IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/00434

REGIONS BANK
(chartered as Regions Financial Corporation)

Plaintiff

AND

MR. CECIL FRED HUDSON III

First Defendant

AND

CHANDLER

Second Defendant

Before: The Honourable Madam Justice Simone I. Fitzcharles

Appearances: Mrs. Vanessa Smith with Ms. Alicia Gibson (of McKinney, Bancroft & Hughes) for the Plaintiff

Mr. Rhyan Elliottt (of Higgs & Johnson) and Mrs. Tara Knowles (of Eastwood Chambers) for the First Defendant

Mr. Ryan Brown (of RBO Advisors) for the Second Defendant

Hearing Date: 23 March 2023 and 6 July 2023

RULING

FITZCHARLES J.
Introduction

1. These are two consolidated applications brought by Cecil Fred Hudson III ("the First Defendant") and Chandler ("the Second Defendant") (collectively, "the Defendants"), respectively, to set aside and/or stay the Order of the Honourable Mr. Justice Ian R. Winder (as he then was) dated 7 May 2019 and filed on 1 July 2019. By this Order Winder J granted Regions Bank (chartered as Regions Financial Corporation) ("the Plaintiff") the authority to possess and sell freehold properties owned by the First Defendant and located in Scotland Cay, Abaco, The Bahamas in satisfaction of a judgment debt ("the Order for Sale and Possession").

2. By way of a Summons filed on 28 November 2022 ("the First Defendant's Summons"), the First Defendant sought the following reliefs, namely –

   i. "an Order pursuant to the inherent jurisdiction of the Court that the Order of the Honourable Mr. Justice Ian Winder dated 7 May 2019 ("the Order for Sale and Possession") be set aside on the basis that, *inter alia*:

      (a) by the Plaintiff's own admission, the properties ordered to be sold and possessed by the Order for Sale and Possession, include properties which were, at the time of entry, legally and beneficially owned by third parties (including non-parties without notice of these proceedings);

      (b) the properties ordered to be sold and possessed by the Order for Sale and Possession are nevertheless subject to execution and a legal and/or equitable charge in favour of Chandler, the Judgment Creditor, in Common Law and Equity Action No. 00653 of 2017;

      (c) in all the circumstances, such discharge is just and equitable;

   ii. further and/or alternatively, an Order pursuant to RSC Order 45, Rule 11 for a stay of execution of the Order for Sale and Possession;

   iii. An Order that the costs of and occasioned by this application shall be paid by the Plaintiff to the Defendant, in any event, to be taxed, if not agreed; and

   iv. Such further and/or other relief, as the Court deems just."

3. By way of a Summons filed on 28 February 2023 ("the Second Defendant's Summons"), the Second Defendant sought the following reliefs, namely –

   i. "an order pursuant to the inherent jurisdiction of the Court that the Order of the Honourable Mr. Justice Ian Winder, Chief Justice of the Supreme

Court, made herein on the 7th day of May A.D., 2019 and filed on the 1st day of July A.D., 2019 be set aside on the grounds that:

(a) the properties ordered to be possessed and sold pursuant to same by the Plaintiff are the subject of a pre-existing Order made in Supreme Court Action No. 2017/CLE/gen/00653, which created a legal and/or equitable charge in favour of the Second Defendant, the Judgment Creditor there;

(b) the Plaintiff has admitted in the Affidavit of Demi Forbes filed herein on the 13th day of April 2022 that the aforesaid Order of the Honourable Mr. Justice Ian Winder, Chief Justice of the Supreme Court, is, *inter alia,* unenforceable as it affects the proprietary rights of third parties that existed prior to the aforesaid Order;

ii. alternatively, an Order, pursuant to Order 45, Rule 11 of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court, to stay the execution of the Order of the Honourable Mr. Justice Ian Winder, Chief Justice of the Supreme Court, on the grounds that:

(a) the execution of same would have an adverse consequence on the Second Defendant;

(b) there is a serious risk to the Second Defendant being prejudiced in the conduct of the proceedings in Supreme Court Action No. 2017/CLE/gen/00653 if the application is refused;

(c) it would be just and convenient to stay the execution of the aforesaid Order in the circumstances; and

iii. that the costs of and occasioned by this application to be paid to the Second Defendant, by the Plaintiff, to be taxed, if not agreed."

4. The First Defendant's Summons was supported by the Affidavit of Renai B. Martin filed on 20 March 2023 ("the Martin Affidavit"), which exhibited the Affidavit of Cecil Fred Hudson II sworn on 16 March 2023 ("the Hudson Affidavit"). Messrs Higgs & Johnson, one of the law firms representing the First Defendant, undertook to file the original copy of the Hudson Affidavit in the Registry of the Supreme Court upon receipt of it from the First Defendant.

5. The Second Defendant's Summons was supported by the Affidavit of Delevia Rolle filed on 17 November 2022 ("the Rolle Affidavit").

6. The Plaintiff opposed the applications and contended that the Court, in the exercise of its discretion, should vary the Order for Sale and Possession as opposed to setting it aside. Furthermore, the Court, in the exercise of its discretion, should not stay the

execution of the Order for Sale and Possession. The Plaintiff's opposition was supported by the Affidavit of Peteche Bethell filed on 21 March 2023 ("the Bethell Affidavit").

Factual and Procedural Background

7. The factual matrix relevant to these applications may predominantly be found in the pleadings and evidence filed by the parties. The Court has adopted the factual matrix contained in the Plaintiff's written submissions with the appropriate modifications to incorporate the opposite views expressed by the Defendants in their respective written submissions where necessary. The factual matrix is somewhat peculiar.

8. On 6 February 2017, the Plaintiff filed a Concurrent Writ of Summons along with a Statement of Claim seeking to enforce in The Bahamas three judgments obtained by the Plaintiff against the First Defendant in the Seventh Judicial Circuit Court of Volusia County in the state of Florida, United States of America. The Statement of Claim alleged that the First Defendant owed the Plaintiff the cumulative sum of $11,854,177.11 with interest to accrue at a rate of 6% per annum.

9. On 11 April 2017 after the service of the Plaintiff's Concurrent Writ of Summons and Statement of Claim, the Plaintiff filed an Ex Parte Summons seeking, *inter alia,* to restrain the First Defendant from transferring, assigning, charging, disposing of, and/or encumbering the freehold properties owned by the First Defendant in The Bahamas. The Ex Parte Summons was supported by the Affidavit of Rodman F. Delevaux Jr. filed on the same date.

10. On 12 April 2017, the Plaintiff's Ex Parte Summons was heard and relief was granted as prayed.

11. On 26 May 2017, the Second Defendant commenced a separate action by way of a Writ of Summons in The Bahamas Supreme Court Action Number 2017/CLE/gen/653 claiming payment for a purported debt owed to the Second Defendant by the First Defendant together with interest under the Civil Procedure (Award of Interest) Act, 1992, and costs ("the Chandler Action").

12. On 8 June 2017, the Plaintiff, by way of a Summons, applied for Summary Judgment against the First Defendant. The Summons was supported by the Affidavit of John Koromilas dated 17 May 2017 and the Affidavit of Godfrey Perpall dated 8 June 2017.

13. On 1 September 2017, the Second Defendant, in the Chandler Action, entered Judgment in Default of Defence against the First Defendant in the amount of $618,000.00 with interest at the statutory rate from the date of judgment until payment, and costs to be taxed. The Judgment in Default of Defence was filed on 5 September 2017.

14. On 18 October 2017, Winder J granted the Plaintiff Summary Judgment against the First Defendant for $11, 854,177.11 with interest to accrue at a rate of 6% per annum. The written ruling on the Summary Judgment application was delivered on 12 February 2018.

15. On 23 February 2018, the Plaintiff, by way of a Summons, applied for the Order for Sale and Possession. The Summons was supported by the Third Affidavit of Rodman F. Delevaux Jr. dated 23 February 2018.

16. On 29 June 2018, the First Defendant, by way of a Summons, applied for leave to appeal the Summary Judgment. The Summons was supported by the Affidavit of Roberta Quant dated 29 June 2018.

