In the Commonwealth of The Bahamas
In the Supreme Court
Common Law and Equity Division
Claim No. 2013/CLE/gen/01179

BETWEEN:
GATEWAY ASCENDANCY LTD.

Plaintiff

AND
BERTRAM ALEXANDER WALLACE

First Defendant

AND
KEVA MONIQUE WALLACE

Second Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Candace Hepburn of Mitre Court for the Plaintiff Myra E. Russell of Alpin O. Russell Jr. & Co. for the First Defendant
Hearing Date:	5 June 2023

Mortgage—Order for Possession—Ord 77, RSC 1978—Writ of Possession—Writ issued outside of 6-year period—Application made for leave to issue writ within statutory period—Whether statute barred—Limitation Act 1995, s 5(3)—RSC Ord. 46, r.2—Homeowner's Protection Act 2017, s. 23(3) —Setting aside writ of possession—Equitable considerations—Acquiescence—Delay in hearing application for leave to issue writ—Error in Order—Court's power to correct

RULING

KLEIN, J.

INTRODUCTION AND BACKGROUND

1. This is an application to strike out or set aside a writ of possession for enforcement of a vacant possession Order granted in a mortgagee's action on the ground that the writ issued outside of the 6-year limitation period for actions on a judgment. It raises a short but difficult point relating to execution of a judgment in circumstances where a mortgagee delays enforcement to allow the mortgagor opportunities to settle the mortgage arrears or refinance, only to later find its efforts to enforce imperiled by the provisions of the *Limitation Act 1995* ("the Act").

Procedural History

2. The brief background of this matter is as follows. On 3 July 2013, Scotiabank (Bahamas) Limited ("Scotia"), the original plaintiff in these proceedings, commenced an action against the defendants by Originating Summons pursuant to Ord. 77 of the Rules of the Supreme Court (R.S.C.) 1978, seeking vacant possession of the property mortgaged by the defendants by Deed of Mortgage dated 6 November 1995. The property concerned is Lot No. 2, Block 17, in the Sea Breeze Estates Subdivision.

3. The Order for vacant possession and judgment in the amount of $411,769.73 was made on 11 February 2016 ("the Judgment") and filed 1 March 2016, and a copy of that Order was served on the defendants' counsel on 11 March 2016.

4. By Deed of Transfer dated 4 May 2016, made between Scotia and Gateway Financial Ltd. ("Gateway Financial"), the full benefit, *inter alia*, of the mortgage together with all sums of money due and payable thereunder were assigned and transferred to Gateway Financial. There was another assignment made on 19 February 2018 of the full benefit of the mortgage together with all sums of money due and payable under the mortgage between Gateway Financial and Gateway Ascendancy Ltd. ("Gateway Ascendancy"), which is the current plaintiff in this action,

5. According to the evidence of the plaintiff, following the obtaining of the Judgment for possession, Gateway Financial and Gateway Ascendancy afforded the defendants many opportunities to seek financing to pay off the loan, as well as proffered a settlement agreement for a reduced payment of one-half of the outstanding mortgage arrears.

7. However, after the defendants failed to secure financing, the plaintiff filed an *ex-parte* summons supported by affidavit on 7 October 2021 seeking an Order pursuant to Ord. 46, Rule 2(b) and/or Ord. 15, R. 8(2) "*for leave to issue a Writ of Possession and/or Amendment of the Originating Process*". That application was eventually heard and an Order granted by Lewis-Johnson J. on 12 September 2022.

8. The plaintiff contends that the Order was "*granted as prayed*", but the terms of the Order only recites the following: "…*That Gateway Ascendancy Ltd. is to be substituted as the Plaintiff in the action herein under the provisions of Order 15 Rule 8(2) of the Rules of the Supreme Court*." There was no reference to leave being granted to issue a writ under Ord. 46 (2).

9. The plaintiff filed a praecipe for a writ of possession on 21 December 2022 and the writ issued on 2 March 2023.

10. On the 9 March 2023, the first defendant filed a summons, supported by the affidavit of Bertram Wallace ("the Wallace affidavit"), along with a certificate of urgency, seeking an order that the "*action on the judgment, including proceedings for the enforcement of the judgment*", was not brought within the six-year limitation period. As a result, he sought to have the proceedings by the plaintiff stayed/or struck out pursuant to Part 26.3 of the Civil Procedure Rules, s. 5(3) of

the Limitation Act, Ch. 83, and/or under the inherent jurisdiction of the Court, on the grounds that the plaintiff is statute-barred from enforcing the judgment by statute law or under the common law.

