

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/01039

IN THE MATTER of an Indenture of Supplemental Second Mortgage made 27th day of November, A.D., 2002 between Earl Miller, Ronald Miller and Earl Miller (t/a Nassau Industrial Gases) and Royal Bank of Canada.

AND IN THE MATTER of an Indenture of Supplemental Mortgage made 17th day of September, A.D., 2013 between Earl Miller and RBC Royal Bank (Bahamas) Limited

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

BETWEEN

RBC ROYAL BANK (BAHAMAS) LIMITED

(formerly Royal Bank of Canada)

Claimant

AND

EARL MILLER

Defendant

Before: **The Honourable Madam Justice C.V. Hope Strachan**

Appearances: **Mr. Audley Hanna for the Claimant**
Mrs. Tai Pinder Mackey for the Defendant

Hearing Date: **6th March, 2024**

Writ of Possession – Stay — Whether Interim Injunction order should be discharged. - Res Judicata

RULING

[1.] By a Writ of Possession filed 5th April, 2023 the Defendants were ordered to deliver up to the Plaintiff on or before **19th November, 2021** vacant possession of All THAT piece parcel or Lot of land situate in the Western District of the Island of New Providence and being Lot Numbered Thirty-four (34-B) in the Subdivision known as Love Estates, New Providence, The Bahamas which is shown on a plan or diagram attached to the Indenture of Supplemental Second Mortgage dated 27th November, A.D., 2002 from the Defendant and Ronald Miller and the Defendant (t/a Nassau Industrial Gases) which is recorded in the Registry of Records in the City of Nassau, in the Island of New Providence in the Commonwealth of the Bahamas in Volume 8825 at pages 366 to 377. The Defendants were also ordered to pay to the Plaintiffs costs of and occasioned by the subject court action to be taxed if not agreed.

[2.] By way of Notice of Application (without Notice) filed **27th April, 2023** the Defendants made application to this court for:

- i. an order that the Defendant be at liberty to remain in his dwelling house for Six (6) months from the date of the hearing of the application.
- ii. that the Writ of Possession filed 5th April, 2023 be stayed for six (6) months from the date of the hearing or until the issues raised and the relief sought in the application have been determined.
- iii. any other relief and directions as to the Court deems fit in the circumstances.

[3.] The application was supported by an affidavit of Earl Miller filed 18th April, 2023. Mr. Miller's affidavit stated:

- i. That I am a Defendant in the instant matter.
- ii. That on 12th April 2023 I was served with a letter from Higgs and Johnson Counsel and Attorneys at Law, Attorneys for the Plaintiff and subsequently a Writ of Possession that was filed on the 5th of April 2023. That now shown to me and attached are copies of the letter and the Writ marked "Exhibit EM1" and "Exhibit EM2".
- iii. That the letter indicated that I should vacate the premises situated at Lot Numbered 34-B, Love Estate by noon on the 18th April 2023.
- iv. That premises is my place of residence.
- v. That I have been making payments on the mortgage on the subject property from before the date of the Order referenced in the letter and I continue to make

payments to the present day. That now shown to me and marked "Exhibit EM 3" is a copy of my bank statement of RBC Account 05745 1745231 which shows the deposits and loan payments dating back to January of 2021.

