



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
(COMMERCIAL COURT)**

2018: No. 315

BETWEEN:

**MOLLY WHITE
STEPHEN WHITE**

Plaintiffs

- and -

DENISE PRISCILLA TREW

Defendant

RULING

Mortgage Action (RSC Order 88), Writ of Possession, Application to stay a Writ of Possession, Legal principles for an application for a stay of judgment under RSC Order 47/1

Date of Hearing: 7 April, 14 June 2021

Date of Ruling: 23 July 2021

Appearances: Kim White, Cox Hallett Wilkinson Limited, for the Plaintiffs

Michael Scott, Browne Scott, Defendant/Applicant

RULING of Mussenden J

Introduction

1. This matter came before me by the Defendant Mrs. Trew's Summons dated 25 September 2019: (a) for a stay of the Order for Possession granted on 25 October 2018 for a period of 14 days; (b) if the Defendant shall after the stay herein, serve a summons for a further stay supported by an affidavit in accordance with Order 47 r 1, an Order for the said stay herein sought to be continued until the Writ Summons issued against the HSBC Bank Ltd. and the Executor is heard or otherwise disposed (sic); (c) An Order for the Defendant's Re-entry to Warwick Lane House, 20 Warwick Lane, Warwick (the "**Property**") forthwith; and (d) Such other orders as the Court deems just. (the "**Defendant's Applications**")
2. The application is supported by the affidavit of Mrs. Trew sworn on 16 September 2019 ("**Trew 1**") with its Exhibit "**DPT-1**" and the affidavit sworn on 10 October 2019 ("**Trew 2**").
3. The Plaintiffs Molly White ("**Mrs. White**") and Stephen White oppose the application. They rely on the Second Affidavit of their son and brother respectively Lt. Col. William White, ("**Lt. Col. White**") sworn 8 October 2019 ("**White 2**") with its Exhibits "**WW-1 to WW-2**". White 2 refers to his First Affidavit sworn 3 June 2019 ("**White 1**") together with its Exhibits "**WW1 to WW-6**".

Background

4. The Defendant's husband Mr. Allan Trew died on 20 January 1999. The Defendant became the owner of the Property by way of a vesting deed from the Trustees of Mr. Trew's estate in 2004.
5. By a mortgage dated 14 December 2004 made between the Plaintiffs and the Defendant, the Property was conveyed to the Plaintiffs as security for a loan of \$450,000 (the "**Mortgage**"). The rate of interest was 7% per annum. The term of the mortgage was 3

years. There was to be 35 monthly interest payments of \$2,625 followed by 1 payment of \$450,000. Material clauses included the obligation of the Defendant to make the payments and in default, the Plaintiffs would be entitled to sell the property. The Defendant failed to pay the interest and principal for a period of time. The last interest payment was due on 14 December 2007. On 21 March 2018 the Plaintiffs demanded repayment of all monies owing to the Plaintiffs.

6. On 25 October 2018 the Court ordered as follows:
 - a. The relief in the Originating Summons issued 20 September 2018 was granted, namely: (a) delivery by the Defendant to the Plaintiffs of the mortgaged property, that is the Property (“**Possession Order**”); (b) a Declaration that the Plaintiffs have liberty to exercise their power of sale under the mortgage; (c) the sum of \$450,000 (principal), \$78,375.98 (interest) and \$3,500 (legal fees) were due under the said mortgage as at 14 September 2018; and (d) further or other relief.
 - b. The Order was stayed for a period of 90 days;
 - c. Liberty to apply.

7. On 11 March 2019 a Writ of Possession was issued by the Court to the Provost Marshal General. It stated as follows:

“WHEREAS in the above named action it was on the 25 October 2018 ordered that the Defendant do give the Plaintiffs possession of the mortgaged property situate at 21 Warwick Lane, postponed for 90 days.

AND WHEREAS the Defendant has failed to vacate the said property known as 21 Warwick Lane, Warwick as ordered after the passage of 9 days.

We COMMAND you that you enter the said land and cause the Plaintiffs to have possession forthwith.