11. At the outset of the hearing of this matter, counsel for the plaintiff gave an undertaking to the Court that it would not move to execute pending the hearing and determination of the summons, which remains in place.

ANALYSIS AND DISCUSSION

Issues

12. The central issue which arises for the determination of the court is whether the plaintiff's attempt to issue execution on a judgment more than six years old is barred by limitation.

First defendant's argument

13. The argument of the first defendant is simply that the writ of possession was issued outside of the 6-year limitation period and is therefore statute barred. As mentioned, the Order for possession was made on 11 February 2016 and the writ of possession did not issue until the 2 March 2023, just over seven years later. He relies on s. 5(3) of the Limitation Act, and the Supreme Court's decision in **Bank of the Bahamas v Herman Cleophas Maycock and Sabrina Elizabeth Maycock** (2012/CLE/gen/00458), Cooper-Burnside J (Act'g).

14. Section 5(3) of the Limitation Act provides as follows:

> "(3) An action shall not be brought upon any judgment after the expiry of six years from the date on which the judgment became enforceable, and no arrears of interest in respect of any debt shall be recovered after the expiry of six years from the date on which the interest became due."

15. In the **Maycock** case, Cooper-Burnside J. affirmed the principle stated by Winder J (as he then was) in **Perfect Luck Investments Limited and another v CTF BM Holdings Ltd. and another** [2017] BHS J. No. 122, that an action on a judgment, including proceedings for the enforcement of a judgment, are required to be brought within six years, or they will be statute barred.

16. It is to be noted, however, that in the **Maycock** case, Cooper-Burnside J. declined to follow **Perfect Luck** because she found that on the facts of that case, the provisions of s. 23(3) of the *Homeowners Protection Act, 2017* ("HOPA") applied, and took it outside of s. 5(3). Section 23 of the HOPA (which is set out in full below) stipulates that no mortgagee shall recover from any mortgagor any sums owing under a judgment after the expiry of six years from the judgment date, or the date of last payment pursuant to that judgment. As payments were made subsequent to the expiry of the 6-year period, and merged with the judgment, the Court held that this repeatedly

extended the limitation period to the last payment and the writ of possession, although issued outside of the 6-year period, was not therefore invalid.

Plaintiff's arguments

17. The plaintiff made a number of arguments in support of its claim to be able to enforce the judgment: (i) that the defendants have not come before the court with clean hands; (ii) that the plaintiff applied for leave to issue the writ within the limitation period and "*the order was granted as prayed*"; (iii) that the court must take into account the overriding objective of HOPA 2017; (iv) that the limitation period is discretionary; and (v) that the court had a Rules-based and inherent jurisdiction to remedy any irregularities with respect to the form of the Order.

Equitable principles

18. As to the appeal to equity and the clean hands doctrine, it is alleged the defendants should not be permitted to strike out or set aside the writ, having effectively procured the delays over a 5 year-period during which the plaintiff and its predecessor in title accommodated the defendants in trying to find options for settlement and/or refinancing. These activities are detailed between paras. 6-17 of the affidavit of Allan Butler, general manager of the plaintiff, sworn in opposition to the application of the defendant. They have not been controverted. Mr. Butler states in part as follows:

> "19. I find it disingenuous of the First Defendant to attempt to rely on the limitation period when Gateway Financial as well as the Plaintiff herein attempted giving him countless opportunities to keep his home. I personally prepared and executed the letters upon which the First Defendant sought to rely when seeking financing […]
>
> 22. I verily believe that the Plaintiff should not be estopped from asserting its rights of vacant possession as it is entitled to. The Plaintiff and previous assignees did everything in its power to assist the First Defendant."

Application for leave and court's jurisdiction to remedy irregularities

19. I think it is convenient to consider the second and fifth points together. It should be noted that the application for leave was made on the 7 October 2021, pursuant to Ord. 42, r. 2(1)(b) on the grounds of a change of the parties entitled to execution. It was not made under Ord. 42, r. 2(1)(a) (i.e., leave to issue outside the 6-year period), because at that point the application was still within the 6-year period, which did not expire until 10 February 2022.

20. However, the Order was not granted until 12 September 2022, and despite the representation that the order was granted as prayed, the terms of the Order did not include leave to issue the writ. This is made plain by the fact that under the rubric of the fifth point appealing to the "*inherent jurisdiction of the Court to alleviate any irregularities*", the plaintiff invites the

Court to treat the omission in the Order to state that leave was granted to enforce the possession Order as a "procedural defect" that can ameliorated by the Court either under its inherent jurisdiction or under the Rules (Ord. 2, r. 1(1) of the RSC 1978).