17. On 25 October 2018, the First Defendant, through the examination of the judgment debtor in the Chandler Action, entered into a Consent Order with the Second Defendant ("the Consent Order"). However, the Consent Order was not filed until 28 January 2021. The terms of the Consent Order read as follows –

> "1. To satisfy the Judgment entered herein on 5 September 2016, the [First Defendant] shall –
>
> (i) convey to the [Second Defendant] his freehold property with dwelling homes thereon, situate in Scotland Cay, one of the Cays in the Abaco Group of Cays in the Islands of The Bahamas, which occupies 2.5 acres of land and which is valued at Six Hundred Thousand ($600,000.00) Dollars within twenty-one (21) days of the examination i.e. on or before 15 November 2018; and
>
> (ii) pay the sum of Eighteen Hundred ($18,000.00) Dollars in cash to the [Second Defendant].
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> 2. The [First Defendant] shall obtain, and deliver to the [Second Defendant], all original title documents relating to the Property.
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> 3. The [First Defendant] shall deliver up vacant possession of the property to the [Second Defendant], within twenty-one (21) days of the examination, i.e. on or before 15 November 2018
>
> 4. The [First Defendant] shall pay any and all other costs associated with the conveyance of the property to the [Second Defendant], including, but not limited to legal fees, stamp duty, real property taxes, and any costs in connection with the utilities of the home, up to the point transfer.
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> 5. The [First Defendant] shall pay to the [Second Defendant] the costs occasioned with this cause to be taxed if not agreed.

18. On 15 November 2018, Winder J denied the First Defendant leave to appeal the Summary Judgment application.

19. The First Defendant also applied for a stay of enforcement/execution pending appeal but that application was also denied by Winder J.

20. On 7 May 2019, the Honourable Mr. Justice Ian R. Winder granted the Order for Sale and Possession as prayed. The terms of the Order for Sale and Possession read as follows –

> "1. The freehold properties owned by the [First Defendant] which are located on Scotland Cay one of the Cays in the Abaco Group of Cays in the Islands of the Commonwealth of The Bahamas which is more particularly described as:
>
> a. ALL That piece parcel or lot of land situate on Scotland Cay one of the Cays in the Abaco Group or Cays in the said Commonwealth of The Bahamas and being Lot Number Ten (10) in Block B of the Subdivision called and known as "Scotland Cay Estates" which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated 14 April 1988 made between Stafford J. King and Ruth W. King of the one part and Clarence Shawer of the other part and recorded in the Registry of Records in Volume 4980 at pages 215 to 224 and thereon coloured Pink;
>
> b. All Those pieces parcels or lots of land being Lots One (1) to Five (5) inclusive in Block C of Scotland Cay which said pieces parcels or lots of land has such position shape marks boundaries and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated 2 June 1975 made between Outter Reef Corporation of the one part and Annibale Scotti Casanova of the other part and recorded in the Registry of Records in Volume 2432 at pages 79 to 93 thereon coloured Red; and
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> c. All That piece parcel or lot of land being Lot Number Six (6) in Block A of Scotland Cay which said piece parcel or lot of land has such position shape marks boundaries and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated 7 October 1983 made between Outter Reef (1982) Limited of the one part and Annibale Scotti Casanova of the other part and recorded in the Registry of Records at Volume 3965 at pages 1 to 13 and thereon coloured Pink (collectively referred to as "the Properties")
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> Be Sold for the best possible price by a real estate agent by public auction or by private contract and that the money to arise from such sale be paid as follows:-
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> a. to settle the commission of the real estate agent associated with the sale of the Properties (if any), such commission to be fixed at 6% of the purchase price in the event the properties are developed and 10% of the purchase price in the event the Properties are vacant;
>
> b. to settle the costs of the legal work associated with the sale of the Properties, such costs to be fixed at 2.5% of the purchase price plus reasonable disbursements;
>
> c. to settle 50% of the stamp tax payable in respect of the sale of the Properties;

d. to settle the real property tax relating to the Properties up to the date of the sale;

e. to settle any mortgages, liens or encumbrances attached to the Properties which rank in priority to the [First Defendant's] debt to the Plaintiff;

f. to settle the [First Defendant's] outstanding debt to the Plaintiff in the amount of US Eleven Million Eight Hundred and Fifty-Four Thousand One Hundred and Seventy-Seven Dollars and Eleven cents (US$11,854,177.11) created by the Judgment filed herein on 13 February 2018 together with interest to accrue at a rate of 6% per annum to the date of said Judgment and thereafter at the statutory rate and costs to be taxed if not agreed;

g. to pay the costs of this application to be taxed if not agreed; and

h. the balance (if any) to be paid to the [First Defendant].

2. The [First Defendant] do deliver up to the Plaintiff vacant possession of the Properties.

3. The [First Defendant] do deliver all original title documents relating to the Properties to the Plaintiff's attorneys at McKinney, Bancroft & Hughes within 14 days of receiving notice of this Order.

4. The [First Defendant] do within 14 days of receipt of a written request by the Plaintiff (or its attorneys or duly appointed agent) sign, seal, and execute any agreement for sale, conveyance, or other necessary document relating to the Properties to be sold pursuant to this Order for the purpose of effecting a valid transfer of the ownership in the Properties to a purchaser and any such request shall be deemed to be sufficiently made if a letter requesting the same is sent to the Attorney of Record for the [First Defendant] in these proceedings.

5. In the event that the [First Defendant] fails, neglects, or refuses to execute any agreement for sale, conveyance, or other necessary document required for effecting a transfer of the Properties to a purchaser pursuant to the terms of this Order and without prejudice to any right to commencing proceedings for contempt of Court against the [First Defendant], any Registrar of the Supreme Court (including any Deputy Registrar or Assistant Registrar) is hereby nominated and appointed pursuant to section 28 of the Supreme Court Act, 1996 to execute said agreement for sale, conveyance or other necessary document instead of or for and on behalf of the [First Defendant] upon the Plaintiff establishing to the satisfaction of the Registrar that the [First Defendant] failed, neglected, or refused to comply with this Order and any such costs associated with such application shall be paid by the [First Defendant] to the Plaintiff out of the proceeds of the sale of the Properties to be taxed if not agreed.

6. That the costs of and occasioned by this application be paid by the [First Defendant] to the Plaintiff to be taxed if not agreed."

21. The First Defendant sought leave to appeal the Summary Judgment application out of time to the Court of Appeal and on 29 May 2018, the application was withdrawn and dismissed.

22. On 13 April 2022, the Plaintiff, by way of a Summons, applied for a Writ of Possession to enforce the Order for Sale and Possession. The application was supported by the Affidavit of Demi Forbes dated 13 April 2022.

23. On 30 July 2022, the Second Defendant, in the Chandler Action, commenced committal proceedings against the First Defendant. The application was denied by the Honourable Mr. Justice Neil Braithwaite on the ground that the Order for Sale and Possession created a lien that prevented the First Defendant from complying with the Consent Order.

24. On 11 November 2022, the Second Defendant, by way of a Summons, applied to intervene in the present action. The application was supported by the Affidavit of Delevia Rolle dated 16 November 2022.

25. On 29 November 2022, the Court granted the Second Defendant's application and permitted the Second Defendant to be added as a party in the present action. The terms of the Order read as follows –

> "1. Leave is hereby granted to the [Second Defendant] to be added as a party to this action to intervene on the grounds that there exists between the parties to this action and the [Second Defendant] a question or issue arising out of or relating to or connected with the relief granted in the cause or matter, namely, the relief contained in the Order of the Honourable Mr. Justice Ian Winder, Chief Justice of the Supreme Court, made on 7 May 2019 and filed on 1 July 2019, which in the opinion of the Court, would be just and convenient to determine as between the [Second Defendant] and the parties as well as between the parties to the cause or matter.
>
> 2. The [Second Defendant] is hereby added as a Defendant to this action.
>
> 3. The costs of and occasioned by this application are hereby reserved."

26. On 6 July 2023, the Court heard the parties at the hearing of the present applications, *inter alia*, reserved, and promised to deliver a decision at a later time. The ruling herein embodies the Court's decision on the present applications.

