In The Supreme Court of Bermuda

CIVIL JURISDICTION

Civ. 2011 No. 478

BETWEEN:

LEYONI JUNOS

Plaintiff

- v -

HSBC (BANK OF BERMUDA) LTD

First Defendant

-and-

KEVIN TAYLOR

Second Defendant

RULING

(In Chambers)

Date of Hearing: June 15, 2012
Date of Judgment: June 29, 2012

The Plaintiff appeared in person
Mr. Timothy Marshall, Marshall Diel & Myers Limited, for the Defendants

Introductory

1. By a Summons issued on February 7, 2012, the Defendants applied to strike-out the entirety of the claims asserted against the Second Defendant and those portions of the Writ and Statement of Claim relating to fraud, the Order for Possession and the procedural steps to enforce the Order.

2. By a Summons issued on February 16, 2012, the Plaintiff sought, *inter alia*, an interim injunction restraining the Bank from selling the Property until trial.

3. On February 16, 2012, I gave directions for hearing of these cross-applications. I also directed that the Plaintiff's claims relating to Order 42 rule 2(2) and Order 45 rule 6(2), (3) be tried as a preliminary issue together with the Defendants' contention that

challenging the enforceability of the Possession Order was barred by the *res judicata* doctrine.

Chronology

4. These applications cannot be understood without reference to a chronology of the principal steps in Civil Jurisdiction 2007: No. 334 (the "Foreclosure Proceedings") issued by the Bank against the Plaintiff to which the present action relates:

    - on November 29, 2007 the Bank issued an Originating Summons under Order 88 of the Rules and commenced the Foreclosure Proceedings seeking (a) monetary damages, (b) an order that the mortgage may be enforced by sale and (c) possession
    - on April 2, 2009, the Bank was granted monetary judgment, an order for sale and possession by Simmons J. At this juncture, the Plaintiff was merely seeking an opportunity to make a payment on her arrears
    - on November 19, 2009, the Court of Appeal set aside the April 2, 2009 Orders (on the technical ground that the orders were made by a judge not seized of the matter) and remitted the matter to Greaves J to continue hearing the Bank's application for possession. The Court of Appeal noted the Plaintiff's indication that she would meet her mortgage obligations to November, 2009 out of monies recovered pursuant to certain judicial review proceedings
    - on January 27, 2010, the Plaintiff (the First Defendant and mortgagor in the Foreclosure Proceedings) filed a Summons setting out a Defence and Counterclaim. Directions were ordered by Greaves J for the hearing of the Bank's possession Summons
    - on May 10, 2010, Greaves J, *inter alia*, granted the Bank possession of the Property ("the Possession Order") and dismissed the Plaintiff's Counterclaim without prejudice to her right to pursue it in a separate action
    - on June 30, 2010, the Plaintiff applied to the Supreme Court to set aside the Possession Order
    - on July 12, 2010 the Bank issued a Writ of Possession
    - on August 2, 2010, Ground CJ summarily struck-out this application as an abuse of process and vexatious
    - on September 3, 2010, the Plaintiff filed a Notice of Appeal against the August 2, 2010 decision on the implicit basis that this decision was a final one
    - on September 10, 2010 I granted an interim stay of execution of the Possession Order pending the application being heard and the Chief Justice clarifying the status of the August 2, 2010 decision
    - on October 11, 2010, Ground CJ held that his August 2, 2010 decision was an interlocutory one requiring leave to appeal[1] and indicated the Plaintiff's proper remedy was to seek an extension of time within which to appeal the Possession Order
    - on October 18, 2010 the Plaintiff applied to the Court of Appeal for an extension of time

[1] [2010] Bda LR 69. I am indebted to this Judgment for much of the chronology set out above.

- on October 22, 2010, Ground CJ granted an extension of time until October 29, 2010 for the Plaintiff to appeal the Possession Order
- on October 29, 2010 the Plaintiff filed her Notice of Appeal against the Possession Order
- on June 13, 2011, the Court of Appeal dismissed the appeal against the Possession Order
- on December 19, 2011 the Plaintiff issued her Generally Indorsed Writ of Summons herein, seeking *inter alia* to set aside the Possession Order
- on January 5, 2012 I directed the preliminary trial of the issue of whether the Plaintiff was entitled to a declaration that the manner in which the Possession Order was enforced was unlawful
- on January 19, 2012, the Plaintiff filed a Statement of Claim "*Limited to the preliminary issue of liability in the claim of the unlawful eviction*".

