof, including modification of the mortgage terms if possible;

(g) Contact information for the mortgagee, including an address to which a mortgagor may come in person and a telephone number." [Emphasis added].

26. The primary object of the HPA is to provide protection and relief to homeowners and for ancillary matters. The Homeowners Protection Bill was called the 'legislative centerpiece of a comprehensive response to the Bahamian mortgage crisis, which was a direct result of the global financial crisis commencing in 2008.' It was enacted to protect homeowners who had paid their mortgage payments faithfully for years, but found themselves in arrears and at risk of losing their homes due to the negative effect of tough economic times. In part, it was also intended by Parliament to 'level the playing field' in the often encountered situation where the lender would require the homeowner to give up his rights under the Conveyancing and Law of Property Act in the mortgage, thereby making it easier for the lender to engage the foreclosure process.[1] S. 4(1) brought into effect a mandate that a notice be sent before court action by the lender to the homeowner which contained a list of named particulars.

27. In the case of ***RBC Royal Bank (Bahamas) Limited v. Lawson H Hall and Rhonda Hall***, 2020/CLE/gen/00236, Winder J (as he then was) had occasion to comment on the purpose of the HPA. This was a case in which the mortgagor defendants challenged the action of the mortgagee on the basis that the mortgagee did not comply with the requirement of s. 4(1) of the HPA to serve them either personally or by registered post with a notice as stipulated in that provision. On the evidence before the Court, Winder J. found that the purported service of a demand letter upon the mortgagors was inadequate and not in conformity with the HPA. Resultantly, the Court struck out the mortgagee's action against the mortgagors. The Court stated in the final paragraphs of its Ruling –

> "8. The purpose of the HPA legislation was to provide meaningful protection to the homeowners by ensuring a true and proper discourse between the Mortgagor and the Mortgagee prior to taking the significant and ultimate step of recovering the security through litigation. Its provisions ought to be strictly complied with otherwise mortgagees would be precluded from instituting proceedings.
>
> "9. In the circumstances I am not satisfied that there has been compliance with the HPA in the result that the plaintiff is prohibited from instituting proceedings without

[1] See (2017) Senator The Hon. Gibson, A. QC. 'AG Speech for Homeowners Protection Bill' *TheBahamasWeekly.com, 27 March 2017.*

complying …The action is therefore struck out. The plaintiff is free to commence fresh proceedings which comply with …the HPA…". [Emphasis added].

28. Similarly, in this case the Second Defendant argues that the Court ought to strike out the action for the Claimant's failure to comply with **s. 4(1)** of the **HPA**. For the reasons set out below, it is my judgment that the preliminary point cannot prevail.

29. The acts of default by the Mortgagor and the Guarantor were committed prior to 2013. This action was commenced by the Claimant's predecessor on 10 May 2013. The HPA had not yet been conceived or debated as a bill in Parliament at that time, and it only came into effect some years later on 31 March 2017. S. 4(1) contemplates that the lender would have had to serve on the mortgagor a notice containing the exact list of information set out in that provision before the lender could start a court action to recover judgment and vacant possession for the mortgagor's default in making loan payments. To say that the Mortgagee should have complied in 2013 with a statute not brought into force until 2017, before starting his action in 2013 is, in this case, defiant of logic. Neither the Claimant, nor indeed the Second Defendant, would have been aware of the HPA and its specific mandate on 10 May 2013, the date from which this action existed. Indeed, there are requirements in the HPA which could not possibly be adhered to in 2013. For example, the demand letter to the Mortgagor in 2013 could not contain, pursuant to HPA s. 4(1)(e), "the rights of the mortgagor under this Act [the HPA] …", for the Act did not then exist. Apt are the words of Lord Goddard CJ who succinctly proclaimed in ***Barnes v Jarvis*** [1953] 1 WLR 649 at 652,

"A certain amount of common sense [must be applied] in construing statutes."

