

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/CLE/gen/00782

BETWEEN

ALONZO LOPEZ

(Representing himself and the Electorate of The Bahamas including
Residents of the Northern Division of the Supreme Court of The Bahamas)

Plaintiff

AND

- (1) **THE ATTORNEY GENERAL**
- (2) **COMPTROLLER OF CUSTOMS**
- (3) **THE TREASURER OF THE BAHAMAS**
- (4) **GRAND BAHAMA PORT AUTHORITY LIMITED**
- (5) **GRAND BAHAMA DEVELOPMENT COMPANY LIMITED**
- (6) **GRAND BAHAMA POWER COMPANY LIMITED**
- (7) **INTERCONTINENTAL DIVERSIFIED CORP.**
- (8) **PORT GROUP LIMITED**
(Representing itself and all affiliated or associated companies
of the Grand Bahama Port Authority Limited)
- (9) **HUTCHINSON PORT HOLDINGS (BAH.) LTD.**
- (10) **HUTCHINSON PORTS (BAHAMAS) LIMITED**
- (11) **HUTCHINSON LUCAYA LIMITED**
(Representing itself and all companies affiliated or associated
with the Hutchinson Group of Companies)
- (12) **THE ESTATE OF EDWARD ST. GEORGE**
- (13) **THE ESTATE OF SIR JACK HAYWARD**
- (14) **LAKEVIEW MEMORIAL PARK LIMITED**

Defendants

Before: The Honourable Madam Justice Simone I. Fitzcharles

Appearances: Mr. Alonzo Lopez, *pro se*
Mr. Edward J. Marshall II, for the 4th, 6th, and 8th Defendants
Mr. Antoine Thompson (watching) for the 1st, 2nd and 3rd Defendants

Hearing Dates: 19 December 2022 and 7 September 2023

RULING

(On Applications to Set Aside Notice of Motion)

FITZCHARLES, J.

Introduction

1. These are applications brought by Grand Bahama Port Authority Limited (the “4th Defendant”), Grand Bahama Power Company Limited (the “6th Defendant”) and Port Group Limited (the “8th Defendant”) (collectively, “the Defendants”), respectively, to set aside, in part as it relates to them, the Notice of Motion filed on 17 December 2021 by Alonzo Lopez (“the Plaintiff”).
2. The Defendants seek the reliefs as follows –
 - (1) An Order pursuant to Order 2 Rule 2 of the Rules of the Supreme Court, Chapter 53 (“the RSC” or “the Rules”) to set aside paragraph 1 of the Plaintiff’s Notice of Motion filed on 17 December 2021 on the ground that it is irregular in that –
 - (i) the Plaintiff has filed the Notice of Motion to set aside the Order made on 1 October 2021 in circumstances where he was obligated to file and serve a notice in accordance with Order 58 Rule 1(2) of the RSC;
 - (ii) the Plaintiff purports to seek an order setting aside the Order made on 1 October 2021 out of time in the circumstances where he was obligated by Order 58 Rule 1(3) of the RSC to file and serve on the Defendants a notice on or before 6 October 2021.
 - (2) An Order that the costs of and occasioned by these applications be paid by the Plaintiff to the Defendants and taxed if not agreed.
3. The applications were made by way of Summonses and Amended Summonses filed on 6 September 2022 and supported by the Affidavits of Samuel R. Brown filed on 12 December 2022.
4. The Plaintiff opposed these applications by way of an Affirmation affirmed by himself and filed on 19 December 2022.

Factual Background

5. On 30 May 2016, the Plaintiff commenced an action by way of a Specially Indorsed Writ of Summons against the Defendants and eleven named parties. The relief sought by the Plaintiff includes special damages, *inter alia*, general damages, exemplary damages, constitutional relief and declarations, a stay of the 2016 Referendum on Gender Equality, interest, costs, and such further or other relief as the Court deems just.
6. On 25 June 2021, the Defendants made an application to strike out the Plaintiff’s Statement of Claim against them on the grounds that it failed to disclose a reasonable

cause of action, *inter alia*, it was frivolous, and/or vexatious and it was otherwise an abuse of the Court's process ("the Strike Out Application").

