IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2013/CLE/gen/01228

IN THE MATTER OF an Indenture of Mortgage made on the 23rd day of November, A.D, 1999 between Scotiabank (Bahamas) Limited of the one part and Alfred Junior Cash of the other part and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 7650 at pages 311 to 327.

BETWEEN

GATEWAY ASCENDANCY LTD.

Plaintiff

AND

ALFRED JUNIOR CASH

Defendant

Before: The Hon Mr. Justice Neil Brathwaite

Appearances: Byron Woodside for the Plaintiff

Tanya Wright for the Defendant

Hearing Date: 17th January A.D. 2023

DECISION

BRATHWAITE, J

FACTUAL SUMMARY

[1.] On 24th March 2014 Scotiabank (Bahamas) Limited obtained an Order for payment of all sums due and owing, and for vacant possession of a property at Lot Number 68 in the subdivision known as "Yamacraw Shores" formerly New Providence Estates in the Eastern District of the Island of New Providence, which was the subject of a mortgage between the Defendant and Scotiabank. That mortgage was transferred to Gateway Ascendancy Limited on 26th February 2018, who thereafter obtained an Order on 26th May 2021, substituting Gateway Ascendancy Limited for Scotiabank as Plaintiff in the matter. A Writ of Possession was then obtained and filed on 25th August 2021, and was served on the Defendant. A Notice of Appointment of Attorney was then entered for the Defendant on 6th December 2021, and a summons was filed on behalf of the Defendant on 23rd December 2021 seeking the following relief:

> **1.** Pursuant to Order 45 Rule 11 of the Rules of The Supreme Court (RSC) 1978, that the execution of the Order entered against the Defendant on 24th day of March A.D., 2014 and the Writ of Possession issued on 25th day of August A.D., 2021 be stayed pending an application on the part of the Defendant for an Order that the said Writ of Possession be set aside.
>
> **2.** An Order that the Writ of Possession filed herein on 25 day of August A.D., 2021 be set aside on the grounds that:
>
> a. Pursuant to Order 3 Rule 5 of the RSC 1978 the Plaintiff failed to provide Notice to the Defendant of its intention to proceed with this matter in or around March 2021 when it filed a summons for the substitution of the Plaintiff for Scotiabank (Bahamas) Limited after no action had been taken in these proceedings within a period of 12 months or more, more specifically since March 2014 when the order for possession and judgment was filed, over seven (7) years prior.
>
> b. The Writ of Possession was issued without the leave of the Court as required by Order 46 Rule 2(l)(a) and (b) of the RSC 1978.
>
> c. The amount of the judgment debt has not yet been quantified on the face of the Order nor does it contain a date within which the payment is to be made.
>
> d. There has been serious prejudice to the Defendant by reason of the Plaintiff's actions or conduct.
>
> **3.** That the said 24th March 2014 Order be stayed and or set aside and the Originating Summons filed herein against the Defendant be dismissed on the grounds that:
>
> a. Continuing with this action in all the circumstances is an abuse of the process of the Court.
>
> b. The Defendant has suffered prejudice as a result of the actions conduct and delay of the Plaintiff.
>
> **4.** That the Plaintiff do pay the costs of the Defendant to be taxed and paid if not otherwise agreed.

[2.] In support of the summons the Defendant filed two affidavits of Alfred Cash. In the first, the affiant indicates that he is a retired school teacher, and that his mortgage payments were always made by salary deduction, with no arrears until 2009 when the affiant suffered a medical emergency which caused brain damage, with some issues such as poor memory still continuing. As a result of the illness, the affiant indicates that he retired in August 2009, accepting a reduced pension and a gratuity which were used to fund the mortgage payments, and that his affairs were singularly managed by a sister, who has unfortunately died, leaving him unable to properly defend this action, as she was in possession of important papers which he has been unable to retrieve. Mr. Cash indicates that he thought the mortgage had been paid off, as he was under the impression that his pension was duly servicing the mortgage.