- vi. That on the 17th of March 2023 I received an email message from an employee of the Plaintiff which I accept was denoted "Without Prejudice" indicating that they had an offer for purchase from the subject property for \$1,300,000.00. That now shown to me and marked "Exhibit EM4" is a copy of said Email.
- vii. That the latest appraisal of the subject property gives a Market Value of the property between \$4,864,000.00 and \$5,620,000.00. That now shown to me and marked "Exhibit EM5" is a copy of the applicable pages of the most recent appraisal of the said property.
- viii. That at the time of the Order upon which the Writ of Possession is based was granted the amount said to be due and owing as at July 22nd 2021 was \$809,606. 77 (principal, interest, charges).
- ix. That in addition to making consistent payments I am also awaiting the disbursement of funds from the proceeds of a sale from a completed sale of property. Once I have received those funds I will be in a position to service the outstanding debt in the instant matter. That now shown to me and attached and marked "Exhibit EM6" is the first page of the recorded conveyance and that sale.
- x. That as recently as November of 2022 a sale for one of the units of the subject property had to be cancelled. That sale was approximately \$400,000.00 and would have significantly reduced the amount owing. That now shown to me is a copy of the correspondence between my Attorneys and the purchaser's Attorneys marked "Exhibit EM7".
- xi. That I am of the belief that the sale was not finalized due in part to the Plaintiff's failure to provide an executed Declaration of Condominium, the first one being misplaced by them and no follow up with reference to a replaced document. That now shown to me, and marked "Exhibit EM8" is a copy of an email in which it is acknowledged by the Plaintiff's Attorney that the Plaintiff misplaced the first document.
- xii. That in all the circumstances I am asking this Honourable Court to stay the Writ of Possession for at least six months to give me time to reduce the amount owing or alternatively to find a purchaser willing to pay the market value of the property.
- xiii. That the contents of this affidavit are made from my personal knowledge and are true and correct to the best of my knowledge, information and belief. ' .

[4.] The application was brought pursuant to Section 6 (2) of The Homeowners Protection Act, 2017 and/or the inherent jurisdiction of the court.

[5.] The Courts urgent hearing was sought by a Certificate of Urgency filed 18th April, 2023.

[6.] A further affidavit was filed by the Defendants in support of their application sworn by Earl Miller and filed on 23rd June, 2023 the pertinent parts which read as follows:

- ii. That I swear this affidavit to address issues raised in the affidavit of Roneika Rolle (“the Rolle Affidavit”) filed in the Registry of this Honourable Court on 16th May, 2023.
- iii. That I deny that I have failed to make material disclosures to this Honourable Court as suggested in the Rolle affidavit.
- iv. That I in fact made specific reference in my affidavit filed 18th April 2023 of a pending sale that fell apart due in part to the Claimants misplacement of a required document.
- iv. That I currently reside at the subject property as my only dwelling place and as such this application is made pursuant to the Homeowner’s Protection Act 2017 (HOPA).
- v. That I disagree that Her Ladyship the Honourable Madam Justice Charles considered arguments relative to the HOPA, rejected them and made an Order based on her rejection of those arguments.
- vi. That I believe that her Ladyship’s position was in fact more aligned with the reasoning that if the HOPA was to be relied on the issue should have been properly raised, and put before her in submissions so that it could be properly ventilated and considered. Her Ladyship then went on to make her decision based on other factors that did not include any consideration of the HOPA.
- vii. That I contend that I have been making consistent payments on the debt as indicated in my affidavit filed on the 18th of April 2023 and also noted in the Rolle affidavit.
- viii. That I have never, nor would I ever prevent an appraiser access to the property in order to determine a fair market value. That is not in my character nor is it in my best interest to deny such access. Further to that the email that the Claimant exhibits to advance this position of denial of access, in no way indicates that I prevented said access.
- ix. That the Claimant contends that the loan is of a commercial nature and as such the HOPA does not apply which I believe again is a misguided concept as the subject

property is a dwelling house. Further to this the property was pledged as security for the loan and a commercial loan was taken out to initially purchase the property.

- x. That the contents of the affidavit are made from my personal knowledge and are true and correct to the best of my knowledge, information and belief.

[7.] The Plaintiffs in response to the Defendant’s Application filed an affidavit on 16th May, 2023 sworn by one Roneika Rolle:

i. I am Regional Manager, Special Loans of RBC Royal Bank (Bahamas) Limited (“RBC”) which carries on the business of banking from its offices situate Royal Star House, John F. Kennedy Drive, New Providence, one of the Islands of the Commonwealth aforesaid, and elsewhere in the said Commonwealth, I am duly authorized to make this affidavit on behalf of the Claimant.