Issues

27. The disposition and determination of the present applications drew the Court's attention to two important questions, namely –

    (1) whether the Court has the jurisdiction to set aside and/or vary the Order for Sale and Possession; and /or

(2) whether the execution of the Order for Sale and Possession ought to be stayed.

Evidence

Affidavit Evidence of the First Defendant (First Applicant)

28. The Hudson Affidavit was the principal affidavit relied upon by the First Defendant to support his application. In the Hudson Affidavit, it was stated as set out below –

    (i) Mr. Hudson is the First Defendant and Judgment Debtor in this action.

    (ii) The Order for Sale and Possession was made over and granted in respect of the following properties located on Scotland Cay, The Abacos, The Bahamas ("the Properties") –

        a. Lots 1 – 5, Block C, Scotland Cay ("Lots 1-5");
        b. Lot 6, Block A, Scotland Cay ("Lot 6"); and
        c. Lot 10, Block B, Scotland Cay Estates, Scotland Cay ("Lot 10").

    (iii) By virtue of the Order for Sale and Possession, the Properties are encumbered in favour of the Plaintiff/Judgment Creditor.

    (iv) The Order for Sale and Possession was made following the Plaintiff/Judgment Creditor's application by Summons, filed herein on 26 February 2018, and was supported by the Third Affidavit of Rodman F. Deleveaux Jr. (the "Supporting Affidavit").

    (v) The Supporting Affidavit read as follows at paragraph 6 –

        "The Defendant is the freehold owner of the Properties and attached hereto and shown to me marked "RFD-3" are copies of the conveyances referred to in paragraph 3 above evidencing this."

    (vi) The evidence contained in the Support Affidavit is relatively concise and importantly, does not condescend to or explain the means by which Mr. Deleveaux and/or the Plaintiff/Judgment Creditor ascertained the ownership of the Properties. Certainly, the Supporting Affidavit is silent as to whether the Plaintiff/Judgment Creditor made any inquiries in respect of the Properties or obtained critical and current title searches in relation to same prior to seeking the Order for Sale and Possession.

    (vii) Unfortunately, it is apparent from the Plaintiff/Judgment Creditor's own evidence, as is contained in the Affidavit of Demi Forbes, filed herein on 13 April 2022 (the "Forbes Affidavit") (sworn in support of the Plaintiff/Judgment Creditor's subsequent application for leave to issue a Writ of Possession to enforce the Order for Sale and Possession), that the evidence outlined in the Supporting Affidavit is materially incorrect and contains fundamental errors of fact on the critical issue of the ownership of the Properties. Therefore, in some respects, it appears that

the Court was materially misled upon the Plaintiff's application for the Order for Sale and Possession.

(viii) In the circumstances, the erroneous statements contained in the Supporting Affidavit must be corrected to accurately detail the ownership of the Properties, which are subject to and now encumbered by the Order for Sale and Possession.

(ix) Mr. Hudson is the legal owner of Lots 1-5, having purchased the same from Tino Giacinto Inselmini (Executor of the Estate of Annibale Scotti Casanova) in 2006. There are three (3) cottages, which are known as the Pirate Hatch, The Guest Hatch, and The Nite Hatch (the "Cottages"), constructed upon Lots 1-5.

(x) Since the purchase of Lots 1-5 and the construction of the Cottages on or about 2007/2008, Mr. Hudson employed Mr. Pierre Olivier Julien Hertz as a caretaker of the Cottages and the surrounding land. Mr. Hertz has, for the past 17 years, lived in the cottage known as the Nite Hatch, which is constructed over portions of Lots 1-5 (Mr. Hudson believes Lots 2-3), has two (2) bedrooms, and is approximately 1,000 square feet in size. In consideration of his service as a caretaker, Mr. Hudson agreed with Mr. Hertz that he shall have the right (the "Life Estate") to live in the Nite Hatch for the remainder of his lifetime.

(xi) Following the near-total destruction of the Nite Hatch in Hurricane Dorian, in furtherance of his Life Estate, Mr. Hertz completely rebuilt the Nite Hatch at his own cost, which I understand to be in the region of approximately $100,000.00.

(xii) To this end, the Plaintiff/Judgment Creditor is and has, at all material times, been fully aware that Mr. Hertz resides at and is in full and exclusive possession and occupation of the Nite Hatch. This knowledge is evidenced by the notice issued to Mr. Hertz by the Plaintiff/Judgment Creditor's attorneys, McKinney, Bancroft & Hughes, by correspondence dated 20 October 2020.

(xiii) By a Conveyance dated 11 October 2006, Mr. Hudson sold Lot 6 to Mr. John C. Slevin and Luck Cay Ltd. (which entity was beneficially owned by Mr. Walter Wadsak (now deceased), who both own adjacent lots at Scotland Cay. Mr. Slevin and Luck Cay Ltd. purchased Lot 6 in an effort to protect their views from their adjoining lots and their privacy. The sale of my interest in Lot 6 is acknowledged and admitted by the Plaintiff/Judgment Creditor at paragraph 6 of the Forbes Affidavit.

(xiv) Despite the assertion in the Supporting Affidavit, Mr. Hudson has never been the sole owner of Lot 10. As is acknowledged and admitted by the Plaintiff/Judgment Creditor at paragraph 7 of the Forbes Affidavit, Lot 10 was initially conveyed to Mr. Hudson and Mr. Stanley Shirah as tenants in common in undivided and equal shares.

(xv) However, by a Conveyance dated 20 May 2019, Mr. Shirah conveyed 13% of his undivided share to Mr. Harrold Melville and 37% of his undivided equal share to Mr. Hudson. Accordingly, Mr. Hudson presently owns a 63% share, and Mr. Melville owns a 37% share in Lot 10, as is acknowledged by the Plaintiff/Judgment Creditor at paragraph 7 of the Forbes Affidavit.

(xvi) In all the circumstances, it is apparent that the statement of evidence made by the Plaintiff/Judgment Creditor at paragraph 6 of the Supporting Affidavit was erroneous, and as a result, the Court was, in many respects misled, and the Order for Sale and Possession was improperly made.

(xvii) In all the circumstances, it would be unjust and inequitable to permit the continuance of the Order for Sale and Possession, which presently negatively affects the rights, interests, and titles of innocent third parties. Accordingly, it is prayed that the Order for Sale and Possession should be set aside and/or stayed.

Affidavit Evidence of the Second Defendant (Second Applicant)

29. The Second Defendant relied on the Rolle Affidavit to support his application. In the Rolle Affidavit, it was stated as set out below –

(i) Ms. Rolle is a paralegal engaged by RBO Advisors, Counsel for Chandler, the Intervener herein, and the Plaintiff in Supreme Court Action No. 2017/CLE/gen/653, Chandler v Cecil Fred Hudson ("the Chandler Proceedings").

(ii) On 5 September 2017, Chandler entered judgment against Cecil Fred Hudson, the Defendant in both actions, for the sum of $618,000.00 with interest at the statutory rate from the date of judgment until payment and costs to be taxed in the Chandler proceedings.

(iii) The Order was granted by Mr. Edmund Turner, Deputy Registrar of the Supreme Court, and dated 25 October 2018. The Order was filed on 28 January 2021 in the Chandler Proceedings. The Order was made following an examination of Cecil Fred Hudson.

(iv) On or before 30 July 2021, Chandler sought leave to commit Cecil Fred Hudson to The Bahamas Department of Correction for his contempt of Court because of his failure to honour the terms of the Order of Mr. Edmund Turner.

(v) The application was heard by Mr. Justice Neil Braithwaite on 22 June 2022 and was denied on the basis that, *inter alia,* the order of the Learned Chief Justice, the Honourable Mr. Justice Ian Winder made herein, created a lien on the property of the Defendant.

(vi) On 7 May 2019, the Learned Chief Justice, the Honourable Mr. Justice Ian Winder, in this action, granted an Order to the Plaintiff for the sale of certain lots purportedly owned by the Defendant, namely, Lot No. 10 in Block B of Scotland Cay Estates, Abaco and Lots 1 to 5 in Block C and Lot No. 6 in Block A, Scotland Cay, Abaco.