[3.] In the second affidavit, filed 24th January 2022, the affiant references concerns with the Writ of Possession, and discussions seeking forbearance with respect to the execution of that writ, as well as the filing of the summons seeking to have the writ set aside. He further indicates that he was visited by an officer on 21st January 2022 and 22nd January 2022 who demanded that the premises be vacated immediately, despite an indication from the Plaintiff on 30th November 2021 that the eviction was stayed pending further instructions from the client. The Defendant asserts that these are indications of bad faith on the part of the Plaintiff.

DEFENDANT'S CASE

[4.] The Defendant commences by citing the provisions of Order 45 rule 11 RSC 1978, which reads as follows:

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

[5.] The Defendant suggests that inordinate delay, the medical challenges of the Defendant, and the death of the Defendant's sister are all matters which have occurred since the date of judgment, and which entitle the Defendant to the grant of relief.

[6.] The Defendant further notes Order 3 Rule 5 RSC, which requires the provision of one month's notice where a year or more has elapsed since the last proceedings in a cause or matter, and suggests that the plaintiff was therefore required to provide notice, and has failed so to do. The cases of **Major v Attorney General (2012) 1 BHS J. No. 5**, and **Mosko United Construction Limited v Turnstar Limited (2009) 4 BHS J. No 43,** both decisions of the Supreme Court of the

Commonwealth of the Bahamas, are cited in support of this submission. In particular, in the Mosko case, the learned Hepburn J. emphasizes that the purpose of Order 3 rule 5 is **"to ensure that the defendant is given not less than one month's notice of the plaintiff's intention to take a step in the action where a year or more has elapsed since the last proceeding in the action. If no step is taken for a year or more, it is assumed that the plaintiff has abandoned the action".** The Defendant therefore submits that the failure to issue a notice of intention to proceed is fatal to the issuance of the writ of possession.

[7.] The Defendant goes on to submit that, pursuant to Order 46 rule 2 RSC, the issuance of the writ of possession required leave of the court, as that rule states that the same may not issue without leave of the court where more than six years have elapsed since the date of the judgment or order. In the instant case, the order having been made by the learned Evans J on 24th March 2014, the Defendant submits that leave was required before the writ of possession could be issued as it was on 25th August 2021.The Defendant further submits that the reliance of the Plaintiff on the Emergency Powers (COVID 19) Special Provisions Order 2020 does not assist, as those provision relate to extensions of time periods mandated by the Limitation Act. Instead, the Defendant submits that the applicable provision is to be found in the Supreme Court (COVID 19) Rules 2020, which extended the time periods fixed by the Rules of the Supreme Court for filing any pleading or document or the taking of any procedural step to fourteen days following the cessation of the Public Emergency. Further rules were issued, the last of which was the Supreme Court (COVID 19) (No. 3) Rules 2020, extending those periods to conclude on 7th September 2020. It is therefore again submitted that the writ of possession should be stayed, as the six year period for enforcement without leave expired on 7th September 2020, and no leave was obtained to issue a writ of possession after that date.

[8.] On the issue of costs, the Defendant suggests that while costs are in the discretion of the court, that discretion should be exercised in this case to award costs to the Defendant on an indemnity basis, and rely on the decision of **Wailes v Stapleton Construction and Commercial Services Lt and Unum Ltd (1997) 2 L.L.R. 112** in which the learned Newman J said the following:

> **"There may be cases otherwise, falling short of such behavior in which the Court considers it appropriate to order indemnity costs. The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, such conduct which can be properly categorized as unreasonable, and I would add to that in a way which the Court is satisfied constitutes unreasonableness of such a high degree that it can be categorized as exceptional."**

[9.] In seeking to meet that standard, the Defendant submits that the conduct of the Defendant in this case warrants such an order as the Plaintiff had confirmed that the execution of the order would be stayed, but nevertheless went ahead and sought eviction, on short notice, and without extending to counsel for the Defendant the requested courtesy of notice of any intention to enforce, and despite

knowledge of the medical condition and personal circumstances of the Defendant. The Defendant further complains that the Plaintiff exhibited bad faith by attempting to compel eviction by the presence of a police officer as opposed to the Provost Marshall, and by seeking to blame the COVID pandemic for any failures to follow proper procedure.