ii. Insofar as the facts and the matters to which I herein depose are within my own knowledge they are true and insofar as they are derived from statements I have heard or documents I have read; they are true to the best of my knowledge and belief. Further, the information set out herein is derived from: (a) my review and consideration of the files and documents related to this action and (b) advice provided to me by Counsel for the Claimants with direct involvement in the action.

iii. There is now produced and shown to me and exhibited hereto marked “R.R.1” a bundle of documents to which I shall refer. References to tab numbers are to tab numbers of that exhibit.

iv. I make this Affidavit in opposition of the Defendant’s application by way of Notice of Application filed herein on 27th April 2023. I also make this affidavit in response to the affidavit of the Defendant filed herein on 18th April 2023 (“the Miller Affidavit”).

v. The Defendant is seeking an Order to remain in what he alleges to be his dwelling house, situated at Lot Numbered Thirty-Four (34-B), Love Estates Subdivision in the Western District of the Island of New Providence, Bahamas (“the property”) for six (6) months. Further, the Defendant is requesting a stay of the Writ of Possession filed on 5th April 2023 for Six (6) months from the date of the hearing of this matter or alternatively until the issues raised and relief sought in the aforesaid Notice of Application have been determined.

vi. The Defendants application is made pursuant to section 6(2) of the Homeowner’s Protection Act, 2017 (the “HOPA”) and/or the inherent jurisdiction of the Court.

vii. I am advised by Counsel for the Claimant and verily believe that the Defendant has committed material non-disclosure in his application to this Honourable Court which is impermissible in the context of an ex parte application. I am further advised

by Counsel for the Claimant that Counsel for the Defendant has failed to provide a contemporaneous note of the ex parte hearing of 17th April, 2023 (“the Hearing”) which is likewise impermissible.

viii. Prior to commencing the instant action, the Claimant issued several demand letters to the Defendant commencing 16th March, 2016 seeking payment of the arrears owed under the Indenture of Mortgage made between the Defendant and Ronald Miller t/a Nassau Industrial Gases of the one part and the Claimant of the other part, dated 7th November 2002. Unfortunately, these demand letters did not encourage the Defendant to pay the arrears owed under the aforesaid Indenture of Mortgage within a reasonable time and in some instances at all. There is now produced and shown to me a true copy of the Demand Letter dated 16th March 2016, which is annexed hereto at Tab 1 of Exhibit “R.R.1”.

ix. Despite numerous attempts by the Claimant to reach an amicable settlement of this matter, it became apparent that the Defendant was unwilling and unable to settle the arrears due but unpaid under the said Indenture of Mortgage. Subsequently, the Claimant filed an Originating Summons and affidavit seeking vacant possession of the Property.

x. The Defendant has failed to disclose that, by affidavit sworn by one of his former attorneys, Miguel Darling (“Mr. Darling”), filed on 1st December, 2020 (“the First Darling Affidavit”). Evidence in support of the Defendant’s application for an adjournment was provided to the effect that the Defendant had agreed to sell a parcel of property for the sum of \$400,000.00. There is now produced and shown to me a true copy of the First Darling Affidavit which is annexed hereto at Tab 2 of Exhibit R.R.1”.

xi. Thereafter by letter dated 9th December 2020, former Counsel for the Defendant indicated the Defendant’s understanding that he needed to sell two of the units within the building on the property to satisfy the debt owed to the Claimant. There is now produced and shown to me a true copy of an email from Mckinney, Bancroft & Hughes dated the 8th December 2020, which is annexed hereto at Tab 3 Exhibit R.R.1”.

xii. The application for an adjournment was ultimately granted with the Court issuing an Order for directions to this effect dated 10th December, 2020 (“the Adjournment”) There is now produced and shown to me a true copy of the Adjournment Order which is annexed hereto at Tab 4 of Exhibit “R.R.1”.

xiii. The Defendant has failed to disclose that, by virtue of an affidavit sworn by Mr. Darling filed on 22nd February, 2021 (the “Second Darling Affidavit”) evidence in support of the Defendant’s application for a further adjournment was provided to the effect that an agreement for sale was then in place for the sale of the aforementioned units for the sum of \$400,000.00. There is now produced and shown to me a true copy of the First Darling affidavit which is annexed hereto at Tab 5 of Exhibit “R.R.1”.