7. Upon being served with the Strike Out Application, the Plaintiff informed the Defendants' Counsel that they were scheduling a hearing before the Registrar in Freeport, Grand Bahama, The Bahamas, while the substantive action was pending in New Providence, The Bahamas, without an Order transferring the same.
8. On 15 September 2021, the Plaintiff and the Defendants, through their respective Counsel, received an email notice from Deputy Registrar Renaldo Toote (as he then was) informing them of a remote hearing on 23 September 2021 for the hearing of the Strike Out Application. Prior to the aforesaid hearing of the Strike Out Application, the Plaintiff made several constitutional and procedural objections. The Plaintiff delivered said objections to the Office of the Deputy Registrar and Defendants' Counsel electronically.
9. On 23 September 2021, the Strike Out Application was heard remotely by Deputy Registrar Toote. The Plaintiff did not appear for the remote hearing. He appeared to be of the view that remote hearings are unconstitutional. However, the Plaintiff did not attend the Court scheduled hearing appropriately to proffer reasons for his objections.
10. On 23 September 2021, Deputy Registrar Toote made two Orders relative to the Strike Out Application. The Learned Deputy Registrar struck out the Plaintiff's Statement of Claim against the Defendants and awarded the Defendants the costs of and occasioned by the Strike Out Application set out in the amount of \$10,000 each. The said Orders were dated and signed on 23 September 2021. However, the Order in relation to the 4th and 8th Defendants was filed on 1 October 2021 and the Order in relation to the 6th Defendant was filed on 8 October 2021. Both Orders were served on the Plaintiff on 19 October 2021.
11. On 17 December 2021, the Plaintiff filed a Notice of Motion seeking an Order that the Orders of Deputy Registrar Toote pronounced on 23 September 2021 be set aside on the ground that they are null and void and without effect in law. The Plaintiff's Notice of Motion was served on the Defendants on 7 January 2022.
12. On 1 June 2022, the Plaintiff emailed the Defendants' Counsel seeking to obtain convenient dates for the hearing of the Notice of Motion.
13. On 2 June 2022, the Defendants' Counsel responded to the Plaintiff informing him, *inter alia*, that they had taken the legal position that the Notice of Motion was irregular and that they intended to challenge it on that basis.
14. On 6 September 2022, the Defendants filed the present applications.

15. On 7 September 2023, the Court heard the parties relative to the present applications. The Court reserved its decision and promised to deliver a ruling at a later date. This ruling embodies the Court's decision on the present applications.

Issue

16. The determination and disposal of these applications requires the Court to consider whether the Court ought to exercise its discretion and set aside the Plaintiff's Notice of Motion in the manner prayed for in the Defendants' present applications. This question gives rise to three interconnected issues, namely –

- (i) whether the Plaintiff's Notice of Motion is irregular;
- (ii) if the Plaintiff's Notice of Motion is irregular, whether the Defendants took any fresh steps in these proceedings; and
- (iii) if the Defendant did not take any fresh steps in these proceedings, whether the Defendants made the present applications within a reasonable time.

Submissions

17. The parties laid over written submissions relative to the present applications and also made oral submissions at the hearing of the present applications. The Court wishes to thank Counsel on both sides for their helpful and comprehensive submissions. While those submissions will not be reproduced in detail, they have been fully considered.

The Applicant Defendants' Case

18. The foundation of the Defendants' case rests on the premise that the Plaintiff's Notice of Motion filed on 17 December 2021 was manifestly irregular in that it was served on the Defendants contrary to the requirements of Order 58 Rule 1(3) of the RSC and therefore, the Notice of Motion ought to be set aside as prayed in the present applications with costs awarded to the Defendants.
19. Learned Counsel for the Defendants, Mr. Edward Marshall II, contended that Order 58 Rule 1(3) of the RSC mandated the Plaintiff to file and serve the Notice of Motion on the Defendants on or before 6 October 2021 unless the Court directed otherwise. In present applications, the Plaintiff's Notice of Motion was filed on 17 December 2021, just shy of three months after the Orders of Deputy Registrar Toote were made and it was not served on the Defendants until 7 January 2022, just two weeks short of four months after the Orders of Deputy Registrar Toote were made. The Plaintiff did not apply for and obtain an Order of the Court permitting him to file the Notice of Motion outside of the timeframe prescribed by Order 58 Rule 1(3) of the RSC. To support his position, Mr. Marshall drew the Court's attention to The Bahamas Supreme Court decision of **Mosko United Construction v Turnstar Limited [2003] BHS J. No. 161**. In that decision, the court set aside a Notice of Appeal against the Acting Deputy Registrar's decision for

irregularity where it was filed out of time, because *inter alia*, no application for extension of time was made or granted and there was no explanation, excuse or reason proffered for the delay in issuing the Notice of Appeal within the prescribed time. Mohammed J, *in obiter*, opined that the time limit for the filing of the Notice of Appeal begins to run from the date when the decision is signed and dated.