[10.] The Defendant further submits that the impugned conduct of the Plaintiff amounts to an abuse of process, which must be considered in the context of costs as well as with respect to the issue of whether the writ should be set aside.

[11.] In all the circumstances, the Defendant urges the Court to set aside the Writ of Possession filed on 25th August 2021, with costs to the Defendant on an indemnity basis.

PLAINTIFF'S SUBMISSIONS

[12.] In responding to the submissions of the Defendant, the Plaintiff points out that the Defendant was served with a Summons to substitute Gateway Ascendancy as the Plaintiff on 24th May 2021, but did not appear for the hearing. They therefore suggest that the Defendant did have some notice of steps being taken by the Plaintiff. The Plaintiff further submits that there was no necessity to file a formal Notice of Intention to proceed, as the provisions of Order 3 Rule 5 RSC are not applicable, and relate only to interlocutory proceedings. In support of this submission, the Plaintiff has cited section 3/6/1 of the **Supreme Court Practice White Book 1976**, which states that "last proceedings" "refers to interlocutory proceedings before final judgment, and has no reference to execution". The Plaintiff suggests that the Order made by the learned Evans J on 24th March 2014 was a final order, and that there was no requirement to file a Notice of Intention to Proceed before execution.

[13.] With respect to the question of leave the Plaintiff submits that no leave was required, and that the relevant provision is to be found at Order 45 rule 2, which states as follows:

> **"A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 77 applies."**

[14.] The Plaintiff further submits that the limitation period did not end until 12th December 2021, as the period under the Limitation Act was extended by virtue of the state of emergency caused by the COVID 19 pandemic, as a result of which the Emergency Powers (COVID 19) (Special Provisions) Order was promulgated. Pursuant to section 4 of that Order,

> **"Any limitation of time provided under the Limitation Act CH. 83 is suspended from the 17th day of March, 2020 for the duration of the state of public emergency and extending thirty days thereafter."**

[15.] The Plaintiff submits that six year period from the making of the order by the learned Evans would have ended as of 23rd March 2020, but was extended until thirty days after the end of the state of public emergency, which expired on 13th November 2021. They therefore contend that the relevant period would have ended on 12th December 2021, and that the Writ of Possession issued on 25th August 2021 was well within time, so that no leave was required as mandated by Order 46 Rule 2.

[16.] The Plaintiff accepts that the amount of the debt is unquantified, and state that they do not seek to enforce the Order for payment of the sums of money due and owing. They go on to suggest that the Defendant is in essence mounting a collateral attack on a court of concurrent jurisdiction, which the Plaintiff submits is an abuse of process. They go on to submit that the Plaintiff extended every courtesy to the Defendant by extending the eviction date from 29th November 2021 to 31st December 2021, and that they were not prevented from seeking to enforce by an application for a stay, which did not in fact amount to a stay. The Plaintiff therefore denies that there has been any egregious conduct, and note that there has been no payment on the outstanding debt since 3rd October 2011, so that the amount due and owing was $138,067.03 as at 24th January 2022. In all the circumstances of this case, the Plaintiff urges the court to dismiss the summons of the Defendant, with cost to the Plaintiff.

DISCUSSION

[17.] Order 3 Rule 5 of the Rules of the Supreme Court provides as follows:

"5. Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule."

[18.] The Defendant submits that the Plaintiff failed to give notice in accordance with this rule. The Plaintiff counters by submitting that this rule does not apply to final orders, and have supported that submission by reference to section 3/6/1 of the Supreme Court Practice White Book as cited above, which states that the rule relates to interlocutory proceedings, and not to proceedings in execution after final judgment. The Defendant submits that the order in this case must be viewed as interlocutory, as the amount of the judgment was not quantified, while the Plaintiff states that there was no intention to seek payment of any amount.