xiv. The application for a further adjournment was granted.

xv. The Defendant has failed to disclose that, by Affidavit filed on 17th May, 2021 (the “May 2021 Affidavit”), the Defendant sought to consolidate the evidence in support of his application for a further adjournment and continued that a sale of the referenced units was pending. The next hearing, fixed for 20th March, 2021. Was adjourned, however, this was due to a conflict in Her Ladyship’s calendar. There is now produced and shown to me a true copy of 17th May affidavit which is annexed hereto at Tab 6 of Exhibit R.R.1”.

xvi. However, the Defendant has failed to make consistent payments to either contribute to reducing the debt owed or satisfy the debt owed under the said Indenture of Mortgage, while it has been suggested that several individuals expressed an interest in purchasing the property, it does not appear that any sales were concluded.

xvii. As no sale was ever finalized by the Defendant the Claimant was constrained to continue with the Court proceedings.

xviii. The Defendant has failed to disclose that elements of his arguments in favour of an adjournment and/or in opposition to this action were: (i) that a stay was necessary to enable the Defendant to secure a sale; and (ii) the process undertaken by the Claimant and the claim that the HOPA applied to this action and that the Plaintiff had not made a proper demand under HOPA (this latter issue being raised in oral arguments on 8th March, 2021, by one of the Defendant’s former attorney Ms. Erin Hill). These arguments were duly considered by Her Ladyship the Honourable Madam Justice Charles and rejected resulting in the pronouncement of her Order dated 22nd July, 2021 (“the Possession Order”). There is now produced and shown to me a true copy of the body of the Submissions of the Defendant dated 5th March, 2021 which is annexed hereto at Tab 7 of Exhibit “R.R.1”)

xix. Although she did not accede to the Defendant’s arguments, the Learned Judge nevertheless suspended the possession Order for a period of 5 months which was certainly ample time for the Defendant to resolve the matter.

xx. I am advised by Counsel for the Claimant, and verily believe, that the possession Order was never appealed.

xxi. Due to the Defendant’s non-compliance of the Possession Order, a Writ of Possession was duly filed on 5th April 2023 and served on the Defendant by the Deputy Provost Marshal of The Supreme Court of The Commonwealth of The Bahamas. The Defendant was informed that he was required to deliver vacant possession by no later than 18th April, 2023 at 12:00 p.m.

xxii. To date the Defendant remains in the Property and owes a substantial amount under the said mortgage which continues to accumulate daily. He has failed to make any consistent payments since May 2021, and it is not anticipated that he will be able to satisfy this debt within a reasonable time or at all. There is now produced and shown to me a true copy of the Loan Transaction History for the facility dated 15th May, 2023 which is annexed hereto at Tab 8 of Exhibit “R.R.1”)

xxiii. Additionally the Claimant has made numerous attempts to have an Appraiser enter the Property to value the property and provide the Defendant with an evaluation report. However, the Defendant has prevented the Claimants Appraiser from accessing the Property. Consequently the Claimant is unable to confirm the market value of the Property or market the property effectively. There is now produced and shown to me a true copy of an Email from Karen Duvalier to Roneika Rolle dated 1st May, 2019 which is annexed hereto at Tab 9 of Exhibit “R.R.1”)

xxiv. Having regard to the foregoing, we believe that the Defendant does not meet the criteria for a loan restructure. He has defaulted on the loan facility and has not provided any proof to establish his ability to service the debt. We are aware that the Defendant’s Company, Nassau Industrial Gases Ltd. is no longer operational and we have not been provided with additional documentation to establish additional sources of income. Considering that the Defendant has defaulted on the loan facility and has not provided any documentation to establish his financial ability to service the debt, the application for a stay of execution is futile and will only seek to prolong a matter that has not been resolved in eight (8) years ago.

xxv. Further the mortgage loan in question was a commercial loan and the Structure on the Property being commercial in nature. Consequently, I am advised as aforesaid, and verily believe that the Property does not fall within the ambits of HOPA with this issue already having been canvassed before this Honourable Court prior to the issuance of the Possession Order.

xxvi. The contents of this affidavit are true and correct to the best of my knowledge information, knowledge and belief.

