

**IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

2024/CLE/gen/FP/00133

IN THE MATTER OF the Property comprised in an Indenture of Mortgage dated 8th November, 2006 made between Donna Lee Jones to FirstCaribbean International Bank (Bahamas) Limited.

AND IN THE MATTER OF the Conveyancing and Law of Property Act, Chapter 138 of the Statute Laws of The Bahamas

B E T W E E N

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Claimant

AND

DONNA LEE LAING JONES

Defendant

Before: The Honourable Justice Constance Delancy

Appearances: Justine Smith, Esq. with Alexandria K. Russell, Esq. for the Claimant
Osman Johnson, Esq. for the Defendant

Hearing date(s): 13 February, 2025

DECISION
(On the Papers)

DELANCY, J

[1.] This is the Defendant's application for an order:

- i. setting aside the service of the Fixed Date Claim and Statement of Claim filed herein; and
- ii. striking out the Fixed Date Claim and Statement of Claim filed herein.

[2.] On 1 August, 2024, the Claimant filed a Fixed Date Claim Form and Statement of Claim against the Defendant supported by the Affidavit of David Hanna ("the Hanna Affidavit") seeking:

- i. Access to the property (“the property”) which the security in the Mortgage (“the Mortgage”) dated 8 November, 2006 and made between the Defendant and the Claimant;
- ii. Vacant possession of the property;
- iii. Judgment for the sums due and owing under the Mortgage;
- iv. Further or other relief as the Court shall deem just; and
- v. Costs.

[3.] The Claimant filed an Affidavit of Service on 31 January, 2025 in which the Affiant stated at para.4 thereof that she served the Defendant on 23 January, 2025 with the Fixed Date Claim Form, Statement of Claim and the Affidavit of David Hanna filed by the Claimant in these proceedings.

[4.] On the 27 January, 2025 the Defendant’s Counsel filed an Acknowledgment of Service on behalf of the Defendant.

[5.] On 5 February, 2025 the Defendant filed a Notice of Application and Affidavit in Support pursuant to Parts 1.1(1) and 1.1(2), 9.7 (6)(b) and (c) and 26.3(1)(a) of the Supreme Court Civil Procedure Rules 2022 “CPR”) and in accordance with the overriding objectives of the CPR and/or the inherent jurisdiction of the Court:

- (a) An Order pursuant to Part 9.7(6)(b) of the CPR setting aside service of the Claimant’s Fixed Date Claim and the Statement of Claim filed herein, and on the basis of irregular service not being in compliance with the requirements under Part 8.14 of the CPR;
- (b) An Order pursuant to Part 9.7(6)(c) and/or Part 26.3(1)(a) of the CPR striking out the Claimant’s Fixed Date Claim and the Statement of Claim filed herein, and on the basis of irregular service not being in compliance with the requirements under Part 8.14 of the CPR and the failure of the Claimant to comply generally with the provisions of the CPR;
- (c) Additionally and/or alternatively an Order pursuant to Rule 1, with specific reference to 1.1(1) and 1.1(2) of the CPR setting aside the service and/or striking the Claimant’s Fixed Date Claim form and Statement of Claim filed herein and on the basis of irregular service not being in compliance with the requirements under Part 8.14 of the CPR and pursuant to the overriding objectives of the CPR.

[6.] The Court must determine whether to (a) set aside the service of the Fixed Date Claim Form, the Statement of Claim and the Hanna Affidavit filed herein; and (b) strike out the Claim.

[7.] At the first hearing of the Claimant's Fixed Date Claim on 13 February, 2025 the Defendant's Counsel brought the Defendant's application to the Court's attention and requested to be heard on the same. The Court notes that no skeleton arguments were forwarded as required by Practice Direction 13 of 2023.

[8.] The Claimant's Counsel in anticipation of the Defendant's application forwarded submissions in opposition to the same on 12 February, 2025. The Defendant's Counsel requested an opportunity to reply to the same. The Court directed the Defendant to forward submissions in reply by 17 March, 2025. At the date of writing of this decision no submissions have been filed or forwarded to the Court by the Defendant's Counsel.

Law & Discussion

[9.] The CPR at Part 8.14 provides the procedure for issuance and service of a Standard Claim Form:

- (1) When a claim form is served on a defendant, **it must be accompanied by** —
 - (a) a copy of any order made under rules 8.2 or 8.13;
 - (b) **a defence form in Form G10;**
 - (c) **a form of acknowledgement of service in Form G8;**
 - (d) if the claim is for money, an application to pay by instalments in Form G13; and
 - (e) the prescribed notes for defendants.

[Emphasis added].

[10.] The Defendant's Affidavit in Support of the application acknowledges at para.4 thereof that she was served with the Fixed Date Claim Form, the Statement of Claim and the Hanna Affidavit filed herein by the Claimant. She averred that when she was served with the aforementioned documents she did not received any other documents and she never received an Acknowledgment of Service or a Defence Form.

[11.] In his oral submissions to the Court the Defendant's Counsel contends that the absence of Forms G8 and G10 at the time of service on the Defendant is a violation of the rules and the service ought to be set aside on the basis of irregularity not being in compliance with the mandatory requirements of Part 8.14. Further that the Court ought to set aside of the Claim form or strike out the Claim Form pursuant to Part 9.7(6) and (c).