The Plaintiff's claim

5. The Plaintiff's Statement of Claim advanced the following claims which form the subject of the present strike-out application:

   (a) it is alleged that the Second Defendant obtained the Possession Order by fraudulent means;

   (b) the Bank obtained the Possession Order by, inter alia, fraudulently misrepresenting the true state of account between the parties to the Foreclosure Proceedings as alleged in the Generally Indorsed Writ;

   (c) the Possession Order was unenforceable because it failed to specify a (future) date for compliance;

   (d) the Writ of Possession and all steps taken to enforce it were unlawful and a nullity by virtue of (c).

6. The Plaintiff also issued a Summons for interim injunctive relief to restrain the Bank from selling the Property and, in effect, exercising their rights of possession pursuant to the Possession Order. This application presupposes that the claims summarised above are arguable claims which are not liable to be struck-out.

7. Accordingly, if the Bank's strike-out application succeeds, the foundation for the Plaintiff's interim injunction relief falls away altogether.

Findings: did the Second Defendant obtain the Possession Order by fraudulent means?

8. The Plaintiff alleges that the Possession Order was obtained by fraud because the contents of the Order did not conform to the order orally pronounced by Greaves J during the hearing. This plea is obviously unsustainable and bound to fail.

9. The undisputed or indisputable facts pertaining to this issue may be summarised as follows:

(a) on Monday May 10, 2010 at a hearing attended by the Plaintiff, Counsel for the Guarantor and the Second Defendant as counsel for the Bank, the Judge made the following order (according to the Plaintiff's transcript prepared from the Court Smart recording):

> "*So the Order of the Court is as follows:*
>
> 1) *The Plaintiff is granted the order for possession.*
> 2) *The Counterclaim of the First Defendant is struck out with the First Defendant at liberty to proceed therewith in a separate action.*
>
> *And that is my decision*";

(b) on Tuesday May 11, 2010 at 2.48 pm, the Second Defendant forwarded a draft order to the Plaintiff and invited comments before Thursday. On Wednesday May 12, 2010 at 7.04 am, the Plaintiff sought more time to listen to a recording of the hearing. She also queried a recital;

(c) on Friday May 14, 2010 at 4.08pm, the Plaintiff emailed the Second Defendant objecting to the inclusion of paragraphs 1), 2) and 4) of the draft order on the grounds that they had not been actually pronounced. Four minutes later she reiterated her objection to the recital;

(d) on May 20, 2010 the Second Defendant wrote to the Registrar (enclosing the draft order and both of the Plaintiff's May 14, 2010 emails) in the following terms:

> "*We refer to the hearing of this matter before the Honourable Mr. Justice Greaves on 10 May 2010. We enclose a stamped order, in duplicate. This draft embodies what the Plaintiff believes to be the appropriate order arising from the hearing.*
>
> *Ms. Junos disagrees with the Plaintiff's draft order. With her permission, we have enclosed two emails which set out her position, which we view to be self-explanatory. In the event that Justice Greaves would like any corrections made to our draft order, we would be grateful if such changes could be communicated by letter and we will undertake to resubmit fresh drafts. In the event Justice Greaves is pleased with the draft order, we look forward to receiving filed copies in due course...*";

(e) the Possession Order was signed by Greaves J in the form submitted by the Second Defendant on behalf of the Bank.

10. The Second Defendant demonstrably acted with unimpeachable propriety in submitting his draft of the Possession Order to the Court together with the Plaintiff's objections and allowing the judge who made the Order to decide. The plea in paragraphs 12 and 14 of the Statement of Claim (to the effect that the Second Defendant obtained the Possession Order by fraudulent means) is quite obviously frivolous and bound to fail.