20. Mr. Marshall also contended that it was pellucidly clear that the Plaintiff's Notice of Motion was irregular on its face and had been served on the Defendants contrary to the requirements of Order 53 Rule 1(3) of the RSC. Counsel argued that this is not a case where the Court ought to exercise its discretion in the Plaintiff's favour by enlarging the time and allowing the appeal to proceed in light of: (1) the Plaintiff's delay, and (2) the fact that the Plaintiff has not provided any explanation, excuse, or reason for the delay. Mr. Marshall relied on **Revici v Prentice Hall Inc. [1969] 1 All ER 772** and **Ratnam v Cumarasamy and Another [1964] 3 All ER 933** to buttress his position.
21. Mr. Marshall further contended among the factors the Court must take into consideration when determining an application made pursuant to Order 2 Rule 2 of the RSC is whether the applicant has taken any fresh steps in the proceeding before making it. Save for the filing of the present application on 6 September 2022, for an order setting aside the Notice of Motion for irregularity, the Defendants have not taken any fresh steps since the service of the Notice of Motion on 7 January 2022. In this regard, it has been judicially determined that for the purposes of Order 2 Rule 2 of the RSC, the filing of an application to set aside a proceeding for irregularity is not deemed a fresh step. Consequently, it was argued that the Defendants having not taken any fresh steps since becoming aware of the irregularity, were not prohibited from making the present application.
22. Mr. Marshall further contended that the Defendants anticipated that the Plaintiff would seek to characterize any application pursuant to Order 3 Rule 4 of the RSC, for an extension of time, as trivial. However, he argued, such characterization would be inaccurate. Mr. Marshall relied on the Bahamian Court of Appeal decision of **Glen Alexander Colebrooke and Others v National Insurance Board SCCivApp No. 127 of 2008** wherein the Court of Appeal, citing the observations of Luckhoo JA in the Court of Appeal of Guyana decision in **Hardial and Others v Sookhia [1986] 28 WIR 261**, outlined principles for consideration when the court must decide whether to accede to an application for extension of time to file an appeal, namely, (i) the length of the delay; (ii) whether there was any good reasons provided for the delay; and (iii) whether any prejudice may be caused to the other side. Luckhoo JA in **Hardial** posited –

“... the rules laid down or sanctioned as to time are to be observed unless justice clearly indicated that they should be relaxed. It is true that the modern tendency is to give liberal construction to rules regulating practice and procedure. Courts avoid a too harsh and rigid construction. They realize the rules are designed to

serve justice, and, as I observed in an earlier case, they provide the machinery of law, the channel and means whereby the law is administered and justice is reached. One should seek to strike a fair balance between a too-rigid application of principle and the giving of too much latitude to those who failed to comply. Principles should be adapted to meet the changing circumstances of the times. But, at the same time, one should bear in mind that respect for, and faithful observances of, the rules will all ensure a smooth working of the machinery for the determination of a litigant's rights."

23. Mr. Marshall ultimately contended that filing the Notice of Motion on 17 December 2021 and serving it on the Defendants on 7 January 2022, in the absence of an order by the Court extending the time in which to do so, deprived the Court of its discretionary jurisdiction by failing to address any of the factors as is required to be taken into consideration whether to extend time. Moreover, Counsel argued, it deprived the Defendants of their opportunity to make representations as to why time ought not to be extended based on those factors. The provisions of Order 58 Rule 1(3) of the RSC are mandatory. It was simply not open to the Plaintiff to flout or circumvent the provisions of Order 58 Rule 1(3) of the RSC in the manner he did.