[19.] In my view, the submission of the Plaintiff is well-founded. The Writ of Possession which is being enforced does not relate to any amounts, but seeks vacant possession of the property itself. There is no question to my mind that, certainly with respect to vacant possession, the order of Evans J was final. The failure to quantify the amount could obviously lead to difficulties in enforcing that portion of the judgment, but does not mean that the order with respect to vacant

possession is not final, and could not be enforced. I therefore hold that the order made by the learned Evans J was not interlocutory, and there was no requirement to file a formal Notice of Intention to Proceed in this matter.

[20.] The Defendant also submits that the Plaintiff was required to seek leave before issuing the writ of possession. Order 46 provides as follows:

> **"1. In this Order, unless the context otherwise requires, "writ of execution" includes a writ of fieri facias, a writ of possession, a writ of delivery, a writ of sequestration and any further writ in aid of any of the aforementioned writs.**
> **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;....."**

[21.] The Plaintiff submit that the relevant provision is Order 45 Rule 3(2) which reads as follows:

> **"(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 77 applies."**

[22.] While the order in the instant case is made in a mortgage action, and Order 45 Rule 3(2) would normally permit the issuance of the writ of possession without leave, it is my view that this provision does not assist when more than six years have elapsed since the date of the judgment or order, in which case Order 46 Rule 2 applies, and leave in such cases is required.

[23.] The Plaintiff in this case relies on the Emergency Powers (COVID 19) (Special Provisions) Order 2020 made on 30th March 2020, which had the effect of suspending any limitation period provided under the Limitation Act for the duration of the state of public emergency and extending thirty days thereafter. There is no dispute that the state of public emergency ended on 13th November 2021, so that any limitation period so suspended would end on 12th December 2021.

[24.] The difficulty in this case is that what is being considered is not a limitation period fixed by the Limitation Act, but rather a procedural requirement for leave prescribed by the Rules of the Supreme Court, so that the Emergency Powers (COVID 19) (Special Provisions) Order 2020 is not applicable. Instead, the applicable provision is the Supreme Court (COVID 19) Rules 2020. The first of these was issued on 1st April 2020, and section 2 reads as follows:

> **"Any period of time fixed by the Rules of the Supreme Court, any practice direction, court order or direction for filing any pleading or document or taking any procedural step in any action under such Rules or doing any act or thing under such**

Rules, which would expire during the aforesaid period of emergency, shall be extended to fourteen days following the cessation of the Public Emergency."

[25.] What is clear is that at that time, when the registries of courts were not operating, and there was great uncertainty, provision was made to extend time at least to fourteen days after the State of Emergency, so that litigants who could not proceed as a result of any emergency measures would not be left without redress through no fault of their own. However, the courts transitioned to greater use of information technology, which permitted many operations to continue while not endangering the public, and facilitating a more rapid return to functionality. As a result, the Rules were again amended, and the last of those amendments read as follows:

"Any period of time fixed by—

(a) the Rules of the Supreme Court; or

(b) a practice direction, court order or direction,

which was further extended pursuant to rule 2 of the Supreme Court (Covid 19) (No. 2) Rules, 2020, is hereby further extended until the 7th day of September, 2020."

[26.] It is clear that the initial extension of the times fixed by the Rules of The Supreme Court until a period beyond the end of the State of Emergency, was changed, and instead a specific date was fixed in keeping with the attempts to return to some sense of normalcy, and in recognition of the fact that courts and registries were actually operating, albeit remotely and in different ways. It is also clear in my view that the six year period in this case, within which leave would not have been required to issue a writ of possession, and which would have expired in March 2020, but which was extended by virtue of the COVID 19 Rules initially until beyond the end of the state of emergency, and then to 7th September 2020, in fact ended on that date. The Plaintiff in this case would therefore have been required to issue the Writ of Possession before 7th September 2020, failing which leave would be required. The Plaintiff having not sought leave, the Court must now go on to consider the impact of that failure on these proceedings.

[27.] Order 2, rule 1 Rules of the Supreme Court states:

"1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or)eft 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 a 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.