11. In her Partial Written Submissions, the Plaintiff argued that the Possession Order was obtained by fraud because the Bank's attorneys knew that a time for giving up possession should have been specified in the Order. This argument was based on the fact that at a January 27, 2010 hearing, the Second Defendant foreshadowed an order in the "usual terms" giving the Plaintiff 28 days to vacate the premises. As Mr. Marshall rightly pointed out, there is no mandatory legal requirement that a possession order should be postponed for 28 days. Moreover, the Possession Order was eventually granted over three months after the 28 day indulgence was originally mentioned by the Bank's counsel.

12. In the exercise of my discretion I strike-out the claim against the Second Defendant under Order 18 rule 9(1) (b) of the Rules of the Supreme Court 1985 and/or under the inherent jurisdiction of the Court to prevent its processes from being abused.

Legal findings: res judicata

13. The doctrine of *res judicata* (literally the matter has been decided) is designed to promote finality in litigation and discourage litigants from undermining the integrity of the legal process by reopening issues that have been finally determined.

14. It is usually obvious that a litigant cannot reopen an issue which has been explicitly determined on a final basis between the same parties in earlier litigation. Case law on the doctrine of *res judicata* or issue estoppel has largely centred on attempts to re-litigate related issues which were not explicitly decided in the earlier proceedings but which could and should have been raised in the proceedings in question, even if the parties to the two sets of proceedings are not identical. This is the wider sense in which the doctrine of *res judicata* may be engaged.

15. The governing principles are no longer controversial. How the principles ought to be applied to the unique facts of particular cases often leaves some room for argument. Mr. Marshall relied upon the statement of principles found in a decision of the Court of Appeal for Bermuda which is binding on this Court. In *Thompson-v-Thompson* [1991]Bda LR 9, the Court of Appeal for Bermuda (at page 10), Harvey da Costa JA opined as follows:

> "*The second case is* Yat Tung Investment Co. Ltd. v. Dao Hens Bank Ltd. *(1971) A.C. 581 which was referred to by Peter Gibson J. and which Hobhouse J. referred to as "the leading modern authority" in* Dallal v. Bank Mellat *(1886) 1 All E.R. 239, 248. It was a decision of the Privy Council and therefore binding on this Court. The opinion of the board was delivered by Lord Kilbrandon. The history of the various previous proceedings was*

somewhat complicated and it was recognized that the "true doctrine" of res judicata "in its narrower sense" could not be discerned in them. At PP. 590–591 Lord Kilbrandon observed:

> *'But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V-C in Henderson v. Henderson (1843) 3 Hare 100 at 115, [1843-60] All E.R. Rep 378 at 280-382, where the judge says:" [he then quoted the passage from the judgment in* Henderson v. Henderson *cited above]*.

Lord Kilbrandon continued:

> *'The shutting out of a 'subject of litigation'—a power which no court should exercise but after a scrupulous examination of all the circumstances—is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule ... The Vice-Chancellor's phrase 'every point which properly belonged to the subject of litigation' was expanded in* Greenhalgh v. Mallard *([1957] 2 All E.R. 255 at 257) by Somervell L.J.: "... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."*"

16. The touchstone for any determination of whether a pleading should be struck-out on the grounds of *res judicata* is whether or not the relevant pleas "*so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*"

17. Ms. Junos correctly submitted that the proper way in which to set aside an order obtained by fraud is by way of a fresh action: *Kuwait Airways Corporation-v-Iraqi Airways Company* [2001] UKHL 72 (at paragraph 24);[2001] 1 Lloyd's Rep 485; [2001] 1 WLR 429. She also aptly cited *Owens-v-Noble* [2010] EWCA Civ 224(at paragraphs 47-48).

18. Accordingly, I find that her claim to set aside the Possession Order on the grounds of fraud would not be liable to be struck-out in reliance on the grounds that this point ought to have been raised before the Court of Appeal. This in no way affects the liability of the same averments to be struck-out on the grounds that they are bound to fail.

Findings: is it an abuse of process for the Plaintiff to challenge the enforceability of the Possession Order in the present action?