The Respondent Plaintiff's Case

24. After hearing the oral submissions of Learned Counsel, Mr. Alonzo Lopez, the Plaintiff himself (who appeared *pro se*), the Court gained greater clarity concerning his written submissions.
25. The gravamen of the Plaintiff's case was that an application to have an order of a court set aside as null and void and of no legal effect in law may be made using more than one mechanism. Counsel submitted that this is partly so where the heart of the application involves constitutional arguments. This approach existed prior to the implementation and enactment of the RSC and continued to operate after the RSC, argued Mr Lopez. Therefore, as it relates to the Plaintiff's Notice of Motion, he argued that Order 58 of the RSC does not apply.
26. Mr. Lopez contended that the Defendants' applications were fatally flawed and bound to fail. Counsel opposed the Defendants' applications on the ground that the Strike Out Application was irregular on its face and sought as of right a hearing before a Registrar in Freeport, Grand Bahama, The Bahamas on an action commenced and pending in New Providence, The Bahamas. Furthermore, Counsel argued that the Strike Out Application contained several other flaws that could not be overcome. Particularly, the Strike Out Application provided a vacant return date before a Registrar to be named. Mr Lopez argued that the Defendants amended the Strike Out Application to correct that particular problem but obtained an illegal judgment against the Plaintiff nonetheless. Specifically, upon the proper construction of Article 28 of the Constitution, only a Judge of the Supreme Court could have heard the Strike Out Application and a determination thereof had to be in open court. Counsel further argued that since the Strike Out Application was

heard in chambers where it unconstitutionally excluded the attendance of the general public, it must necessarily fail. This flaw was repeated and shared by all other named parties who purported to obtain Orders striking out the Plaintiff's Statement of Claim contained in the Specially Indorsed Writ of Summons, including the 1st, 5th, and 11th Defendants.

27. Mr. Lopez contended that the Strike Out Application sought to remove the Defendants from the Plaintiff's constitutional claim by denying his right to access to the Court guaranteed under Article 20(8), (9), and (10) of the Constitution. By such hearing and denial of access the Defendants obtained Court Orders adverse to the Plaintiff which Orders must be set aside as a nullity.
28. Mr. Lopez further argued that Chapter 7 of the Constitution addresses the Judicature. The Judicature is divided into two parts, namely: (1) the Supreme Court; and (2) the Court of Appeal. The Supreme Court is established by Article 93 of the Constitution. Articles 93 to 97, which pertain to the Supreme Court only refer to Justices of the Supreme Court and never Registrars or other adjudicatory personnel. Consequently, it may be safely deduced that only Justices of the Supreme Court and/or Court of Appeal can proceed to hear any portion of a constitutional hearing. As the present application to strike out the Notice of Motion is directed to a Judge in Chambers where it will be discussed privately, it must necessarily fail. The Constitution itself provides a procedure by which constitutional rights, a specific class of civil rights, are to be litigated.
29. Mr. Lopez further contended that it was inconsistent with the Constitution for a Registrar or anyone other than a Judge of the Supreme Court, in open Court, to determine or strike out his Statement of Claim provided it alleged constitutional breaches for which he was seeking redress in the Supreme Court. Paragraph 1 of Article 28 of the Constitution refers to all proceedings from the commencement and enforcement of a constitutional claim. Even if the latter contention was insufficient, the Defendants' claims must ultimately fail because constitutional claims are of high public importance and the Courts will not allow them to go unheard because of claims for Order 18 Rule 19 of the RSC breaches or procedural error.
30. Mr. Lopez ultimately submitted that notwithstanding his action commenced by way of a Specially Indorsed Writ of Summons, the facts concerning the 4th Defendant are of public knowledge, so much of the case against the 4th Defendant requires only a simple application of a little law. Mr. Lopez relied on the English Court of Appeal decision of **Dyson v The Attorney General [1911] 1 KB 410** to support the position that actions are not to be struck out where they involve a serious investigation of ancient law and questions of general importance. Mr. Lopez therefore contended that the Defendants' present applications exhibit the same fatal defects and must be dismissed with costs to the Plaintiff.

Law and Discussion

Issue (i): Whether the Plaintiff's Notice of Motion is irregular.