(vii) The reliefs granted by the Learned Chief Justice conflict with Chandler's interest as set out in the Order of the Deputy Registrar, which predates the aforesaid Order of the Learned Chief Justice.

(viii) RBO Advisors has reviewed the Affidavit of Demi Forbes filed in this action on 13 April 2022 in support of the Plaintiff's application for leave to issue a Writ of Possession pursuant to the aforesaid Order of Mr. Justice Ian Winder, Chief Justice. The Plaintiff, at paragraphs 6 to 7, has acknowledged that the Order of the Learned Chief Justice is not enforceable against the Defendant in its entirety as it conflicts with third-party rights.

(ix) The remaining property that the Plaintiff herein claims is the property that is the subject of the Order of Mr. Edmund Turner. The relief granted in the Order of Mr. Justice Ian Winder herein in favour of the Plaintiff conflicts with proprietary and legal interest granted to Chandler in the Chandler Proceedings and other third party rights.

(x) The Order of Mr. Justice Ian Winder, Chief Justice, was made without notice of the Order of Mr. Edmund Turner in the Chandler Proceedings.

(xi) Accordingly, it is the position of Chandler that it would be just and convenient for Chandler to intervene in this action for the sole purpose of setting aside the Order of the Learned Chief Justice so that the prior Order of Mr. Edmund Turner may be enforced.

Affidavit Evidence of the Plaintiff (the Respondent)

30. The Plaintiff relied on the Bethell Affidavit to support its opposition to the Defendants' applications. In the Bethell Affidavit, it was stated as set out below –

(i) Ms. Bethell is an associate in the firm of Messrs McKinney, Bancroft & Hughes who represent the Plaintiff in this matter.

(ii) At paragraphs 12-15 of the Hudson Affidavit, Mr. Hudson stated that he agreed with Mr. Pierre Hertz ("Mr. Hertz"), the caretaker of the cottages and the surrounding land, that in consideration of his caretaking of the property he shall have the right to live in the "Nite Hatch", one of the cottages situate on the properties owned by Mr. Hudson, for the remainder of his life. He further asserted that following Hurricane Dorian, Mr. Hertz rebuilt the "Nite Hatch" at his own expense.

(iii) The Plaintiff became aware of the fact that Mr. Hertz was in possession of the property in or about 24 August 2020, when he made an offer to the Plaintiff to purchase Lots 4 and 5, Block C, on which he resides.

(iv) It is clear from the Order for Sale and Possession exhibited at "DP-1" of the Affidavit of Demi Forbes filed on 13 April 2022 that Mr. Hudson was represented by Mr. Kahlil Parker and Mrs. Roberta Quant at the time the said order was granted.

Submissions

31. Each party proffered written submissions regarding the present applications to the Court. The submissions of the First Defendant and Second Defendant somewhat mirror each other; however, where they differ, the appropriate modifications have been made to incorporate each of the Defendants' differing views. While those submissions will not be reproduced in detail, they have been fully considered.

Submissions of the First Defendant (First Applicant)

32. Learned Counsel for the First Defendant, Mr. Rhyan Elliott, contended in his written and oral submissions before the Court that it was well-established that the Court is vested with a wide inherent and procedural jurisdiction to discharge, set aside, revoke, and/or vary its own orders. Mr. Elliott contended that Order 31A Rule 18 (7) of the RSC operates to grant the Court the procedural power to set aside and/or vary its orders. Counsel fortified his contentions using several authorities, including **Collier v Williams and Others [2006] All ER (D) 177 (Jan)**, **Anthony James Cole v Liam Paul Paris Howlett & Others [2015] EWHC 1697**, and **Gabrielle Volpi v Delanson Services Ltd, Matteo Volpi and Simone Volpi Consolidated Appeals 2020/APP/sts/00013, 2020/APP/sts/00018**. Mr. Elliott contended that from those authorities, there was a clear distinction to be drawn between interlocutory orders, final orders, and judgments. He submitted in this regard and for the purposes of these applications, the Order for Sale and Possession did not amount to a judgment but an order ancillary to the enforcement of the summary judgment granted by Winder J in favour of the Plaintiff in this action.

33. Mr. Elliott contended that circumstances existed for the Court to exercise its jurisdiction under its inherent jurisdiction and/or procedural jurisdiction under Order 31A Rule 18(7). He contended that the Plaintiff admitted and fully accepted that the evidence used by them in the application for the Order for Sale and Possession was materially incorrect and contained fundamental errors of fact on the critical issue of ownership of the properties contained in the Order for Sale and Possession. Mr. Elliott contended that authorities firmly suggest that where the Court has been misled, even innocently, the Court ought to exercise its discretion to revoke or set aside the order, which was obtained by material misrepresentation.

34. Counsel further contended that the arguments put forth by the Plaintiff that the First Defendant has only now brought the present application and should have raised the ownership issues before Winder J is unsustainable and does not justify the material representations made by the Plaintiff in the application for the Order for Sale and Possession. Moreover, there is no evidence before the Court of the submissions made

on behalf of the Plaintiff at the hearing of the application for Order for Sale and Possession.

35. For the First Defendant it was contended that ordinarily, it is expected that a party seeking to establish the legal owner of land would conduct a title and/or asset search. Yet there is no evidence before the Court that such searches had been completed. Counsel stated that the evidence relied upon by the Plaintiff in the application for the Order for Sale and Possession failed to specify the source and belief that the Plaintiff was the sole owner of the properties in the Order for Sale and Possession.

36. Mr. Elliott argued (without prejudice to the First Defendant's submissions that the Plaintiff has made no application for variation) that the continuation of the Order for Sale and Possession is prejudicial to the interest of innocent third parties (non-parties to these proceedings). Therefore, in considering whether to discharge, revoke (or vary as propositioned by the Plaintiff) the Order for Sale and Possession, the Court ought to conduct a review of the relevant legal issues and in this regard, the Court ought to consider and determine the critical issue of ownership of the properties, by way of inquiry, and upon considering accurate and direct evidence.

37. Counsel stated that the Court may only do justice between the parties and deal with this case justly, as is required by the RSC and CPR, after conducting the appropriate inquiry as to the ownership of the properties. To this extent, an inquiry may only be properly conducted following the discharge or revocation of the Order for Sale and Possession, which provides the opportunity for fresh proceedings to be brought by the Plaintiff for an Order for Sale and Possession. This will enable the proper notification and representation by the relevant innocent third parties who may be affected by any order made on such an application.

38. Mr. Elliott, in his penultimate submissions, contended that any variation of the Order for Sale and Possession is undesirable. The purport and effect of any order pronounced by the Court should be apparent and readily ascertainable from the face of and within the four corners of the document. In this case, the effect of any variation of the Order for Sale and Possession to exclude the properties admitted to be affected by third party interests would not be readily ascertainable upon the face of the document itself if the order is merely varied. Any variation would be insufficient to adequately remedy the unjust interference with the property rights of innocent third parties and insufficient to properly and prominently revoke the encumbrance upon the properties imposed by the Order for Sale and Possession. Any variation of the Order for Sale and Possession would create more harm than good; it would create more confusion than clarity.

39. It was submitted ultimately for the First Defendant that the Order for Sale and Possession ought to be set aside and/or revoked in its entirety, as it is required by the justice of this case.

Submissions of the Second Defendant (Second Applicant)

40. Learned Counsel for the Second Defendant, Mr. Ryan Brown, in his written and oral submissions before the Court, contended that the Court has the inherent jurisdiction to set aside an order where it has been obtained in the absence of an interested party. Mr.

Brown contended that where such circumstance exists, the jurisdiction to revoke such an order may be invoked by application or by the Court on its own initiative. Mr. Brown relied on **Order 31A Rule 19(1) of the RSC** and **Harrison's Share under Settlement, Re, Harrison v Harrison [1954] 2 All ER 453** to support his proposition.

41. Mr. Brown contended that the Court is also seized with the inherent jurisdiction to set aside an order where it has been obtained due to a misapprehension as to the facts and/or law. This misapprehension may be occasioned by, *inter alia*, a change in the law or the material non-disclosure of a party. Mr. Brown relied on **Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300** to supplement his former contention. Mr. Brown contended that this jurisdiction was once confined to orders that had not been drawn up. However, the Court's jurisdiction to set aside and/or vary an order made by it is supplemented by **Order 31A Rule 18(7) of the RSC**. Mr. Brown contended that this jurisdiction is without prejudice to the Court's jurisdiction to set aside, wholly or in part, any judgment or order made due to irregularity. Mr. Brown's latter contention was grounded by **Order 2 Rule 2 of the RSC**.