[8.] The Defendants filed another affidavit on 18th July, 2023 to support their contentions. Roneika Rolle was again the Affiant. This affidavit reads as follows:

i. I am regional Manager, Special Loans of RBC Royal Bank (Bahamas) Limited (“RBC”) which carries on the business of banking from its office situate at Royal Bank House, 101 East Hill Street, New Providence, one of the Islands of the Commonwealth aforesaid, and elsewhere in the said Commonwealth, and I am duly authorized to make this affidavit on behalf of the Claimant.

ii. Insofar as the facts and the matters to which I herein depose are within my own knowledge they are true and insofar as they are derived from statements I have heard or documents I have read; they are true to the best of my knowledge and belief. Further, the information set out herein is derived from: (a) my review and consideration of the files and documents related to this action and (b) advice provided to me by Counsel for the Claimant with direct involvement in the action.

iii. There is now produced and shown to me and exhibited hereto marked “R.R.1.” a bundle of documents to which I shall refer. References to tab numbers are to tab numbers in the exhibit.

iv. I make this affidavit: (i) in opposition to the Defendant's application by way of Notice of Application filed herein on 27th April, 2023; (ii) and in response to the affidavit of the Defendant filed herein on 23rd June 2023 ("the Second Miller Affidavit")

v. With respect to Paragraph 4 of the Defendants affidavit in response, the contention that the pending sale fell apart due to the Claimant's misplacement of a required document is without merit and unsubstantiated. The Claimant admits that by Email dated 25th February 2022("the Claimants February email"), its Counsel informed then counsel for the Defendant, that the first executed deed had been misplaced. However, in an effort to prevent any further delay, counsel for the Claimant requested a new Deed and indicated that the Claimant's new execution clause and attesting witness affidavit would need to be included therein. Counsel for the Claimant also attached a copy of the Power of Attorney (the "Power of attorney") for then Counsel for the Defendant's review to expedite the process. There is now produced and shown to me a true copy of the Claimant's February Email and true copy of the Power of Attorney which are annexed hereto respectively at Tab 1 and Tab 2 of Exhibit "R.R.1")

vi. Although then Counsel for the Defendant indicated by following email dated 25th February 2023 (the "Defendant's February Email") that they would forward a newly signed Declaration at their earliest convenience, this was never done. There is now produced and shown to me a true copy of the Claimant's February Email and true copy of the Defendant's February Email which is annexed hereto respectively at Tab 3 of Exhibit "R.R.1").

vii. Having regard to paragraph 5 and 6 above, it is clear that the Defendant has, and continues by virtue of paragraph 4 of the Second Miller affidavit, to conceal critical facts. Accordingly, the Claimants denial of failing to disclose material facts is easily unsustainable.

viii. With respect to paragraph 5 of the Second Miller affidavit, while a contention was made that the Defendant resided on the property during the course of the substantive action no evidence which sufficiently proved this to be the case. In any event: (i) the property in question while comprised of residences, is commercial; (ii) I am informed by Counsel for the Claimant, and I verily believe, the Home Owners Protection Act (the HOPA") expressly relates to dwelling homes and the definition of dwelling homes as used in HOPA does not extend beyond duplexes in the context of an entire building or a singular condominium unit in the context of a complex. In the context of the property which is the subject of the instant action, it does not fall within the contemplation of the HOPA; and (iii) I am advised by Counsel for the Claimant and verily believe that as the Possession Order has already been pronounced, the issue of the applicability of the HOPA is res judicata and has also not been appealed by the Defendant.