31. For any avoidance of doubt, the Court is well aware that the RSC was repealed and superseded by The Bahamas Supreme Court Civil Procedure Rules, 2022 (as amended) ("the CPR"). However, the present applications were governed by the RSC.
32. Unless expressly excluded by any provision of the RSC or some other law, all appeals concerning any judgment, order, or decision of the Registrar shall lie with a judge in chambers. The mechanism governing an appeal from the Registrar is found in **Order 58 of the RSC**. It provides –

"ORDER 58

APPEAL FROM THE REGISTRAR

1. (1) An appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar.
 - (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order, or decision was given or made a notice to attend before the judge on a day specified in the notice.
 - (3) Unless the Court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.
 - (4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought." [Emphasis added]
33. The appeal process is strictly procedural. Therefore, it is prudent for any party aggrieved by a judgment, order, or decision of the Registrar to comply with the procedure outlined by the Rules. Otherwise, the party in whose favour the Registrar's judgment, order, or decision was made may be prompted to have the proceedings set aside for purported irregularity. **Order 58 Rule 1(3) of the RSC** stipulates that any party intending to appeal a judgment, order, or decision of the Registrar must issue a notice thereof within 5 days after the judgment, order or decision appealed against was given or made, and served not less than 2 clear days before the day fixed for the hearing of the appeal. Mohammed J in **Mosko United Construction Limited v Turnstar Limited [2003] BHS J. No. 161** stated that the time limit for filing the notice begins to run from the date the judgment, order, or decision is signed and dated.
34. Under the RSC, an irregularity occurs where there has been non-compliance in some form with the Rules. The effect of non-compliance with the Rules is provided for in **Order 2 of the RSC**, which provides –

"ORDER 2

EFFECT OF NON-COMPLIANCE

1. (1) Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has been anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.
- (2) Subject to paragraph (3), the Court may, on the ground that there has been such failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
- (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of the Rules to be begun by an originating process other than the one employed.
2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment, order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
- (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.
[Emphasis added]

35. *Prima facie*, respect, and adherence should be given to the Rules. In other words, the Rules should be complied with. Otherwise, litigants would feel comfortable flouting the Rules. Such action would be an affront to justice. It is the mandate of the Court to administer justice in every case. The Rules were implemented to ensure the seamless movement and disposition of cases through the judicial system – to aid in the Court’s role in the administration of justice: see **Glen Alexander Colebrooke (supra)**.

36. Notwithstanding this, not every case of non-compliance with the Rules would render the proceedings, any step taken in the proceedings, or any judgment or order made therein susceptible to be set aside for irregularity. Judicial guidance is drawn from the Board decision of the Judicial Committee of the Privy Council in **Texan Management Limited and Others v Pacific Electric Wire & Cable Company Limited** [2009] 4 LRC 1 wherein Lord Collins at paragraph 1 pronounced –

“[1] ... It has often been said that, in the pursuit of justice, procedure is a servant and not a master.”

37. The Court may either set aside wholly or allow such amendments, if any, to be made and to make such order, if any, to cure the irregularity or defect in the proceedings as it deems fit and just. On the other hand, the Court is very much cognizant that the Rules were implemented to ensure the efficient and effective flow of the administration of justice. The Rules ensure that the rights of all parties are secured: the rights of the non-compliant party and the compliant party. Therefore, the Court must be mindful of its discretionary jurisdiction in cases where non-compliance with the Rules arises and the difficult balancing act involved. In exercising its discretion, the Court must assess each case on its merits. The Court will not drive parties away from the judgment seat solely as a result of non-compliance with the Rules unless fairness and the administration of justice demand so. The Court would only resort to this more drastic course of action where the non-compliance amounts to a defect or irregularity so manifestly incurable that no action of the Court could be employed to rectify the irregularity or defect in the proceedings, i.e., to bring the non-compliant party into compliance with the Rules again.
38. Particularly, where non-compliance with the Rules has been made concerning time, the courts have long grappled with the conundrum of deciding whether discretion should be exercised to extend and/or enlarge time or to set aside the proceedings for irregularity. Numerous decisions have pointed to this balancing act executed by the courts, including those decisions provided by the Defendants.
39. The Court's jurisdiction to extend and/or enlarge time is governed by **Order 3 Rule 4 of the RSC**, which provides –

**“ORDER 3
TIME**

4. (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by judgment, order, or direction, to do any act in any proceedings.
 - (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
 - (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file, or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.”
40. The Court's jurisdiction to extend and/or enlarge time remains unfettered. It retains such jurisdiction notwithstanding the application for extension was made after the expiration of the time limit required by the Rules. On an application for an extension of time, the Court must consider several factors.
41. I recall and adopt the factors as outlined by the Court of Appeal in **Colebrooke (supra)**. Allen P posited that the Court should take into consideration the following factors when considering whether to exercise its discretion and grant an application for an extension of

time, namely, (i) the length of the delay; (ii) whether any good and substantial reasons are provided for the delay; and (iii) any prejudice that might be caused to the other side. In that decision, an application for an extension of time to file a Bill of Costs pursuant to Rule 9 of the Court of Appeal Rules, 2005, was filed two months after the Deputy Registrar's hearing, sixteen months after the costs order, thirteen months after the time limit prescribed for filing had expired. The Court of Appeal found that given the length of the delay, the inexcusable reasons for the delay, and the prejudice inferred by the court from the unjustifiable delay, the application for an extension of time to commence taxation proceedings ought to be refused.