21. Thus, the argument appears to be that as the plaintiff got its foot in the door before the limitation period expired, and did seek leave to issue the writ in time, the expiration of the limitation should not count against it.

Overriding objective of HOPA and CPR

22. The third argument of the plaintiff was that the Court ought to take into account the "overriding objective" of the HOPA, to the extent that certain of its provisions encourage or require mortgagees to give defaulting mortgagors a reasonable opportunity to save their homes. The plaintiff contends that it would "*be a dangerous precedent to unjustly refuse a mortgagee who acted in good faith and gave….to the defendants countless opportunities to seek financing…*" the right to enforce its vacant possession order because the limitation period expired in the interim.

23. Reference was made to a number of local and common law authorities for the principle that the Court will reluctantly interfere with a mortgagee's right to vacant possession: **Finance Corporation of Bahamas Limited v. Phillip Arlington Mitchell and Brenda Mae Mitchell** (2013/CLE/gen/01398); **Citibank N.A. v Major** [2001] BHS J No. 6; **Four Maids Ltd. v Dudley Marshall (Properties) Ltd.,** [1975] Ch. 3137. I am not of the opinion that any of these cases are relevant to the issue before the Court, as no one is questioning the right of the mortgagee to obtain an Order for vacant possession, which was obtained.

Limitation period is discretionary

24. The next argument was that the limitation period is "discretionary." The basis for this contention was never explained in the plaintiff's written or oral submissions. However, the plaintiff did assert that the **Perfect Luck** judgment was distinguishable on its facts, and in addition set out and apparently relies on the provisions of Ord. 46, r.2 of the RSC. If one follows the implied logic of the argument, it is that the language of Ord. 46, r. 2 of the RSC retains a discretion in the Court to grant leave for the issue of a writ of execution to enforce a judgment outside of the 6-year period.

Court's discussion and conclusions

25. While I have tremendous sympathy for the position of a mortgagee who finds itself hard up against the limitation period caused partly or wholly by their efforts to extend time and opportunities to a defaulting mortgagor to redeem his mortgage, for the reasons given below I am not of the opinion that any of the plaintiff's arguments can succeed.

26. Firstly, the equitable maxim of clean hands has no place in the workings of the Act. If I follow the plaintiff's logic, the true contention (although not stated in so many words) is that the defendants acquiesced in the delay that led to the eventual expiration of the limitation period, and they should therefore be estopped from asserting a limitation defence.

27. Section 44 of the Act does provide that "*Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise*." However, where the law provides a statutory bar to relief, waiver and estoppel can only be established if there is a clear and unequivocal representation that a party will not rely on a time bar (see **Super Chem Products Ltd. v American Life and General Insurance Co. Ltd.** [2004] UKPC 2 [at 21]. There was no evidence put before the Court that the defendants or any of them made any such representation, and in the circumstances there are no equitable considerations that can oust the clear provisions of the Act—if I find that s. 5(3) is applicable. The defendants would be entitled to the benefit of any limitation period, not having specifically waived their right.

28. As has often been said, the maxim behind the limitation periods is that the law aids the vigilant or those who do not sleep on their rights (*vigilantibus non dormientibus*) (see **R.B. Policies at Lloyd's v Butler** [1950] 1 KB 76. In the instant case, it is not that the plaintiff slept on its rights, but it held them in abeyance and did not seek to take action until just a few months short of the expiration of the limitation period.

29. I come now to look at the question of delay following the filing of the application for leave/amendment and the claim that the court can (or should) correct the order to reflect the relief that was sought.

30. Whenever the court has to exercise a discretion involving delay that is not the fault of the party but in the administration of justice, the court will always exercise its discretion in favour of that party. But this can only operate where there is a discretion to be exercised, and it cannot trump legal considerations.