ix. With respect to paragraphs 6 & 7 of the Second Miller affidavit, I am not clear whether Mr. Miller was actually present at the hearings and if not what the basis could be for his belief that Justice Charles did not reject the HOPA arguments. In any event it is clear even from the Second Miller affidavit that the issue of HOPA was placed before Justice Charles and that Justice Charles made the possession Order with full knowledge of

the Defendant's contention that HOPA was a defence to this action. The Defendants apparent contention that he did not put HOPA properly before Justice Charles should not now be considered by this Honourable Court and should not give the Defendant "a second bite of the cherry" in this forum.

x. With respect to paragraph 8 of the Second Miller affidavit, the Claimant disagrees with the Defendant's contention that he has been making consistent payments. Upon reviewing the Defendant's recent payment history for the period of January 2023 to July 2023 it is evident that the Defendant has only made inconsistent payments to the Claimant. A principal payment was made on 31st day of January 2023 in the sum of \$6,000.00; a second principal payment was made on 28th February 2023 in the sum of \$4,000.00; and a principal payment of \$3,000.00 was made on 27th June 2023. There is now produced and shown to me a true copy of the Loan Transaction History dated 7th day of July, A.D. 2023 which is annexed hereto at Tab 4 of Exhibit "R.R.1").

xi. As of 7th July 2023 the loan was currently 2,284 days in arrears in the amount of \$679,325.32. This has caused the Claimant to form the view that the Defendant does not meet the criteria for a loan restructure and he has a substantial outstanding balance on his loan facility that he is unable to reduce consistently. There is now produced and shown to me a true copy of the Loan Delinquency Report dated 7th day of July, A.D. 2023 which is annexed hereto at Tab 5 of Exhibit "R.R.1").

xii. Given the current non-productive status of the demand loan facility, payments are manually processed to reduce the principle balance of the loan as opposed to an automatic blended (principal and interest) payment being debited by the system. As such, the loan payment dates differ from the actual deposit dates. The defendant made deposits on (i) 19th December 2022 in the sum of \$3,000.00 (ii) 30th January 2023 in the sum of \$3,000.00; 27th February in the sum of \$4,000.00; and (iv) 12th June 2023 in the sum of \$3,000.00. However, the aforementioned sums were reflected and applied to the demand loan facility on the aforementioned dates stated in Paragraph 10 above. The Defendant has failed to make any deposits during the months of March, April, or May 2023. There is now produced and shown to me a true copy of the Deposit History Report dated 14th day of July, A.D. 2023 which is annexed hereto at Tab 6 of Exhibit "R.R.1").

xiii. With respect to Paragraph 9 of the Second Miller affidavit this is disputed and it is maintained that the Defendant has restricted access.

xiv. With respect to Paragraph 10 of the Second Miller affidavit, I'm advised by Counsel for the Claimant and verily believe that the Defendant's statement as to the legal effect of the HOPA is inaccurate and, in any event the issue is now res judicata.

[9.] Upon the hearing of the Urgent application without notice to the Plaintiffs the court on 21st April, 2023 granted an Interim injunction after consideration of the provisions of Part 17 .1 (1) (b) 17.2 (4), 17.2(5), 17.2 (6), 17.3, 17.4 and 17.5 of the Civil Procedure Rules in the following terms:

- (1) That the Defendant be allowed to remain in his dwelling house that is the subject matter of this action until the determination of the issues raised and relief sought in this application is determined.
- (2) That the Writ of Possession filed 5th April 2023 is stayed until 17th May, 2023 when the substantive hearing of the application shall take place.
- (3) The Plaintiff to serve the Defendants within the Seven (7) days of the date hereof to be present at the hearing of this matter on 17th May, 2023.
- (4) Leave is granted to both the Plaintiffs and Defendants to file further Affidavits in support of their applications.
- (5) The Injunction order is subject to the usual terms that the applicant shall undertake to abide any order as to damages caused by the granting or extension of the order.
- (5) Costs of the application reserved until the application is heard and determined.

[10.] On 17th May 2023 and 20th July 2023 there were further hearings on the application at which time the parties both sought further directions on the trial of the matter. There was an adjournment to 3rd October 2023. However the court made an order that the Plaintiff should have access to the subject property to obtain an appraisal.