42. The factors outlined in **Colebrooke (supra)** were considered and adopted by Charles (J) (as she then was) in the Bahamian Supreme Court decision of **Donnalee Maria Peet v Michael Baptiste 2008/CLE/gen/00869**. In that decision, an action involving a road traffic accident, judgment in default of defence was entered against the respondent with damages to be assessed by the Registrar. The Registrar awarded costs to be taxed if not agreed. The appellant's counsel wrote to the respondent's counsel enclosing a prepared bill of costs. The respondent's counsel never responded. The appellant did not file the bill of costs within the time limit prescribed by the Rules. In the meantime, the respondent filed an appeal against the Registrar's assessment decision. The appeal was dismissed by the Court of Appeal. The appellant commenced taxation in the Supreme Court and Court of Appeal. The appellant applied for an extension of time. The application was made two years and nineteen days out of time. Charles J (as she then was) granted the extension of time and awarded costs to the respondent. The learned judge rationalized that even though the delay was considerable, the respondent was not taken by surprise by the bill of costs since it was served on his counsel within the three months' time limit prescribed by the Rules. The respondent demonstrated no prejudice and none could be inferred. Charles J (as she then was) at paragraph 33 opined –

“In dealing with the present application, I need to consider not only the issue of delay but prejudice, if any, which such delay might have caused to the party not at fault. As evident from the authorities above, there is inherent in any delay some element of prejudice. But, in *Chapman v Chapman and Other* (1985) 1 All ER 757, a case involving an application by the paying party under O. 62 r 7(5) of the English Rules for an order that the receiving party be granted only nominal costs for failing to procure or proceed with taxation, Sir Robert Megarry V.C. said that the only cases in which prejudice may be inferred from delay are those where it was impossible to adduce evidence of the prejudice.”

43. However, must the non-compliant party make an application for the Court to exercise its discretion to extend and/or enlarge time? In **Mosko (supra)**, a decision provided by the Defendants, the Court answered in the affirmative. On the other hand, the Bahamian Supreme Court in **Bank of The Bahamas Limited v Maynard and Another [2010] 3 BHS J No. 71** held that the Court has the jurisdiction to extend and/or enlarge time

although no formal application was filed to extend and/or enlarge time. Barnett CJ (as he then was), at paragraph 15, stated –

“15. Although no Summons was taken out to enlarge time, the Court has the jurisdiction to enlarge time at the hearing of the appeal (see *Gibbons v London Financial Association* [1878-79] L.R. 4 C.P.D. 263). The notice was only out of time by two days and as the appeal really goes to the jurisdiction of the Registrar as opposed to the exercise of the Registrar’s discretion, I determined that it was in the interest of justice to enlarge the time and hear the appeal.”