42. Moreover, Mr. Brown contended that to obtain an order that affects third parties who were not parties to an action is analogous to obtaining the same on an *ex parte* basis. Such an applicant is under an obligation to provide full and frank disclosure when making the application for the order. An order obtained on an *ex parte* basis is liable to be set aside in the absence of full and frank disclosure. Further, the duty to provide full and frank disclosure, in the absence of an interested third party on an *ex parte* application, is accompanied by a duty on the part of the applicant to make proper inquiries for any relevant additional facts before making the application. Mr. Brown grounded these contentions by relying on several authorities, namely, **The King v The General Commissioner for the Purposes of The Income Tax Acts for the District of Kensington. Ex parte Princess Edmond De Polignac [1917] 1 KB 486** and **Brink's-Mat Ltd. v Elcombe [1988] 3 All ER 188.**

43. Mr. Brown contended that the Plaintiff does not dispute the fact that the Second Defendant entered judgment in the sum of $618,000.00 with interest at the statutory rate and costs to be taxed, if not agreed, in Supreme Court Action No. 2017/CLE/gen/653, on 5 September 2017. This judgment created an equitable charge on all pieces, parcels, or lots of land that were owned by the First Defendant within The Bahamas on the date of entry. The charge immediately attached the moment the judgment was entered. The judgment's entry in the Supreme Court Registry provided notice to the world that it was discoverable upon reasonable inquiry. The charge took priority over any other interest that may arise thereafter. Counsel relied on **section 63 of the Supreme Court Act, Chapter 54, Dames v Frazer [2020] 1 BHS J No. 121** and **Smith v Gibson [2009] 4 BHS J No. 22** to support his contentions.

44. Counsel argued that the Plaintiff and its attorneys ought to have been aware of the judgment in default made in the Chandler action and ought to have brought the same to the attention of Winder J in its application for Sale and Possession. If the Plaintiff did not know of the judgment in default and the consent order emanating therefrom at the material time, it should be made to answer why it did not have that information. The averments made by the Plaintiff that its attorneys sought to review the court file in the Chandler action but could not is of no moment. Much value would have been obtained if Winder J was made aware of the judgment in default and the consent order

emanating therefrom as he would have been in the position to retrieve the court file if the Plaintiff could not have. The Plaintiff simply did not give the Court this option and in turn, failed to provide full and frank disclosure to the Court. In any event, even if the Plaintiff and its attorneys were not aware of the judgment in default made in the Chandler action when it obtained the Order for Sale and Possession, they certainly would have been made aware of the judgment in default after the Order for Sale and Possession had been granted. The Plaintiff and its attorneys did not bring the same to the attention of Winder J at any material time thereafter.

45. Mr. Brown further contended that the Court ought to take judicial notice that had a cause list or title search been conducted by the Plaintiff, the existence of the judgment in default and consent order emanating therefrom would have been discovered. Mr. Brown contended that the Plaintiff did not provide any evidence and had made no averments that it disputed the fact that the Second Defendant sought to enforce the judgment in default in the Chandler action through the consent order, which required the First Defendant to convey 2.5 acres of land in Scotland Cay, Abaco to the Second Defendant and to pay $18,000.00 together with legal and other related expenses. The Plaintiff simply ignored this fact. It is not enough to say that the Order for Sale and Possession mentions any encumbrances. The judgment in default created an equitable charge over the property in favour of Chandler, and he had the right to enforce the same by way of the consent order. This right could not have been taken away by the Order for Sale and Possession.

46. Counsel submitted that it is irrefutable that third party rights have been affected by the Order for Sale and Possession, and those individuals, including the Second Defendant, were not represented when the application was made to obtain the Order for Sale and Possession. This provides the Court with sufficient and ample jurisdiction to set aside the Order for Sale and Possession. The Plaintiff was under a duty to inform Winder J of this development so the learned judge could have provided directions. Such directions would have inevitably resulted in the discharge of the Order for Sale and Possession.

47. Mr. Brown ultimately contended that, ironically, the Plaintiff's extant application for a Writ of Possession has already limited the Order for Sale and Possession due to third party interests. In these circumstances, objecting to the present application to set aside the Order for Sale and Possession, which clearly affects third party rights, is unjustifiable and has resulted in the Second Defendant incurring costs to obtain relief from the same. In the premises, the Court has ample jurisdiction to set aside the Order for Sale and Possession.

48. In the alternative, Mr. Brown contended that if the Order for Sale and Possession is not set aside, the Order for Sale and Possession ought to be stayed. If the Order for Sale and Possession is not stayed, and the application for a Writ of Possession filed by the Plaintiff is granted, it would prejudice the interest of the Second Defendant and other interested third parties who were not represented in the application for Order for Sale and Possession. Furthermore, if the stay is not granted, the Plaintiff would dispose of the fruits of the Second Defendant's judgment in default and the consent order emanating therefrom. In that case, the continuation of the Chandler action will be of no value to the Second Defendant in The Bahamas, as it is not clear whether the First Defendant has any other assets in this jurisdiction to satisfy the same. The Second

Defendant would have to engage in expensive litigation outside The Bahamas in the absence of the stay. The Second Defendant should be allowed to continue to litigate before the Supreme Court of The Bahamas. Mr. Brown grounded his alternative contentions using **section 16(3) of the Supreme Court Act, Chapter 54, Order 31A Rule 18 (1) and (2)(d) of the RSC** and **St. George and Others v Hayward and Others [2007] 4 BHS J No. 10**.

Submissions of the Plaintiff (the Respondent)

49. Learned Counsel for the Plaintiff, Mrs. Vanessa Smith, in her written and oral submissions before the Court, contended that the Order for Sale and Possession ought to be varied to the extent of preserving its efficacy rather than to have it set aside in its entirety. Mrs. Smith agreed with the Defendants that the Court has the general power under **Order 31A Order 18(7) of the RSC** to vary or revoke an order. Mrs. Smith provided that the guidance in which the Court would exercise such jurisdiction was set out in **Tibbles v SIG (t/a Asphaltic Roofing Supplies) [2012] 4 All ER 259**, **Lloyd Investment (Scandinavia) v Ager-Hanssen [2003] EWHC 1740 (Ch)** and **Oyston v Rubin [2021] All ER (D) 59 (Mar)**.

50. Mrs. Smith conceded that some of the properties referred to in the Order for Sale and Possession include properties that are legally and/or beneficially owned by third parties, particularly Lots 6 and 10. However, the Plaintiff only became aware of the third parties' interests after the Order for Sale and Possession was granted. As it relates to Lot 6, shortly after the Order for Sale and Possession was granted, the Plaintiff was informed by Mr. Andrew Wells of Messrs Graham Thompson, Counsel and Attorneys, that he represented Mr. John C. Slevin and Lucky Cay Limited in their purchase of Lot 6 "A" and "B", respectively, from the First Defendant prior to the entry of the Order for Sale and Possession. The purchases were made pursuant to unrecorded conveyances dated 11 October 2006. The conveyances were not recorded until after the Order for Sale and Possession was granted. As it relates to Lot 10, by a conveyance dated 31 July 2000, Lot 10 was originally conveyed to the First Defendant and Stanley Shirah as tenants in common, each having 50% interest in the property. Lot 10 is now jointly owned by the First Defendant and Harold Gregory Melville. Pursuant to a conveyance dated 20 May 2019, Stanley Shirah conveyed 13% of his interest in Lot 10 to the First Defendant and the remaining 37% to Harold Gregory Melville. Accordingly, the First Defendant now holds a 63% interest in Lot 10.