[11.] The next hearing date occurred on 6th March, 2024. Counsel for the Applicants indicated her intention to seek a further extension of the injunction on the basis that they had a potential buyer who was hesitant because of the pending litigation.

[12.] Counsel for the Plaintiffs resisted the application and indicated to the court the desire to wrap up the matter at the hearing.

[13.] Upon the Court's inquiry both Counsel indicated that they had no desire to make written submissions and would rely on their verbal submissions as imparted to the court.

THE APPLICABLE LAW

[14.] Section 6 of The Home Owner's Protection Act 2017:

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

- (a) pay principal and accrued interest at a specified time;

- (b) remedy a default consisting of a breach of any other obligation arising

Under or by virtue of the mortgage; or

- (c) pay arrears.

S. 6 (2) – The Court may –

- (a) adjourn the proceedings; or
- (b) on giving judgment or making an order for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order
 - (i) stay or suspend execution of the judgment or order; or
 - (ii) postpone the date for delivery of possession,

For a maximum of six months.

DISCUSSION, ANALYSIS AND CONCLUSION

[15.] I accept the view posited by counsel for the Plaintiffs that the court should not accept counsel for the Defendant's bare statement, in the absence of any affidavit or other evidence, that the Defendant's have a potential buyer for the subject property. No evidence has been adduced by the Defendant's to verify that assertion. Additionally it is also incorrect to view the litigation before this court in this matter as pending litigation when an order for possession of the subject property has already been obtained by the Plaintiffs since 5th April, 2023. Moreover the fact of the existence of the Writ of Possession should not hamper any potential sale of the property as a sale would overcome the existence of the writ at the end of the day.

[16.] The affidavit filed in support of the application speaks to the subject property being the dwelling home of the Defendant and it is upon that basis that the Defendant is seeking an injunction to stay the Writ of possession under the Home Owners Protection act 2017. The Plaintiff submits that the Defendant had the opportunity to raise this issue at a hearing that took place before Justice Indra Charles from which flowed an Order dated 22nd July, 2021. By Justice Charles's Order the Defendant was ordered inter alia, to deliver up possession of the subject premises on or before the 19th November, 2021. This order has not been appealed. The current application seeks to introduce issues under the HOPA which the Plaintiff contends could have been ventilated and considered before Charles J and thus the doctrine of Res Judicata is invoked. Further that in the circumstances this court no longer has jurisdiction to entertain the present application.

Henderson v Henderson (1843) 3 Hare 100. Per Wigram V-C:

“ In trying this question I believe the rule of Court correctly when I say that where, a matter becomes the subject of litigation in, and by adjudication by, a Court of competent

jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to point upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

[17.] Upon a consideration of the Order made by Justice Indra Charles dated 10th September, 2021 she took into consideration the affidavit of Roneika Rolle filed 28th September, A.D., 2020; the affidavit of Mr. Miguel Darling filed 1st December, 2020; The Second affidavit of Mr. Miguel Darling filed 8th December, 2020; The third affidavit of Mr. Miguel Darling filed on the 22nd February, 2021 and the affidavit of Earl Miller filed on 17th May, 2021. The Miguel Darling affidavit and the Earl Miller affidavit were in support of The Defendant’s cases. Nowhere in any of those affidavits did the Defendants address any issues under the HOPA in particular S 6. This court is not clothed with the authority to relitigate this case: **Johnson v Gore Wood & Co. (a firm) (HL (E), [2002] 2 AC 1.**

The plea of res judicata applies, except in special cases, not only to point upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

I am therefore satisfied that the matter is res judicata.

[18.] Since I have determined that the matter before the court is res judicata there is no obligation to proceed further. However I believe it is remarkable that by virtue of the passage of time over the course of the application the Defendant was afforded the Six (6) months period when the Writ of Possession was stayed, 21st April, 2023 to 27th March, 2024, rendering any further consideration for a stay redundant.

[19.] The Plaintiffs are awarded their costs of the application to be taxed if not agreed.

Dated the 10th day of April, A.D. 2024



The Honourable Madam Justice C.V. Hope Strachan