The Court of Appeal's adjudication of the validity of the Possession Order

19. Sir Robin Auld JA gave the judgment of the Court of Appeal in *Junos-v-Bank of Bermuda (HSBC)* (2011) Bda LR 38. That the Possession Order formed the subject of the appeal is apparent from the introductory paragraphs of that Judgment:

> "3. *As to Ms Junos' appeal against Greaves J's orders, she has advanced a number of complaints, alleging wilful and fraudulent evasion by the Bank of legal requirements for enforcement of its mortgage security, bias and misconduct by the Judge and the Registrar, maladministration by the Registrar and/or her staff, of a variety of so-called "errors of law and fact" by the Judge in his findings. Over-all, she maintains that she is a victim of oppression by the Judge, the Registrar and the Bank in violation of her rights under the Bermuda Constitution Order 1968 to a fair, independent and impartial hearing (Section 6(8)) and not to be dispossessed without compliance with the law (Section 13).*
>
> *4. Ms Junos asks the Court to quash Greaves J's orders of 10th May 2010 for possession and sale of her home and his strike-out of her counterclaim.*
>
> *5. The Court has read and listened carefully to all her many complaints, which she has advanced in person. We are satisfied that there is nothing of legal or factual substance in any of them deserving further mention in this judgment, save possibly for three issues - which to do her justice - Ms Junos put at the forefront of her appeal.*"

20. That short recitation suffices to demonstrate that the Possession Order (including the order for sale) was vigorously attacked before the Court of Appeal. The three points which that Judgment records the Plaintiff in the present action as laying emphasis upon in that appeal were the following:

    (a) the Bank's alleged failure to comply with the requirements of Order 88 rule 6(3) of the Rules with respect to particularizing various matters relating to the mortgage;

    (b) the Bank's alleged failure to comply with section 31 of the Conveyancing Act 1983 by omitting to give the Plaintiff three months' notice before exercising its powers of sale;

(c) the decision of Greaves J to strike-out her Counterclaim which sought to challenge the validity of the mortgage on various grounds, without prejudice to her right to pursue it in a separate action (which she is now doing).

21. The appeal was dismissed and the stay of execution granted by the Chief Justice pending appeal was lifted. Accordingly, the Court of Appeal Judgment of June 17, 2012 expressly decided that:

(a) the Possession Order was not invalid by reason of non-compliance with Order 88 and/or section 31 of the Conveyancing Act 1983;

(b) the Possession Order could forthwith be enforced by the Bank; and

(c) any challenges to the validity of the mortgage should be determined in a separate action.

The Plaintiff's attack on the Possession Order in the present action

22. The Plaintiff alleges that the Possession Order is unenforceable and the Writ of Possession subsequently issued was a nullity by virtue of the following core averment in the Statement of Claim:

> "*16. The Plaintiff contends that for an order for possession to be enforceable, the order must specify that possession be given up on a specified date. If a date is not specified in the order, then the procedure laid out in Order 45/6(2) & (3) must be followed before the order can be enforced…*
>
> *40. And the Plaintiff is seeking a…declaration that there is currently no enforceable order for possession in existence and that, therefore, she is still lawfully in possession of the premises…*"

23. These pleas constitute a renewed attack on the validity of the Possession Order based on additional legal grounds which were not advanced before the Court of Appeal when the Plaintiff initially sought to set that Order aside for, *inter alia*, non-compliance with other provisions in the Rules of the Supreme Court. The pleas also seek to deprive the Bank of the right to enforce the Possession Order, a right which was affirmed by the Court of Appeal when it lifted the stay on execution granted prior to the appeal.

24. The legal argument is in no sense based on fresh evidence which only became available after the appeal hearing. It is plainly a point based on legal arguments which could have been raised in the context of the appeal in proceedings between the same parties and in relation to the same commercial dispute.

Does the Plaintiff's renewed attack on the Possession Order constitute an abuse of process?

25. In my judgment it is clear beyond serious argument that the Plaintiff's attempts to re-litigate the issue of the validity of the Possession Order, an issue which was resolved against her by the Court of Appeal in the Foreclosure Proceedings, is an abuse of process. There are no special circumstances which would support a finding that the doctrine of *res judicata* should not operate so as to shut out the advancement for a second time of a claim which essentially asserts that the Bank is not entitled on technical procedural grounds to enforce the Possession Order.