51. Mrs. Smith contended that the First Defendant sought to describe a life interest he purportedly transferred to Mr. Pierre Mertz, the caretaker of the cottages situate on Lots 1 to 5 in Block C Scotland Cay, Abaco, The Bahamas. Again, the First Defendant was not certain which property was encumbered by Mr Mertz' life interest albeit he claimed to have conferred the same. The First Defendant failed to provide evidence of a life interest given to Mr. Mertz. Mrs Smith further contended that in any event, the transfer of the life interest must be in writing, otherwise it violates the Statute of Frauds. The Plaintiff believed it to be curious that the First Defendant had not exhibited a written document evidencing the transfer, presumably, he would have it in his possession. Also incongruous is the offer made by Mr Mertz to the Plaintiff to purchase Lots 4 and 5 in August 2020 on which Mertz resides. Mrs Smith therefore submitted that if Mr. Mertz had been aware that he had a life interest it would be unlikely that he would have made an offer to purchase Lots 4 and 5. Based on the foregoing it cannot

be said that the First Defendant does not legally own Lots 1 to 5 nor has he transferred his legal interest to anyone.

52. Mrs. Smith contended that in light of the material changes that took place since the Order for Sale and Possession was granted (i.e., that the Plaintiff was made aware that Lots 6 and 10 are owned by third parties), the Court should utilize its general powers to vary the Order for Sale and Possession rather than to set it aside. Save for Lots 6 and 10, there have been no other changes in circumstance since the Order for Sale and Possession. The Court must take into consideration all the circumstances of this case, including the actions of the parties and the Chandler action. Mrs Smith argued that in that action, the Judgment in Default was never tried by a competent tribunal on its merits, and the very allegation that there was a loan between the First and Second Defendant has never been tested. Further, at the time the consent order was entered into in the Chandler action, the First Defendant was well aware that the Plaintiff had obtained summary judgment against him and was seeking the Order for Sale and Possession. Subsequent to the summary judgment, the First Defendant filed a flurry of applications in the Court of Appeal, including seeking an application for an extension of time for leave to appeal the summary judgment. The appeal was struck out by the Court of Appeal on 28 May 2018. The Plaintiff was subsequently granted the Order for Sale and Possession, having not been aware of the consent order as it was not filed on 28 January 2021. The First Defendant was represented by Counsel. At no time did the First Defendant advise the Court of any irregularities with the Order for Sale and Possession sought by the Plaintiff until the filing of the First Defendant's Summons in 2022, four years after the entry of the consent order and three years after the entry of the Order for Sale and Possession.

53. Mrs. Smith further submitted that it was plain from the history of this action and the Chandler action that the Defendants have utilized the machinery of the Court to thwart the Plaintiff's enforcement of the Order for Sale and Possession. In the First Defendant's application, he is seeking to take a second bite of the cherry when he ought to have raised the issues now before the Court at the hearing of the Plaintiff's application for the Order for Sale and Possession. The parties to the action must bring their whole case before the Court, including any defences or claims it may have against any property. The First Defendant failed to do so in 2019 and ought not to be allowed to have a second bite of the cherry three years later. At the time of the hearing for the Plaintiff's application for the Order for Sale and Possession, the First Defendant ought to have advised the Court that the order being sought by the Plaintiff included properties that were legally and/or beneficially owned by third parties and brought the consent order to the Court's attention allowing for proper adjudication of the issues in 2019. Mrs. Smith relied on the authorities of **Henderson v Henderson (1843) 3 Hare 100** and **Dao Heng Bank Ltd. [1975] AC 581** to buttress her contentions.

54. Counsel, in her penultimate submissions, argued that while the Second Defendant's judgment in default created an equitable charge over the properties owned by the First Defendant, the Order for Sale and Possession provides for the equitable charge in that it requires the Plaintiff to settle debts which rank in priority, before payment to itself in the sale of the properties. Accordingly, there is no need to set aside the Order for Sale and Possession to recognize the equitable charge. Mrs. Smith argued that the Defendants' applications ought to be dismissed and the Order for Sale and Possession varied to the extent that its efficacy is preserved.

55. Mrs. Smith ultimately contended that there are no exceptional circumstances that warrant a stay of execution of the Order for Sale and Possession. If the Court refuses to grant a stay, the Second Defendant would not be ruined, instead he could be made whole by carrying out the Order for Sale and Possession, which requires that the Plaintiff settle any mortgages, liens, or encumbrances attached to the properties which rank in priority from the proceeds of the sale. However, the Plaintiff would be prejudiced and denied that to which it is entitled should the Court choose to stay the Order for Sale and Possession. Mrs. Smith grounded her contentions on her opposition to the stay using **Order 45 Rule 11 of the RSC**, **City Services Ltd. v AES Ocean Cay Limited 2006/CLE/gen/FP00178**, **Hammond Suddards Solicitors v Agrichen International Holdings Ltd. [2001] All ER (D) 258 (Dec)**, **George A. Smith v The Bahamas Real Estate Association [2015] 2 BHS J No. 8**, and **Linotype-Hell Finance Ltd. v Baker [1992] All ER 887**.

Law and Discussion

Issue One – Jurisdiction to set aside and/or vary the Order for Sale and Possession

56. The Rules of the Supreme Court, Chapter 53 ("the RSC") was repealed and replaced by The Bahamas Supreme Court Civil Procedure Rules, 2022 (as amended) ("the CPR"). These applications were filed prior to the date of commencement of the CPR and the date for hearing of these applications was fixed prior to the date of commencement of the CPR. As such, the Court directed the parties that the RSC shall govern these applications. However, as these applications were heard after the date of commencement of the CPR, the Court is aware that where it has to exercise its discretion, the Court may take into account the principles set out in the CPR, in particular, Part 1 and Part 25: see the **PRELIMINARY** section, **Rule 2(1)(b)** and **2(3)** of the **CPR** and **Practice Direction No. 9 of 2023**.

57. At the forefront of these applications is the issue of jurisdiction, particularly whether the Court possessed the jurisdiction to set aside and/or vary the Order for Sale and Possession. It is from this issue that these applications may either stand or fall.

58. **Article 93 (1) and (4) of the Constitution of The Bahamas** provides for the establishment of the Court. It states –

> "93. (1) **There <u>shall</u> be a Supreme Court for The Bahamas which <u>shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law</u>.**
>
> ...
>
> (4) **The Supreme Court <u>shall be a superior court of record</u> and, <u>save as otherwise provided for by Parliament</u>, <u>shall have all the powers of such a court</u>.**"
>
> [Emphasis added]

59. **Section 7(1)(a) and (b) of the Supreme Court Act, Chapter 53** outlines the general jurisdiction of the Court. The statutory provision states –

"7. (1) **Subject to this or any other law**, the Court shall have –

(a) **unlimited original jurisdiction in civil and criminal causes and matters**; and

(b) **such appellate jurisdiction as may be conferred upon it by this or any other law**."

[Emphasis added]

60. The Judicial Committee of His Majesty's Privy Council ("the Board") in the Jamaican decision of **Strachan v The Gleaner Co. Ltd and Another [2005] UKPC 33**, in deciding whether a judge had been wrong to conclude that he did not possess the jurisdiction to set aside a default judgment, proffered the following commentary through the judgment of Lord Millet at paragraph 32 –

> "[32] The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has the jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has the jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have the power to correct it."

61. The parties have all commended to the Court **Order 31A Rule 18(7) of the RSC** asserting that this provision provides the Court with the inherited (or procedural) jurisdiction to set aside and/or vary the Order for Sale and Possession. It must be recognized that **Order 31A Rule 18(7)** is a case management power derived from the Court's case management jurisdiction under Order 31A of the RSC. It is similar to the case management power afforded to the English High Court in **Rule 3.1(7) of the English Civil Procedure Rules, 1998 (as amended)**. Notably, the CPR is void of any similar express provision under its case management jurisdiction under Part 26. **Order 31A Rule 18(7) of the RSC** states –

"ORDER 31A CASE MANAGEMENT BY COURT

PART IV

POWERS OF THE COURT

18. …

(7) A power of the Court under these Rules to make an order includes a power to vary or revoke that order"

62. The parties have also commended to the Court that it is empowered with the inherent jurisdiction to set aside and/or vary the Order for Sale and Possession.