31. The position was explained by the UK Court of Appeal in **National Westminster Bank PLC v Powney and Others** [1991] Ch. 339. [at 361] as follows:

> "It is a cardinal principle of procedural law that no party should suffer unnecessarily from delay which is not his fault but rather a fault in the administration of justice. It is an unfortunate but unavoidable fact that courts cannot hear and determine every application on the day when it is first made. Indeed, if they could there would probably be many more litigants seeking justice than there are at present, and the corresponding increase in demand for judges and courtrooms would be exponential. Various measures are taken to alleviate the consequences of delay of this type. For example, an action is commenced for limitation purposes when the writ is issued, even though the trial occurs many years later; interest can be awarded from the date of the writ (or earlier) to the date of judgment; an application to dismiss a claim for want of prosecution is judged on the facts as they were when the application was made, and not when it is heard months afterwards. But the

> principle is not universal—in a personal injury action damages are assessed as at the date of trial, whether this benefits the plaintiff or the defendant.
> We have described this as a cardinal principle. But in matters of discretion it cannot always override other considerations. It is a factor to be taken into account."

32. In **National Westminster**, it was the delay in hearing an application in the County Court to set aside a warrant for possession which had been issued to the Bank in November of 1985 in respect of a 1980 judgment. There was an application by the defendant to set aside the warrant in December of 1985, pursuant to which there were numerous part hearings and adjournments, and during which the warrant was stayed pending determination of the matter. When judgment was eventually given in 1988, the judge set aside the warrant on grounds, among others, that it had been wrongly issued, but also that in any event it was by then statute-barred by s. 24 (1) of the English *Limitation Act 1980* (which corresponds to s. 5(3)). On appeal, the Court of Appeal set aside the judge's decision and exercised the discretion that could have been exercised by the trial judge to grant leave to issue a fresh warrant, although it found on the facts that the defendant had acknowledged the Bank's title in December 1985 and on later occasions, and therefore the Bank's entitlement was to be treated as having accrued on the date of the latest acknowledgement and was not caught by the limitation in any event.

33. In the instant case, all that had been done was that an application had been made for leave. In this regard, the law is clear that a writ (including a writ of possession) issues when sealed by the Registry (see **Freeport Container Port Ltd. v. Jermaine Campbell** [2020/CLE/gen/00150]. That fact that the application may have been made within time does not change the position that the writ was issued outside the statutory period.

34. It should be appreciated that the discretion of the court discussed in the **National Westminster** case to issue a fresh warrant outside of the limitation period, occurred in the context of Ord. 26, r. 5(1)(a) of the UK County Court Rules, which enables a fresh warrant to be issued, with the leave of the Court, more than six years after the date of the Order. It was also predicated on that Court following the UK position as explained in **W.T. Lamb & Sons v Rider** [1948] 2 KB 331, that an "*action on a judgment*" as used in s. 24(1) of the UK Limitation Act 1980 was distinct from execution on a judgment, and that therefore the provision of Ord. 42, r. 23(a) [the predecessor to Ord. 46, r. 2] that allowed execution to issue with leave after six years, was not inconsistent with the 6-year statutory bar for actions.

35. **W.T. Lamb** was applied by the House of Lords in a case called **Lowsley v Forbes (t/a LE Design Services)** [1998] 3 ALL ER 897, in which the House affirmed that an application under RSC Ord. 46, 2 to issue execution on a judgment more than 6 years after it was made (in contrast with an action to obtain relief based on a judgment) was not barred by the 6-year limitation period. This was so notwithstanding that the House did not agree with the narrow definition given to "*action suit or other proceedings*" by the Court of Appeal in **WT Lamb,** but held that as WT Lamb was a part of the legislative history against which the UK 1980 Limitation Act was drafted

and whose terms reflected the interpretation given in **WT Lamb,** the case would not be disturbed, even if thought erroneous.

36. It has been necessary to mention the development of the UK case law on the point because, until **Perfect Luck**, the position in the Bahamas mirrored **WT Lamb** and **Lowsley** (see **Bahamas Commonwealth Bank Ltd. v Lewis** [1996] BHS J No. 96 and **Imperial Life Assurance Co. of Canada v Wells** [20021] BHS J. No. 107). In **Perfect Luck**, Winder J. (as he then was) decided (30 November 2017) that the Courts here were not bound by the legislative history that led to the enactment of the UK 1980 Limitation Act and held that "action" included proceedings to enforce a judgment (the interpretation that the House would have preferred in **Lowsley**). Therefore, execution was similarly caught by the 6-year limitation period for action on a judgment.