30. More fundamental, however, is the fact that the HPA is not silent as to its applicability to cases pending before the statute came into force. The answer to this part of the preliminary objection is patent. **HPA s. 6(5)** which speaks to the power of the Court to grant relief in its proceedings, provides –

"Sections 4, 5, and 6 shall apply to any mortgage executed before or after the coming into operation of this section but not to any legal proceedings existing at the coming into operation of this Act." [Emphasis added].

31. In the result s. 4 of the HPA does not apply to proceedings (such as this case) which were in existence before 31 March 2017. This ground presents no cause to find an abuse of process or to strike out this case. Since the intention of Parliament as to the applicability of the HPA is plain on a literal interpretation of the statute, there is no need to scale the heights of debate on the presumption against, or various legal principles for, a retrospective operation of the statute. Those are matters which would only have arisen for discussion if the intention of the framers of the statute were not made plain, as was the assumption of the contenders in this matter. As it turns out, the answer is on the face of the HPA. But even if this were not the case, principles of fairness and common sense would have guided this Court to come to the same conclusion. By reason that this answer is clear and ends the matter, I have not ventured into other reasons why the same result would be found, such as doubts whether the guarantor is entitled to notice under the Mortgage or at common law. (See Clause 5 of the Mortgage and ***Moschi v Lep Air Services Ltd and anor*** [1972] 2 All ER 393.

32. The Second Defendant further asserted that the claim "practically started...afresh" when the Claimant amended the Originating Summons, and as such, had to comply with s.4(1). On this point, Counsel for the Claimant has advanced the prevailing argument. Order **15 Rule 8** of the **Rules of the Supreme Court, Chapter 53**, applied when the current Claimant (an assignee and transferee of the Mortgage from the Bank) amended the Originating Summons to reflect Gateway Ascendancy Ltd as Claimant. According to **Order 15 Rule 8** (2) –

> "Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party...".

33. On the evidence, this is essentially what happened before the filing of the Amended Originating Summons. The Claimant obtained leave to amend the process so as to substitute Gateway Ascendancy Ltd for Scotiabank (Bahamas) Limited. This brought about no curtailment of the action, but merely a substitution of one entity for another

as claimant. In those circumstances, it could not be successfully contended that the applicability of **HPA s 4** as set forth in **HPA s 6(5)** lost its effect. See also ***Stapleford Finance Limited v Lavelle*** [2016] IECA 104, 11 April 2016, in which the Irish Court of Appeal found that the rules on substitution of parties applied to a situation in which a bank which had advanced a loan to the defendant, had transferred its right in the loan to Stapleford. Stapleford was successfully substituted as the plaintiff without having to commence a fresh action. There, the court cited the words of Lord Millett in the English Court of Appeal case of ***Yorkshire Regional Health Authority v Fairclough Building Limited*** [1996] 1 WLR 210 on Order 15, r. 7 (which was equivalent to the Bahamian RSC Order 15, r. 8):

> "...Even though the rule permits a new party to be substituted for an original party, this does not involve a new cause of action; the new party is substituted because he has succeeded to a claim or liability already represented in the action and sues or is sued in respect of the existing cause of action. The substitution of the successor does not deprive the defendant of an accrued limitation defence. There is no good reason why the substitution should not be made at any stage of the proceedings and whether a relevant period of limitation has expired or not; the expiry of the limitation period is completely irrelevant." [Emphasis added].

34. Apart from the foregoing, the Court is not convinced that Mr Ferguson did not know about the demand letter which was served by the Bank on his wife. The argument that he did not know is untenable because the evidence tended to show, on a balance of probabilities, that after the Bank's demand letter was sent, Mr Ferguson's attorney responded to it. The Bank then replied to Mr Ferguson's Counsel in a favourable manner, to meet and discuss a resolution with Mr Ferguson. As such, on the evidence, the Court is of the view Mr Ferguson was well aware of the circumstances of default and the requirement that he, as Guarantor, pay the mortgage when his wife, the Mortgagor, defaulted. In my view, there appeared during the life of the loan, to be several opportunities for the Mortgagor and Guarantor to engage the Mortgagee in the sort of 'true and proper discourse' referred to by the Court in the ***Hall*** case.