26. In reaching this conclusion, I have regard to the history of this dispute which is summarised in paragraph 4 above. The present proceedings were commenced in 2007. The Bank first obtained a possession order on April 2, 2009, over three years ago. While the Court of Appeal set aside this order on technical grounds in November 2009, this decision was made in the context of the Plaintiff undertaking to make payments on the mortgage out of specific monies, an undertaking which she did not keep. Her claims against the Bank alleging, *inter alia*, fraud in connection with the mortgage, were first raised in late January, 2010, over two years after the commencement of the Foreclosure Proceedings. The Possession Order was obtained by the Bank (for the second time) in May 2010. The Plaintiff has already sought to set aside the Possession Order before the Court of Appeal and failed.

27. The June 13, 2011 Court of Appeal Judgment expressly determined that the Possession Order was valid and in lifting the stay of execution the Court of Appeal also expressly determined that it was enforceable. The Court of Appeal did not expressly decide the point which forms the subject of the Plaintiff's current renewed assault on the Possession Order. But if it were possible to re-litigate the same broad claim simply because another legal argument has occurred to the litigant, litigation would never end.

28. I also rely upon the legal principles set out above. The case of *Yat Tung Investment Co. Ltd. v. Dao Hens Bank Ltd.* [1971] A.C. 581 illustrates the legal theory in practical action.

29. In the first of two actions, Yat Tung and Mr. Lai sought a declaration that a mortgage of certain property foreclosed by the bank was void. The purchasers sought possession of the property sold by the bank and the defendants alleged, as they had in the first action, that the mortgage was void. The second action was stayed pending the determination of the validity of the mortgage in the first action. The validity of the mortgage was upheld in the first action. One month later, Yat Tung advanced a claim in the second action against the purchasers from the bank that the sale by the Bank was ineffective because of fraud. The Judicial Committee of the Privy Council held that, although the parties were not precisely the same as in the first action, "*it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings*"[2]

[2] [1975]UKPC 6, per Lord Kilbrandon at page 6.

Findings: was the Possession Order unenforceable because it failed to specify a time for giving up possession?

30. My primary finding in favour of the Defendants is that it is not open to the Plaintiff to impugn the validity of the Possession Order in the present proceedings as such arguments ought to have been advanced in the Foreclosure Proceedings. It follows that no formal determination of the enforceability of the Possession Order is required. To the extent that this issue does fall for adjudication, I would find that the Possession Order was not in any way defective for the reasons advanced by the Plaintiff.

31. Firstly, it is only a judgment which requires an act to be done which must specify the time for doing the act in question: Order 42 rule 2(1). The Possession Order was not such an order. Order 42 rule 3 provides as follows:

> "*3 (1) A judgment or order of the Court, the Registrar or of a special referee takes effect from the day of its date.*
>
> *(2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court, the Registrar or a special referee orders it to be dated is of some earlier or later day, in which case it shall be dated as of that other day.*

32. Secondly, the Plaintiff advanced the elaborate and carefully researched argument which went as follows:

    (a) a mortgagor is a tenant as stated in Order 88 rule 6 (5) of the Rules and there are only two valid forms of possession order which can be granted as against a tenant;

    (b) the first form of possession order is only obtainable against trespassers (Order 113 rule 6(2) and Form 42A), where no time for giving up possession applies;

    (c) The second form of possession order where a time for giving up possession must be specified is available against tenants (Landlord and Tenant Act 1974, section 24).

33. It is true that Order 88 rule 6 provides as follows:

> "*(5) If the mortgage creates a tenancy other than a tenancy at will between the mortgagor and mortgagee, the affidavit must show how and when the tenancy was determined and if by service of notice when the notice was duly served.*"

34. It may be that, under ancient rules of property law which need not be explored here, a mortgagor is a special form of tenant at will. However, Order 88 itself, which deals with foreclosure proceedings, does not mandate that possession orders specify a time for giving possession. To bridge this gap, the Plaintiff's attack on the formal validity of the Possession Order makes the fundamental assertion that the relationship between the mortgagee and mortgagor is governed by the Landlord and Tenant Act 1974. The

requirements of this Act for determining tenancies are said to apply in the mortgage context. In my judgment, this is a leap of logic too far.