44. The **Bank of The Bahamas Limited (supra)** decision was followed in the Bahamian Supreme Court decision of **Ten OC Estates Limited and Another v Becker Landscaping & Irrigation Inc.** [2011] 3 BHS J. No. 105. In **Ten OC Estates (supra)**, an oral application to extend and/or enlarge time was made by counsel on his feet. **Mosko (supra)**, **Bank of The Bahamas Limited (supra)**, and **Ten OC Estates Limited (supra)** were all decisions of the Supreme Court and pertained to proceedings where a notice was issued in contemplation of **Order 58 of the RSC**. This factor distinguishes those cases from the present case. It is accepted, however, that the Court, as a court of concurrent jurisdiction, is not bound by any first-instance decision, and that the outcome of each case will depend on its own facts and circumstances.
45. In the present applications, the Plaintiff’s Notice of Motion was not filed within the time limit prescribed by Order 58 Rule 1(3) of the RSC. Deputy Registrar Toote (as he then was) signed and dated the Strike Out Application Orders on 23 September 2021. Order 58 Rule 1(3) of the RSC mandated the Plaintiff, if he was aggrieved by the Strike Out Application Orders, to file a Notice of Motion on or before 30 September 2021. The Plaintiff filed the Notice of Motion on 17 December 2021, some 2 months, and 16 days out of time. If the Plaintiff was unable to file the Notice of Motion within the time limit prescribed by Order 58 Rule 1(3) of the RSC, he ought to have applied to the Court for an order extending and/or enlarging the time to file the Notice of Motion.
46. The Plaintiff did not make an application for an extension of time, either formally by filing a written application or informally on his feet during the hearing of the present applications. Nor did the Plaintiff provide any reason or reasonable excuse for not filing the Notice of Motion within the time limit prescribed by Order 58 Rule 1(3) of the RSC.
47. Instead (which is perhaps more damaging to the Plaintiff’s case), the Plaintiff contended that he did not need to comply with Order 58 Rule 1(3) as Order 58 of the RSC, in its entirety, did not apply to his case. The Plaintiff contended that his Notice of Motion relates to an application to have the Strike Out Application Orders of Deputy Registrar Toote set aside as null and void and of no legal effect in law. The Plaintiff contended that the application may be made using more than one mechanism. This is so because the heart of his application involves constitutional arguments and laws of public importance. Counsel submitted that this approach existed prior to the implementation and enactment

of the RSC and continued to operate after the RSC. Therefore, he argued that as it relates to his Notice of Motion, Order 58 of the RSC does not apply.

48. The Plaintiff's contentions are flawed for many reasons. The Plaintiff seeks to challenge the constitutionality of the Strike Out Application and the effect of the resultant Orders made by the Learned Deputy Registrar. Whether the Plaintiff recognizes the constitutionality of the Strike Out Application and efficacy of the Orders made by Deputy Registrar Toote or not, Orders were granted by Deputy Registrar Toote relative to the Strike Out Application. Thus, unless the said Orders are appropriately appealed (for whatever reasons the Plaintiff may choose to advance), the Defendants are entitled to the fruits of those Orders.
49. There existed only one mechanism for the Plaintiff to seek redress against the Orders of Deputy Registrar Toote. That is, to appeal the said Orders to a judge in chambers using the mechanism outlined by Order 58 of the RSC. Any challenge to the Orders made by the Learned Deputy Registrar (as he then was) inclusive of ones founded upon constitutional questions ought to be advanced by way of an appeal of the said Orders. It ought to be noted that the Court is not, at this time, concerned with whether Deputy Registrar Toote possessed the constitutional authority to strike out the Plaintiff's claims against the Defendants. The Court is only concerned with whether the Plaintiff complied with the provisions of Order 58 of the RSC in order to launch an appeal of those Orders for that is the thrust of the objection to the Plaintiff's Notice of Motion.
50. The Rules were employed to govern the effective and efficient management of the flow of the administration of justice. It is they that govern the processes and procedures of the Court. The Rules specifically provided the mechanism in which a judgment, order, or decision of the Registrar may be appealed. The Plaintiff cannot circumvent the Rules and employ any other mechanism not provided for by them. The fluid movement and disposition of cases depend upon on rule-compliance which assists the overall administration of justice.
51. Therefore, the Court having regard to the foregoing circumstances and relevant law, is satisfied that the Plaintiff's Notice of Motion is irregular. By the Plaintiff's very own admission through his written and oral submissions combined, the Notice of Motion was not filed in contemplation of Order 58 of the RSC. As the Plaintiff has not filed the Notice of Motion within the contemplation of Order 58 of the RSC, the Court is not satisfied that there is a proper application before the Court to appeal the Orders of Deputy Registrar Toote (as he then was).

Issue (ii): Whether the Defendants took fresh steps in the proceedings.

52. As mentioned before, the Plaintiff's Notice of Motion does not automatically warrant that it be set aside for its irregularity. The Defendants' right to have the Notice of Motion set aside for irregularity is not absolute. This right is pre-conditioned on the Defendants'

duty under **Order 2 Rule 2(1) of the RSC** to make the application to have the Notice of Motion set aside within a reasonable time and before they have taken any fresh steps.