[28.] In the case of **Bank of the Bahamas v Herman Maycock and Sabrina Maycock 2012/CLE/gen/00458**, a decision of the learned Cooper-Burnside J (Acting), after concluding that the Plaintiff had failed to obtain leave to issue a writ of possession, in circumstances where leave was required, the court went on to consider Order 2 and said the following:

[39]The purpose of the rule is to do away with the distinction between nullities and irregularities insofar as they relate to any failure to comply with a requirement under the Rules of the Supreme Court and is to avoid the problem identified by the Court of Appeal of England and Wales in Re Pritchard. Indeed, the editorial at paragraphs 2/1/1 - 2/1/2 of Supreme Court Practice 1999, explains that the rule was introduced in this form into the English Rules of the Supreme Court in 1964 in light of the decision in that case.

[40]The question in Re Pritchard was whether proceedings brought under the Inheritance (Family Provision) Act 1938 in the local district registry (rather than in the central office of the High Court, as the rules required) were a nullity or whether the failure to bring the proceedings in the central oitice could be treated as an irregularity and so capable of cure under what was then Order 70, rule 1. The rule was in these terms:

"Non-compliance with any of these Rules, or with any Rule of practice for the time being in force, shall not render any proceedings void unless the Court or any Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit."

[41]The court accepted that, notwithstanding the wide scope of the rule, if the proceedings were a nullity, the rule could have no application to them. The importance of the point in that case was that, if the proceedings were a nullity, as the court held (Lord Denning, MR dissenting), it was too late for the claimant to bring fresh proceedings under the Inheritance (Family Provision) Act 1938, as the strict time limit of six months within which such proceedings could be brought had expired.

[42]The position under Order 2, rule 1 in light of that history is helpfully explained by Lord Denning in Harkness v Bell's Asbestos and Engineering Ltd

[1966] 3 All ER 843 where he stated (at pages 845-846):
"This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible ... for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."

[43] In the present case, the issuance of the 2020 Writ without the requisite leave is a "proceeding" within the scope of Order 2, rule 1 and shall be treated by this Court as a mere irregularity. I therefore decline to declare that the 2020 Writ is invalid, i.e. that it has no legal force.

[29.] In considering whether the provisions of Order 2 Rule 2 should be applied, and the writ of possession allowed to stand notwithstanding the failure to obtain leave, I note the contentions of the Defendant that the writ should be set aside as an abuse of process.

[30.] Abuse of process has been considered by many courts. For example, in **Cable v Liverpool Victoria Insurance Co Ltd [2020] EWCA Civ 1015** the English Court of Appeal said the following:

5.1 Abuse of Process

42. Although we were referred to a large number of authorities on abuse of process, the relevant principles can be summarised shortly. The classic summary of abuse of process can be found in the speech of Lord Diplock in Hunter v Chief Constable of West Midlands Police [1982] AC 529C:

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, it would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people. The circumstances in which abuse of process can arise are very varied... it would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power"

This passage has been cited many times since, most recently by the Supreme Court in Summers v Fairclough Homes Limited [2012] UKSC 26, [2012] 1 WLR 2004, a case where the claimant had greatly exaggerated his long-term

disabilities.

> **43. A working definition of abuse of process, adopted by both leading counsel in this appeal, was set out by Lord Bingham, then Lord Chief Justice, in Her Majesty's Attorney General v Paul Evan John Barker [2000] 1 F.L.R. 759. At paragraph 19 he defined an abuse of the process as "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".**

[31.] The complaint of abuse of process in this case is based on the delay in the matter, the fact that the amount of the judgment is not quantified on the face of the order, and the manner in which the Plaintiff proceeded, including the use of a police officer as opposed to the Provost Marshall.

[32.] The Plaintiff in this matter acquired the right to be substituted as Plaintiff in 2018, at which time the pandemic could not have been anticipated, and no issue would have arisen with respect to seeking a writ of possession without leave. Once the pandemic ensued, matters were held in abeyance, in some respects until the end of the state of emergency, and in others until the end of the period declared by the Supreme Court (COVID 19) Rules. With respect to the right to proceed without leave, I have already concluded that the relevant period ended on 7th September 2020. The writ in this case was issued on 25th August 2021, a delay of just under one year. While the delay is significant, I do not find that it is so exorbitant as to amount in and of itself to abuse of the court process in a way which is significantly different from the ordinary and proper use of the court process.