35. The Second Defendant's argument on Order 3 Rule 5 of the Rules of the Supreme Court also fails. Briefly, Order 3 Rule 5 is a requirement under the former rules governing civil procedure in this jurisdiction that after a delay of a year or more without taking a

step in an action, a party must file a Notice of Intention to Proceed and serve it on other parties to the action before proceeding. The Court accepts there is no evidence on file that the Claimant served the Second Defendant with its Notice of Intention to Proceed filed 18 June 2021. This would have been an irregularity in the proceedings on the part of the Claimant in accordance with RSC Order 2, which provides –

> "EFFECT OF NON-COMPLIANCE"
> "Non-compliance with rules (O. 2, r. 1)"
>
> "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.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.
>
> 2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
>
> (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion." [Emphasis added].

36. Under the Rules then applicable (that is, in 2021), the Second Defendant did not apply within a reasonable time to object to the apparent failure of the Claimant to serve the

Notice of Intention to Proceed on him. This point, in fact, was only raised in submissions of the Second Defendant tendered to the Court on 4 December 2023, years after the matter ought to have been raised. Moreover, when the Second Defendant entered a regular appearance on 1 October 2021 in answer to the Amended Originating Summons, and not a conditional appearance by which he could contest the originating process or its service, he took a step which cured the irregularity and any other irregular step which may have been earlier taken by the Claimant in the proceedings. Similarly, owing to the filing of an unconditional appearance in answer to a writ of summons in **Jeudi v Hanna et Al BS 1995 SC 16,** Marques J (Acting) weighed the questions whether a regular memorandum of appearance would be considered a fresh step in the proceedings, and what effect this would have on a challenge to an irregular step. The Court found:

> "...it is a pre-requisite of RSC O.2, r.2 that a party making application to set aside for irregularity any proceeding or any document therein should do so before taking any fresh step after becoming aware of the irregularity. Here the record shows that the first named defendant entered an unconditional appearance to the Writ on the 15th December, 1994 and filed the Summons herein on 16th December 1994.
>
> The filing of such an appearance by the first defendant, the plaintiff/appellant says, constitutes a fresh step for the purposes of RSC O.2 r.2 and referred to paragraph 12/1/3 at page 97 of the 1976 White Book that reads:–
>
> > "Where a defendant enters an ordinary appearance, without any condition or protest reserving his right to object to the irregularity of the Writ or service or the jurisdiction of the court, he is debarred from raising an objection afterwards
> >
> > The effect therefore of an ordinary appearance [is] a waiver of irregularity, if any, as well as a submission to the jurisdiction of the court."
>
> I adopt that statement and do hold that the unconditional appearance of the first defendant did constitute a fresh step precluding him from having the Writ set aside even though he made a timely application...". (Emphasis added).

37. The Second Defendant, having taken a fresh step by entering a regular appearance to the Amended Originating Summons, may not at this stage, object to any

historical failure on the part of the Claimant to serve him with a Notice of Intention to Proceed and on that basis, seek to strike out the Amended Originating Summons. There is, as such, no abuse of process or reason which warrants a strike out of this case.

Conclusion and Disposition

38. In light of the defeat of the preliminary objection of the Second Defendant, the current state of affairs for these parties appears to be in accordance with that which was articulated by Ganpatsingh JA in ***Citibank N.A. v Major*** [2001] BHS J No. 6 at paragraph 10:

> "The position at law is that where under a legal mortgage, being an installment mortgage, the whole money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order…; but this does not exclude a power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so." [Emphasis added].

39. The Court will consider the representations of the parties and the options afforded by the law in the continuation of the hearing of the Claimant's substantive application. The Court will make a single pronouncement as to costs at the hearing of the substantive application. Based on my findings, I make the following Orders:

(1) The preliminary objection of the Second Defendant is hereby dismissed;
(2) Costs of this application shall abide the outcome of the substantive application;
(3) The substantive application shall be heard at 3:00 pm on 17 September 2024.

Dated 24 July 2024

Simone I. Fitzcharles
Justice