[12.] Part 9 of the CPR the deals with the procedure to be used by a Defendant who wishes to contest proceedings and avoid a default judgment being entered. In particular Part 9.7 deals with

the procedure for disputing the Court's jurisdiction. Part 9.7(6) which the Defendant relies on states:

- (6) An order under this rule may also —
 - (a) discharge an order made before the claim was commenced or the claim form served;
 - (b) **set aside service of the claim form**; and
 - (c) **strike out a statement of claim**.

[13.] However, Part 9.7 of the CPR concerns disputing the jurisdiction of the Court, and Part 9.7(6) applies only to that rule. Defence Counsel has failed to satisfy the Court that it does not possess the jurisdiction to try the claim, whether by a matter of law, hierarchy or forum of convenience. Rather, his claim rests on the lack of the appropriate forms.

[14.] Parts 9.7(7) and 9.8 also sets out the provides steps to be taken in the event that Court does not accede to an application sought under Part 9:

- (7) If on application under this rule the Court does not make a declaration, it —
 - (a) may —
 - (i) fix a date for a case management conference; or
 - (ii) treat the hearing of the application as a case management conference; and
 - (b) must make an order as to the period for filing a defence.
- (8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the Court under paragraph (7)(b) and such period may be extended only by an order of the Court.

[15.] The Defendant also relies on the overriding objectives in particular Part 1.1(1) and 1.1(2) of the CPR which provides:

- (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.
- (2) Dealing justly with a case includes, so far as is practicable:
 - (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate to —
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly;
 - (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
 - (f) enforcing compliance with rules, practice directions and orders.

[16.] Although the Rules are to be “liberally construed to give effect to the overriding objective” it does not mean that the Rules are to be used to circumvent or misapply specific and existing rules

in the CPR. In the case of **Treasure Island Co. v Audubon Holdings Ltd.** [2004] Court of Appeal, ECS (British Virgin Islands), Civ App No.22 of 2003, *Saunders, JA* at para. 24 states that:

.... the overriding objective does not in or of itself empower the Court to do anything or grant to the Court any discretion. It is a statement of the principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself...

[Emphasis added]

[17.] The Claimant's Counsel contends that there are no provisions in the CPR that sanctions and in particular no provision in Part 8.14 for the failure to serve Forms. Counsel drew the Court's attention to the case of **James H. Herbert v Nelisa Spencer** [2016] ECSC J0126-1 from the Eastern Caribbean Supreme Court (Antigua & Barbuda) as per *Glasgow, M.* at para. 15, 16 and 29:

[15]While the rules are stated in mandatory terms, there are no sanctions attached for noncompliance. The court is urged to apply the Privy Council decision of **AG of Trinidad and Tobago v Kieron Mathews**, where it was explained that "sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."

[16] The case of **Asia Pacific (HK) Ltd & Ors v Hanjin Shipping Co Ltd** was also cited in support of this view. In that case, a copy of a claim form was forwarded by the claimant's solicitors to the defendant's solicitors by way of fax. The document was marked "claimant's copy", but there was no indication from the claimant's solicitors that the claim was being served by way of the fax. Claimant's solicitor did not forward the forms usually attached to the claim which forms are referred to as the response pack. The defendants sought to argue that, for those reasons, there was no service of the claim form. **The court ruled that "the failure to serve a response pack was a failure to comply with the rules but of itself, it signifies no more than that which ought to have been done on service was not done. It was a procedural irregularity: a technical mistake of the kind that in *Harrigan v Harrigan* ... was not treated as affecting the real substance of the matter."**

[29]As I previously stated, the rules are to govern the conduct of all parties and no party is permitted to cherry pick which rule to obey. But the rules are a self-contained code which specifies, in some instances, specific consequences for disobedience with their dictates. **The Privy Council has stated in *Mathews*, that in cases where no specific sanction is specified, none should be implied.**

[Emphasis added].

Moreover, Supreme Court Civil Procedure Rules Practice Guide, January 2024, at page 93 cited the case of **James H. Herbert** *supra* stated:

a claim will not fail for the failure to serve the accompanying court documents or to amend the timelines for filing an acknowledgment of service or a defence except where the consequence

of failure to comply has been so specified. It is a procedural irregularity and does not go to the substance of the claim.

[Emphasis added].

The Court accepts this argument as there is no specified consequences for failure to attach Form G8 or G10.

[18.] Claimant's Counsel further submitted that the Court should also be guided by the provisions of Part 1.3 of the CPR that "it is the duty of the parties to help the Court to further the overriding objective." Further that the application was unnecessary as it could have been avoided by drawing the Claimant's Counsel to the failure to serve the Forms in question even prior to first hearing.

[19.] The Court accepts Claimant's Counsel assertion that communication between the parties could have avoided the need for this application. The precious resource of Court time could have been saved and first hearing used for case management.

[20.] The Court hereby orders and directs as follows:

1. The Defendant's Application of 5 February, 2025 is hereby dismissed.
2. The Defendant shall file and serve her Defence within 21 days of this ruling.
3. Either party is at liberty, within 28 days of this ruling, to file a notice for case management.
4. Costs awarded to the Claimant to assessed if not agreed.

Dated the **9** day of April, 2025


Constance A. Delancy
Justice