37. However, the terms of RSC 46, r. 2(1), which are patterned on the interpretation given in cases such as **WT Lamb** (see the commentary to Rule 46/2 in the *Supreme Court Practice* (*The White Book*) 1995), continues to provide for a discretionary power to enforce outside of the 6-year limitation period. In this regard, it is useful to set out Ord. 46, r. 2(1) of the RSC, which sets out the circumstances in which leave is needed issue a writ of execution to enforce a judgment or order:

> "2. (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say—
>
> (a) where six years or more have elapsed since the date of the judgment or order;
> (b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;
> (c) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgement or order, and it is sought to issue execution against such assets;
> (d) where under the judgment or order any person is entitled to relied subject to the fulfilment of any condition which it is alleged has been fulfilled;
> (e) where any goods sought to be seized under a writ of execution are in the hands of a receiver appointed by the Court or a sequestrator." [Emphasis supplied.]

38. As mentioned, the plaintiff sought leave on the basis that there had been a change of the party entitled to execution, not on the condition that more than 6 years had elapsed, which it had not at the time. The Order for possession was made on 11 February 2016 and time would have expired on 10 February 2022. The application for amendment/leave was filed on 7 October 2021, although the Order was not granted until 12 September 2022. In my view, the question of whether or not Ord. 46, r. 2 provides any discretion for a writ to issue outside of the 6-year period would not benefit the plaintiff in any event, as leave was never granted to issue the writ (as opposed to amend) and no leave was ever sought to issue a writ out of time.

39. In any event, the question of whether a mortgagee (as opposed to a general judgment creditor, which was the position considered in **Perfect Luck**) could enforce a judgment after six years may have been answered by Parliament from as early as March 2017, when the HOPA took effect. Section 23(3) provides as follows:

> "(3) No mortgagee shall recover from any mortgagor any sum owing under any judgment by the Court for the repayment of any sums borrowed by the mortgagor from the mortgagee after the expiry of six years from the date on which the judgment was obtained or the date of the last payment pursuant to that judgment."

40. In **Lowsley** the House also considered the question of whether the words in s. 24(2) of the 1980 Act providing that "*no arrears of interest…shall be recovered*" after 6 years in respect of judgments was caught by the 6-year limitation period, having already decided that the words "*an action shall not be brought*…" was not caught by that period. The HL said:

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

Therefore, as Parliament adopted similar language in s. 23(3), it seems reasonably clear that it was intended to bar both actions and enforcement proceedings.

41. The plaintiff's reliance on any ability in the court to correct any errors in the Order is also misconceived. The nature of the error allegedly made was not one within the remit of Ord. 20, r. 11 (the slip rule) that could be corrected as an accidental slip or omission on a summons or motion, and in any event none was filed for that purpose. To be sure, the Court retains an inherent jurisdiction to correct errors which do not come under the slip rule "*to bring it in harmony with the order which the Judge obviously meant to pronounce*" (**Hatton v Harriss** [1895] AC 547. But if this is what was sought, the correction should have been made on a motion before the Judge.

42. With respect to the claim that regard should be given to the requirement of the mortgagee to comply with the "overriding objectives" of HOPA, it is correct to observe that the policy behind the Act is to protect the position of the mortgagor, and the Act does impose some additional conditions on the ability of the mortgagee to enforce. But none of those provisions has the effect of stopping the running of the limitation periods. And, as has been pointed out, the plaintiff really can find no refuge in the HOPA, as evidenced by the plain meaning of s. 23(3).

43. As to the contention that the limitation period is discretionary, this submission is obviously misconceived and is perhaps based on a misreading of cases under the English 1980 Act. That Act does provide for the discretionary application or exclusion of the time limits respectively in action for libel or slander or in respect of personal injuries or death (s. 32A and 33). But other than the extensions of the ordinary time limits in certain situations (i.e., when the plaintiff is under

a disability, where the facts relevant to the cause of action cannot be known at the date of accrual, where there has been acknowledgement or part payment, or where the defendant has acted fraudulently or concealed any fact relevant to the plaintiffs' rights of action) the Court has no discretion in applying the time limits and they provide an absolute defence.

44. There is, therefore, nothing in the circumstances of this case to take the writ issued 2 March 2023 in respect of the 2016 Order outside of the provisions of s. 5(3) of the Act, or s. 23(3) of the HOPA. In the circumstances, I am constrained to set aside the writ of possession issued on 2 March 2023 on the grounds that it is statute barred.

CONCLUSION AND DISPOSITION

45. For the foregoing reasons, I will order that the writ of possession issued 2 March 2023 be set aside. In those circumstances, counsel is also released from the undertaking given to the Court, although that naturally falls away.

46. I award costs to the first defendant, which I will summarily assess after hearing from counsel.

Klein J.,

24 February 2025