53. For the purposes of **Order 2 Rule 2(1) of the RSC**, a “fresh step” is any action taken by the Defendants that may reasonably lead one to conclude that the Defendants have waived the irregularity of the Notice of Motion: **see commentary at 2/2/3 of the Supreme Court Practice 1985**.
54. From the onset, the Defendants have acknowledged that the Plaintiff’s Notice of Motion was irregular. The Defendants were served with the Plaintiff’s Notice of Motion on 7 January 2022. On 2 June 2022, the Defendants’ Counsel informed the Plaintiff that they had taken the legal position that the Notice of Motion was irregular and that they intended to challenge it on that basis. The Defendants’ Counsel at that time took the irregularity to be that the Notice of Motion was filed in non-compliance of Order 58 Rule 1(3) of the RSC, that is, it was filed outside of the 5-day time limit prescribed by the Rules. As matters developed in oral argument at the hearing of these applications, it became clear that another possible irregularity existed: that the Notice of Motion was irregular because it was not filed in contemplation of Order 58 of the RSC at all. Defendants’ Counsel appeared to have discerned this at the hearing as the Plaintiff explained the rationale behind the Notice of Motion. The first irregularity involves non-compliance with Order 58 Rule 1(3) while the second involves ignoring Order 58 altogether or treating it as inapplicable. The second irregularity appears more egregious than the first.
55. Considering these matters, I am satisfied that the Defendants have taken no fresh steps that may reasonably lead to a conclusion that they have waived or consented to waive the irregularity of the Notice of Motion. Since being served with the Notice of Motion on 7 January 2022, the Defendants have taken no other action save for the filing of the present application on 6 September 2022 to have the Notice of Motion set aside on the basis that it was irregular.

Issue (iii): Whether the Defendants made the present applications within a reasonable time.

56. Apart from the Court being satisfied that the Plaintiff’s Notice of Motion was irregular and that the Defendants took no fresh step to constitute a waiver of the irregularity, the Court must be satisfied that the Defendants exercised their right under Order 2 Rule 2(1) of the RSC within a reasonable time.
57. One thing that the decisions relied on by the Defendants and cited by the Court in this ruling reveal, even if subtly, is that what amounts to a reasonable time in law is a question of fact having regard to the circumstances and merits of each case.
58. As previously mentioned, the Defendants’ Counsel on 2 June 2022 notified the Plaintiff that they took the legal position that the Notice of Motion was irregular and they intended to challenge it on that basis. The Defendants did not file the present applications to

challenge the Plaintiff's Notice of Motion for purported irregularity until 6 September 2022, some 3 months and 5 days later, but given the earlier notification, the Plaintiff would not have been surprised by the application.

59. The Court, while of the opinion that the Defendants were somewhat indolent in asserting their rights under Order 2 Rule 2(1) of the RSC, is not satisfied that the delay was inordinate enough to conclude that the present applications were not brought within a reasonable time. This is particularly so given the Plaintiff's admission that the Notice of Motion was not filed in the contemplation of Order 58 of the RSC.
60. Moreover, even if the Plaintiff were to file the proper Notice of Motion in contemplation of Order 58 of the RSC, the time limit prescribed by Order 58 Rule 1(3) has long expired. Any prejudice to the Defendants would be an important factor to take into account on any such application. At this juncture, the Court is not satisfied that any reasonable circumstance exists for it to exercise its discretion, whether on application by the Plaintiff or of its own motion, to extend and/or enlarge the time limit.

Conclusion

61. For the foregoing reasons, the Court is satisfied that the Defendants rightfully exercised their rights under Order 2 Rule 2(1) of the RSC to have the Plaintiff's Notice of Motion filed on 17 December 2021 set aside in the manner as prayed in their present applications. The Plaintiff's Notice of Motion is so manifestly irregular that there exists no action, if any, to be taken by the Court to resolve the irregularity and bring it into conformity with the Rules. The Plaintiff not having filed his Notice of Motion in contemplation or compliance with Order 58 of the RSC must reap the fruits of such failure.

62. Therefore, the Court makes the following Orders:

- i. paragraph 1 of the Plaintiff's Notice of Motion filed on 17 December 2021 is set aside on the ground that it is irregular; and
- ii. the costs of and occasioned by the present applications shall be paid by the Plaintiff to the Defendants to be taxed if not sooner agreed by the parties.

63. The Court is cognizant of the time this decision has taken, and as such, extends apologies to the parties for the delay in its delivery.

Dated 13 December 2024


Simone I Fitzcharles
Justice