[33.] I also do not consider the use of a police officer instead of the provost marshal to be so improper as to amount to an abuse of process. While concerns have been raised about the knowledge of the Plaintiff of the circumstances of the Defendant, and the failure to proceed more circumspectly in the circumstances, again I do not consider the matters complained of in this case to rise to the level of an abuse of process.

[34.] The Defendant also claims to have suffered prejudice in this case as a result of the death of his sister, who he claims was responsible for the administration of his affairs, and that he has suffered memory loss and is unable to defend this case. In considering the issue of prejudice, I note that the initial unfortunate medical affliction of the Defendant occurred in 2009, and that he retired in that year and shortly thereafter received his retirement, which he claims should have liquidated the debt. No attempt appears to have been made to contest the making of the order by the learned Evans J, and indeed the order states that the Defendant was present along with his daughter Tamica Cash, although the Defendant claims to have no memory of this. In my view, any issue of the satisfaction of the mortgage should have been raised before Evans J, or in a subsequent appeal of his decision. The Defendant also claims that the Order of Evans J and the Writ of Possession were

not served on him personally. In light of the claims of memory loss, it is difficult to accept this statement, and I also note that in the same affidavit the Defendant states that he had no conversation with Gateway prior to them serving the writ, which seems to contradict the claim of a lack of service. In any event, matters which arose prior to the making of the order, and which were not ventilated in a challenge to that order, could not in my view be considered as contributing to any prejudice after that order so as to impact a decision on whether the writ should stand.

[35.] In the circumstances of this case, it is my view that the claim of prejudice is unsustainable. While the circumstances of the Defendant in this case may engender a great deal of sympathy, they do not alone amount to a basis to deny the Plaintiff the fruits of the judgment in terms of the enforcement of the order for vacant possession. Indeed, as the Plaintiff has submitted, the debt remains outstanding, and has not been serviced for many years, during which the Defendant has had the benefit of occupying the home.

[36.] In **Harkness v Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843** the English Court of Appeal stated that a matter could be treated as an irregularity which the court could and should rectify so long as it could do so without injustice. In considering the issue of injustice, I bear in mind that permitting the writ to stand in this case would have the effect of obviating the need to seek leave. Such applications for leave are brought pursuant to Order 46 Rule 4 which reads as follows:

> **4. (1) An application for leave to issue a writ of execution may be made ex parte unless the Court directs it to be made by summons.**
> **(2) Such an application must be supported by an affidavit —**
> **(a) identifying the judgment or order to which the application relates and, if the judgment or order is for the payment of money, stating the amount originally due thereunder and the amount due thereunder at the date of the application;**
> **(b) stating, where the case falls within rule 2(1)(a), the reasons for the delay in enforcing the judgment order;**
> **(c) stating, where the case falls within rule 2(1)(b), the change which has taken place in the parties entitled or liable to execution since the date of the judgment or order;**
> **(d) stating, where the case falls within rule 2(1)(c) or (d), that a demand to satisfy the judgment or order was made on the person liable to satisfy it and that he has refused or failed to do so;**
> **(e) giving such other information as is necessary to satisfy the Court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.**

(3) The Court hearing such application may grant leave in accordance with the application or may order that any issue or question, a decision on which is necessary to determine the rights of the parties, be tried in any manner in which any question of fact or law arising in an action may be tried and, in either case, may impose such terms as to costs or otherwise as it thinks just.

[37.] The party seeking leave is therefore permitted to proceed without notice, and is required to provide an explanation for the delay. In this case, and on the evidence before me, it is my view that the initial difficulty was occasioned by the COVID 19 pandemic, and the State of Emergency declared as a result of that pandemic. The extensions granted by virtue of the emergency rules cited above ended on 7th September 2020. The period of delay in this case is therefore approximately eleven months, as the writ was not obtained until August 25th 2021, although steps were in fact taken prior to that date to substitute the initial Plaintiff for the current Plaintiff. The Plaintiff also obviously appears to have been of the view that the relevant period did not end until after the conclusion of the state of emergency.