63. The parties may have comforted and satisfied themselves that the Court possesses the inherited (or procedural) jurisdiction and/or inherent jurisdiction to set aside and/or vary the Order for Sale and Possession but they have not comforted and satisfied the Court, to a sufficient degree of certainty, that such jurisdiction exists. The parties have provided little assistance to persuade the Court in this regard. As such, the Court undoubtedly faced a great crossroads and had to conduct an independent inquiry to comfort and satisfy itself that it possesses the jurisdiction to set aside and/or vary the Order for Sale and Possession.

64. The First Defendant and Plaintiff relied upon several authorities, including **Collier v Williams and Others [2006] All ER (D) 177 (Jan), Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen [2003] EWHC 1740 (Ch), Tibbles v SIG (t/a Asphaltic Roofing Supplies) [2012] 4 All ER 259**, and **Oyston v Rubin [2021] All ER (D) 59 (Mar)** to show the guidance set out in which the Court would exercise its inherited (or procedural) jurisdiction pursuant to Rule 3.1(7) of the English Civil Procedure Rules, 1998 (as amended) (which is a similar provision as Order 31A Rule 18(7) of the RSC). However, from these authorities two salient observations may be made. Firstly, while it is recognized that such jurisdiction is not confined to purely procedural orders, there is no real guidance as to the possible limits of this jurisdiction. Secondly, the Court must be very cautious when exercising such jurisdiction.

65. The First Defendant also relied on **Gabrielle Volpi v Delanson Services Ltd, Matteo Volpi and Simone Volpi Consolidated Appeals 2020/APP/sts/00013, 2020/APP/sts/00018** to demonstrate how Order 31A Rule 18(7) of the RSC is relevant to the present applications. However, the Court is not convinced. **Gabrielle Volpi (supra)** is distinguishable and may not be appropriately applied to the present applications. In that decision, Klein J had to consider the jurisdiction of the Court to revisit an oral decision. It is a well-established principle at common law that a judge has the jurisdiction to reverse his decision at any time before it is perfected, but not afterward. However, it also recognized that a perfected order may be revisited where there is some legal provision that expressly allows for such revision, for example, a judgment in default. In contrast, in the instant case, the Order for Sale and Possession, from which the present applications stem, was perfected and filed on 1 July 2019: **see Strachan v The Gleaner Co. Ltd and Another [2005] UKPC 33, Rosina Smith v Fidelity Bank (Bahamas) Limited SCCivApp No. 122 of 2020.**

66. In **Lloyds Investment (Scandinavia) Limited (supra)**, Patten J at paragraph 7, gave the following commentary –

> "[7] … It seems to me that the only power available to me on this application is that contained in CPR Pt. 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders, **and there is no real guidance in the White Book as to the possible limits of the jurisdiction**. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Pt 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct position before him. The latter case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the

order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. **Similarly, it is not, I think, open to a party to the earlier application to seek, in effect, to re-argue that application by relying on submissions and evidence which were available to him at the time of the hearing, but which, for whatever reason, he or his legal representative chose not to employ**…"

[Emphasis added]

67. In **Collier (supra)**, Dyson LJ set out Patten J's observations from **Lloyds Investment (Scandinavia) Limited (supra)**. Dyson LJ at paragraph 40 pronounced the following *dicta* –

> "[40] We indorse that approach. We agree that the power given by CPR 3.1(7) cannot be used simply as an equivalent appeal against an order with which the applicant is dissatisfied. The circumstances outlined by Patten J are the only ones in which the power to revoke or vary an order already made should be exercised under 3.1(7)."

68. In **Tibbles (supra)**, Rix LJ reviewed a plethora of authorities in which the Court considered its jurisdiction under Rule 3.1(7) of the English Civil Procedure Rules, 1998 (as amended). At paragraph 39, Rix LJ stated –

> "[39] In my judgment, this jurisprudence permits the following conclusions to be drawn.
>
> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. **The rule is apparently broad and unfettered but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.**
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> (iii) It would be dangerous to treat the statement of these primary circumstances originating with Patten J and approved in this court as though they were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at an exhaustive definition.
>
> …

(vii) **The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.**"

[Emphasis added]

69. Therefore, for quite some time, there lingered doubt as to whether the principled curtailment of the Court's jurisdiction under Rule 3.1(7) of the English Civil Procedure Rules, 1998 (as amended) extended to final orders. In **Terry v BCS Corporate Acceptances Ltd. and Others [2018] EWCA Civ 2422**, Hamblen LJ at paragraph 73 provided the following clarity –

> "73. ... That "curtailment" of the apparently open discretion does go further in relation to final orders is supported by the decision of the Court of Appeal in *Roult v North West Strategic Health Authority [2009] EWCA Civ 444, [2010] 1 WLR 487.* In that case, a claimant sought to vary or revoke a personal injury settlement that had been approved by the court. It was held that it was not appropriate to do so and that the main two grounds recognised in the case law for invoking Rule 3.1(7) did not apply to a final order disposing of a case. The lead judgment was given by Hughes LJ, with whose judgment Smith and Carnwath LJJ agreed. He stated as follows at [15]:
>
> > "15. There is scant authority upon rule 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal from himself in respect to a final order... If it could, it would come close to permitting any party to ask any judge to review his own decision when it is not suggested that he made any error... There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or two of the assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or part. And it especially does not apply where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interest of justice and of litigants generally, require that a final order remains such unless proper grounds for appeal exist.
>
> ...
>
> "75. In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General consideration such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3

> may be relied upon by analogy – see *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8, [20ll] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871 and *Gohil v Gohil (No 2)* [2015] UKSC 61, [2016] AC 849."

70. The test for determining whether an order of the Court is final or interlocutory was formulated by Lord Esher in **Salaman v Warner and Others [1891] 1 QB 734** and approved in this jurisdiction by the Court of Appeal in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd. SCCivApp Side No. 57 of 2014**. Allen P at paragraph 24 adjudged –

> "24. Lord Esher's 'application test' is that if the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand, the decision if given one way will dispose of the matter in dispute, but if given in the other, will allow for the action to go on, then it is interlocutory."

71. Barnett P in **Belgravia International Bank & Trust Company Limited, Bretton Woods Corporation and Sigma Management v Frank Forbes SCCivApp No. 75 of 2021** at paragraph 32 had the following commentary –

> "32. Applications under O.14 are for final judgment. The basis of the application is there is no defence to the claim. An order for summary judgment is given where there is no defence to the claim or to a particular part of a claim. If there is an arguable defence, a court will not grant judgment but will give leave to defend. The matter will proceed to trial. The court does not make any other order on an application for summary judgment. It will either grant the judgment or give leave to defend. If the court grants judgment, the judgment creditor must enforce his judgment in the usual manner as it would enforce any judgment of the court."

72. In **Finance Corporation of Bahamas Limited v Phillip Arlington Mitchell and Brenda Mae Mitchell 2009/CLE/gen/01398**, Charles J (as she then was) held that the Court becomes *functus officio* once a judgment or final order has been entered. This case involved a mortgage action where the Plaintiff had obtained a Writ of Possession against the Defendants. The First Defendant then filed an application seeking, *inter alia,* a stay of proceedings pending appeal to the Privy Council and also seeking to set aside the Order for Vacant Possession together with the Praecipe and Writ of Possession. The First Defendant claimed that new facts that have arisen since the granting of the Order for Vacant Possession would justify the Order being set aside and that due to the issue of: limitation, and irregularities in form and procedure, the Order for Vacant Possession, Praecipe, and Writ of Possession ought to also be stayed or set aside. Charles J (as she then was) held that since the Order for Vacant Possession was granted in relation to the Plaintiff's entitlement to sums due and owed to them under the mortgage and to vacant possession of the subject property, there were no further functions in which the Court had the power to exercise as it related to the terms or effect of the order. That was particularly so given that the Defendants had appealed to the Court of Appeal, and the appeal was dismissed. Furthermore, the "new facts" that the First Defendant complained of were within the Defendants' knowledge or were available to them at the time when the mortgage proceedings were first commenced.