35. Section 24 of the 1974 Act provides as follows:

> "*24 An order under section 23 granting possession—*
>
> *(a) shall direct the tenant to deliver up possession of the premises to the landlord by a specified date or within a specified time after service of the order on the tenant: and*
>
> *(b) shall state that if the order is not obeyed by the specified date or within the specified time a warrant of possession will issue under section 25 without any further order.*"

36. However it is clear from a cursory review of the Landlord and Tenant Act as a whole that section 24 cannot be read so as to equate "landlord" with mortgagee and "tenant" with "mortgagor". Section 1(1) best illustrates the point through the following definitions:

> " *'contract of tenancy' means any lease or tenancy agreement;...*
>
> *'landlord' means the person entitled to the reversion expectant upon the determination of a contract of tenancy;*
>
> *'lease' or 'tenancy agreement' includes every agreement for the letting of premises, whether oral or in writing;...*
>
> *"possession" includes receipt of rents and profits, or the right to receive the same, if any;*
>
> *'premises' means the subject matter of any contract of tenancy;...*
>
> *'rental period' means the period in respect of which a payment of rent falls to be made;*
>
> *'sub-tenant' includes a mortgagee of a term of years who is not in possession and any person deriving title under a sub-tenant;*
>
> *'tenancy' includes a sub-tenancy;*
>
> *'tenant' in relation to a contract of tenancy means the person who as between himself and the landlord is entitled to exclusive possession of the premises.*"

37. The Plaintiff made the interesting argument, with reference to the legislative history of the 1974 Act, that the Landlord and Tenant Act nevertheless should be construed as applying to mortgage foreclosure proceedings.

38. It is true that the Ejectment Act, 1878 was repealed by the Landlord and Tenant Act 1974. It is correct that section 11 of the 1878 statute governs "*an action of ejectment…brought by any mortgagee…for the recovery of the possession of any mortgaged lands…*" But this statutory provision, according to its terms, only applied where "*no suit is then depending in any Court of equity for or touching the foreclosing or redeeming of such mortgaged lands…*" In my judgment it is clear that foreclosure proceedings are a special form of (historically equitable) procedure which is now governed by the Rules of the Supreme Court, not the Landlord and Tenant Act 1974.

39. Finally, it is important to recall that the Rules of the Supreme Court are essentially procedural guidelines and that their breach will rarely result in any order incorrectly obtained being wholly ineffective. Order 2 (1) provides:

> "*(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 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.*"

40. Accordingly, I find that the Possession Order was not invalid because it failed to specify a time within which possession had to be given up.

Conclusion

41. For the above reasons, the claim against the Second Defendant is struck-out in its entirety. The preliminary issue is resolved in favour of the Bank. However, the Plaintiff is in any event debarred from pursuing on fresh grounds claims which seek to impugn the validity of the Possession Order which was expressly affirmed by the Court of Appeal in the Foreclosure Proceedings.

42. The effect of the decision in the Foreclosure Proceedings that the Counterclaim raised in those proceedings can only be pursued in a separate action (the present proceedings) is as follows. The remaining claims which the Plaintiff asserts against the Bank in respect of the mortgage cannot be used to prevent the Bank from enforcing its rights under the Possession Order, including its power of sale.

43. Some of these claims sound only in damages and may fall to be taken into account in conjunction with determining the Bank's still pending application for a money judgment in the Foreclosure Proceedings. To the extent that the Plaintiff seeks through her remaining claims to establish that the mortgage was entirely ineffective, it seems to me that it is for the Bank as a mortgagee in possession to form its own

judgment as to how such claims impact (if at all) on its ability to enforce the Possession Order.

44. The Court of Appeal expressly determined that the Plaintiff's attacks on the mortgage must be pursued in separate proceedings and that the Bank should be permitted to enforce the Possession Order. This Court is not competent to revisit an issue which has been expressly determined by the Court of Appeal.

45. It follows that the Plaintiff's injunction application, which is based on the premise that this Court can restrain the Bank from enforcing the Possession Order while she pursues the claims first asserted in her Counterclaim in the Foreclosure Proceedings, must be refused.

46. Unless either party applies to be heard as to costs by letter to the Registrar within 21 days, the costs of the present application shall be awarded to the Defendants to be taxed if not agreed.

Dated this 29th day of June, 2012 _____
IAN RC KAWALEY CJ