[38.] On the other hand, while those would have been the facts the court would be required to consider on an application for leave, the court is also required to consider any change in the circumstances of the Defendant since the initial order was obtained, in order to determine where the justice of the case lies. To this end, I note that the Defendant initially fell ill in 2009, prior to the Order of Evans J. in 2014. The Defendant further indicates that he suffered a recurrence to a lesser extent in 2019, and the death of his sister in 2021.

[39.] The Defendant has cited a number of authorities on the effect of delay. The most relevant in my view is the case of **Duer v Frazer [2001] 1 All ER 249**, a case in which the decision of a Master to refuse leave to issue a writ was appealed, and in which the identical provisions to Order 46 rule 4 were being considered. In that case, an order had been made in Germany in March 1984, and registered in England in July 1984. Leave was refused in February 2000, some sixteen years after the judgment was granted, and almost ten years after the period to enforce without leave expired. The Defendant in that case had also suffered a heart attack in 1992, eight years before leave was refused, and two years after the period to proceed without leave had ended.

[40.] In **Duer v Frazer** the court said the following:

25. It seems to me that these two passages from judgments in the Court of Appeal apply to govern the exercise of the discretion to permit the issue of execution after the expiry of six years under RSC Ord 46, r 2 and that they are support for the proposition that the court would not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the

judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in the National Westminster Bank case, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor."

[41.] In the instant case, the initial medical difficulties experienced by the Defendant occurred prior to the grant of the Order by Evans J. The recurrence in 2019 is a factor that must be considered, coming as it did some five years after the order of Evans J, but I am also of the view that it really amounts to a continuation of a medical situation which existed prior to the order of Evans J. These realities must be juxtaposed with the fact that, as opposed to merely a judgment which might be enforced by an order for vacant possession, the order in this case is one for vacant possession, which was not challenged, and with which there was no compliance, as a result of which the Defendant continued to reside in his home for many years while not servicing the mortgage or making any type of payment. While it may be considered harsh to dispossess an elderly and infirm Defendant, harshness does not necessarily equate to injustice. One might also take the view that it is also harsh to deny a Plaintiff relief when the Defendant failed to live up to obligations freely entered into by him. I am therefore satisfied in the circumstances of this case that to require a separate application for leave would only add to the costs of litigation, and as was said by Slade J. in National Westminster Bank plc v Powney [1990] 2 All ER 416 as quoted in Duer v Frazer, **"To refuse the bank leave by reason of any procedural errors on the bank's part would be to impose 'too large a fine ... on the Bank'**. In my view, this posture is also in keeping with the provisions of Order 2 Rule 2. I therefore conclude that the just disposition of this matter requires that the writ of possession be permitted to stand despite the failure to obtain leave.

[42.] With respect to the issue of costs, the Defendant has urged the court to set aside the writ and grant costs on an indemnity basis. The normal rule is that costs follow the event, unless some exceptional circumstance exists which justifies departure from that rule. In this case, the Defendant has not been successful in setting aside the writ, but only because the court has concluded that the failure to obtain leave can be rectified. It therefore cannot be said that the Defendant has been wholly unsuccessful. As a result of the failure of the Plaintiff to obtain leave prior to issuing the writ of possession, and pursuant to Order 46 Rule 2(3) which empowers the court to make such order as to costs as the court deems just, I order that the Plaintiff pay the Defendant's costs of these proceedings, to be taxed if not agreed. I decline to order costs on an indemnity basis, as to do so would require the court to be satisfied that the conduct of the Plaintiff was so unreasonable as to be exceptional, which is the standard necessary to justify an order for costs on an indemnity basis.

While the Plaintiff may be considered insensitive, I do not find the conduct of the Plaintiff to be so unreasonable in the circumstances, in that they were merely seeking to enforce an order which had been long outstanding, and where no effort was made to resolve the matter. The order is therefore that the Plaintiff pay the Defendants costs of this application on the usual basis.

Dated this 10th day of April A.D., 2025

Neil Brathwaite

Justice