73. With respect to the Court's inherent jurisdiction, the Court is guided by the commentary of the learned authors of Halsbury's Laws of England, Volume 12A of 2015, which were approved by the Court of Appeal in **Belgravia (supra)** at paragraphs 56 and 57. The commentary is as follows –

> "Unlike all other branches of law, except for perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called the "inherent jurisdiction of the court". In the ordinary way, the Supreme Court, Court of Appeal, and the High Court, are superior courts and as such no matter is deemed to be beyond their jurisdiction (including the general administration of justice within their territorial limits, and powers in all matters of substantive law) unless it is expressly shown to be so. The County Court, although an inferior court, also has an inherent jurisdiction to regulate its own procedures, provided that the exercise of this power is not inconsistent with statute or statutory rules.
>
> **The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil, properly, and effectively, its role as a court of law. However, the term "inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of the court, and a claim should be dealt with in accordance with the rules of the court rather than by exercising the court's inherent jurisdiction where the subject matter of the claim is governed by those rules.** Even in an area which is not the subject of statute or statutory procedural rules, the court's inherent jurisdiction to regulate how proceedings should be conducted is limited because (subject to certain established and limited exceptions) the court cannot exercise its powers in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.
>
> **In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserved or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of due process of law, to prevent vexations or oppression, to do justice between the parties and to secure a fair trial between them**."

[Emphasis added]

74. The Court, having regard to the line of authorities referred to in this ruling, the submissions of Counsel for the parties, and the circumstances of the present applications, is satisfied that it does not possess the jurisdiction, inherited (or procedural) or inherent, to set aside and/or vary the Order for Sale and Possession.

75. If the First Defendant wishes to challenge the circumstances in which the Order for Sale and Possession was granted, then he ought to appeal the Order for Sale and Possession to the Court of Appeal. It is also notable that the circumstances complained of were undoubtedly not known or brought to the attention of Winder J at the time he granted the Order for Sale and Possession. This Court was not provided with any reasons why the Order for Sale and Possession was not appealed to the Court of Appeal. Notwithstanding, that course remains open to the First Defendant should he wish to do so, although he would have to persuade the Court of Appeal of why he

should have, in the Court's view, a very considerable extension of time. In the meantime, the Plaintiff's application for a Writ of Possession remains extant. The Plaintiff may wish to proceed with that application if it so desires. It is a decision for the parties as to how they will advance their respective cases.

76. It bears observation that the contentions put forth by the First Defendant in relation to his present application are not very reasonable. I say this because at the hearing for the Order for Sale and Possession, the circumstances complained of were within the sole purview and knowledge of the First Defendant, who was represented by Counsel at the hearing of the application for the Order for Sale and Possession. In other words, the circumstances complained of were not new and were available to be disclosed at the time of the hearing for the application for the Order for Sale and Possession. It was incumbent on the First Defendant to raise such circumstances or bring them to the attention of Winder J. Remarkably, there is no evidence before the Court that this was done.

77. The Court is further satisfied that the contentions put forth by the Second Defendant are without merit. The application for the Order for Sale and Possession was not heard on an *ex parte* application but on an *inter partes* application, attended by the Plaintiff and the First Defendant who were both represented by Counsel. Incongruously, the Second Defendant solely criticizes the Plaintiff, but not the First Defendant, for not disclosing to Winder J. the existence of the default judgment and consent order in the Chandler action.

78. While the Second Defendant possesses some interest in some of the properties contained in the Order for Sale and Possession by virtue of the judgment in default and the consent order emanating therefrom in the Chandler action, the Second Defendant is not a party to this action. The Second Defendant was only added to intervene as a party in the action for the limited purpose of making his present application to set aside the Order for Sale and Possession. That is where the Second Defendant's involvement in this action begins and ends. It is incumbent on the First Defendant to ensure that the Second Defendant's interests and/or rights are preserved and/or protected. The First Defendant is at liberty to deploy whatever legal option he chooses to preserve and/or protect the Second Defendant's interests and/or rights.

79. The Order for Sale and Possession is in satisfaction to and for the enforcement of the Plaintiff's summary judgment obtained in this action, a final judgment. The First Defendant appealed the summary judgment; however, the appeal was withdrawn and dismissed. Once the Order for Sale and Possession was perfected and entered, the Court became *functus officio*. There is no further action for which the Court has the jurisdiction to exercise as it relates to the terms or effect of the Order for Sale and Possession. The Court only retains the residual jurisdiction to clarify the effect or terms of the Order for Sale and Possession; not to set aside or vary the terms and effect of the Order for Sale and Possession. The only option available to the Plaintiff is to enforce the Order for Sale and Possession through an application for Writ of Possession. The latter application remains extant before the Court. If the Court were to seek to set aside and/or vary the Order for Sale and Possession, it would, in essence, be exercising an appellate jurisdiction, which is reserved only for the Court of Appeal.

Issue Two – Stay of the Order for Sale and Possession

80. The Court has the wide and unfettered discretion to grant a stay of the execution of any judgment or order provided that matters have occurred since the date of the judgment or order which warrant the relief. The Court's discretion relative thereto is found in **Order 45 of the RSC**, which deals with the Court's enforcement of judgments and orders in general. **Order 45 Rule 11** provides –

> "11. Without prejudice to Order 47 Rule 1, a party to whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may order grant such relief, and on such terms, as it thinks just."

81. The Court will only grant a stay of execution in special circumstances, so as not to deprive the successful litigant of the fruits of his judgment or order. There is no right to a stay of execution. The determination of whether or not to grant a stay of execution is purely within the discretion of the Court. The authorities are clear that the Court would only grant a stay of execution so as to avoid injustice or irreparable ruins to one or both of the parties to the proceedings if the stay of execution is not granted: see **Burnet v Francis Industries Plc [1987] 1 WLR 803, Finance Corporation of Bahamas Limited v Philip Arlington Mitchell and Brenda Mae Mitchell 2009/CLE/gen/01398, City Services Limited v Aes Ocean Cay Limited [2012] 1 BHS J No. 85**, and **George A. Smith v The Bahamas Real Estate Association [2015] 2 BHS J No. 8.**

82. In reference to considering what it means to do justice to the parties in the proceedings before deciding whether to grant a stay of execution, the Court adopts the judicial pronouncement from Charles J (as she then was) in **Finance Corporation of Bahamas Limited** (supra) at paragraph 52 –

> "[52]. ... A lot was also said about justice in this case. It is one of the most abused or misused words in the judicial lexicon. It is trite that doing justice means justice to both parties. It is not a one-way street."

83. The Court, having regard to the relevant authorities on the Court's jurisdiction to grant a stay of execution, the submissions of Counsel for the parties, and the circumstances of the present applications, is satisfied that no special circumstances exist to justify a stay of execution of the Order for Sale and Possession.

84. The circumstances complained of by the Defendants, which they claimed arose since the date of the Order for Sale and Possession, are not new circumstances and were available to the First Defendant to raise at the hearing of the application for the Order for Sale and Possession. The circumstances were within the First Defendant's sole purview and knowledge. The First Defendant was represented by Counsel at the hearing of the application for the Order for Sale and Possession. It was incumbent on the First Defendant and/or his Counsel to raise such circumstances or bring them to the attention of Winder J. There is no evidence before the Court that this was done. The Court has already determined that the Second Defendant has no horse in this action. It is incumbent on the First Defendant to ensure that the Second Defendant's interests and/or rights are preserved and/or protected. The First Defendant is at liberty

to deploy whatever legal option he chooses to preserve and/or protect the Second Defendant's interests and/or rights.

85. The First Defendant may either wish to reopen its appeal of the summary judgment, which was not dismissed by the Court of Appeal on its merits, or appeal the Order for Sale and Possession to the Court of Appeal. In the absence of either action being deployed, it would be unjust for the Court to grant a stay of execution of the Order for Sale and Possession and deny the Plaintiff the fruits of its order, allowing the First Defendant and the Second Defendant (by extension) to sail off into the sunset. That is certainly not justice in this case, which should be for all the parties.

Conclusion

86. In light of the foregoing reasons, the Court hereby dismisses the present applications and shall hear the parties on the issue of costs.

87. This Court is cognizant of the time this decision has taken, and as such, extends sincere apologies for the delay in its delivery.

Dated 28 February 2025

Simone I. Fitzcharles
Justice