WE ALSO COMMAND you that of the goods, chattels, lands, houses and other property of the Defendant, Denise Priscilla Trew, authorized by law to be seized in execution you cause to be made the sum of \$450,000 (principal), \$78,375.98 (interest) and \$3,500 (legal costs), owing as at 14 September, 2018 together with interest and

together with Provost Marshal General's fees, cost of levying and all other legal, incidental expenses and that immediately after execution of this Writ you pay the Plaintiffs Molly White and Stephen White pursuant to the said Judgment the amount levied in respect of the said sums and interest."

8. On 9 April 2019 the Bailiff entered the Property and effected possession such that the Plaintiffs are in possession of the Property. The writ of Possession is endorsed with "... *The Defendant Denise Trew was absent. The locks were changed and the Property was secured with all its contents...*".
9. On [date tbc by counsel] the Defendant moved out of the Property. However, goods belonging to the Defendant remained at the Property.
10. On 20 May 2019 the Property was valued by a local real estate company in its then current state at \$685,000, such valuation being shared with the Defendant.
11. On 8 August 2019 the Court made an Order including that the Defendant remove all her contents from the Property, allow access to the Plaintiffs and that the Plaintiffs were free to remove any contents, recovering any costs from the proceeds of sale of the Property. The Order was stayed for 7 days.
12. After 25 September 2019 (date of issue of the Summons for this present application), there were various Orders to set the matter down for hearing.
13. On 3 October 2019, the Plaintiffs insured the property for a sum of \$762,000 with public liability in the amount of \$2,000,000. Lt. Col. White states in White 2 that as at 1 October 2019 the Defendant owed a total of \$540,276.77 to the Plaintiffs with further likely costs to be incurred in the region of between \$60,000 to \$200,000 for emptying and repairing the Property as well as costs associated with a sale of the Property.

The Defendant's application for a stay

14. The central basis for the application for a stay was that Mrs. Trew, the defendant in this matter, has commenced another Supreme Court Case 2019: 379 CIV which is a writ action, issued 18 September 2019, with Mrs. Trew as plaintiff against a trustee of the estate of her deceased husband Mr. Trew and HSBC Bank Bermuda Ltd (the “**HSBC Matter**”) in respect of a mortgage of a property in St. George’s (the “**St. George’s Property**”). The Writ is exhibited, unsigned and unsealed, to Trew 1 in Exhibit DPT-1. There are no other pleadings in the HSBC Matter exhibited with Trew 1.
15. The Defendant submits that the Court should grant a stay – or suspension - of the further execution (effectively the removal of the Defendant’s possessions, repairs and sale of the Property) of the Possession Order and Writ of Possession pending the determination of the HSBC Matter for several reasons. First, Mr. Scott submitted that Section 13 of the Bermuda Constitution prohibited the compulsory acquisition of property, creating an exception for the enforcement of mortgage rights, but only insofar as such enforcement is reasonable justifiable in a democratic society. However, he stated that he was not making a constitutional argument. Further, the UK Parliament had enacted special protection for mortgagors in relation to residential properties to be afforded to repay the debt despite a fault, relying on some English decisions applying section 36 of the UK Administration of Justice Act 1970 (the “**1970 UK Act**”) as persuasive as to how to address such issues in Bermuda. He referred to the Commission of Inquiry presently under way in Bermuda as support for protecting the property rights of Bermudians in the 21st century, including the modern day descendants of enslaved Bermudians.
16. Second, Mr. Scott submitted that although Order 88 in respect of mortgage actions does not confer any express powers to suspend a possession order, the power to suspend or stay their execution arose under the Court’s inherent jurisdiction and RSC Order 45/11.
17. Mr. Scott submitted that the jurisdiction to suspend a mortgage possession order is broad and unfettered and that as a matter of common law, the Courts have generally exercised that discretion in favour of mortgagees because the substantive law heavily favours mortgagees. Additionally, the equitable doctrine of relief from forfeiture is a flexible

doctrine which permits a defaulting mortgagor to be permitted an opportunity to repay the principal debt where it would be unfair not to do so. However, in modern times, the courts have in practice in relation to a mortgagor's home adopted a more debtor-friendly approach. He stated that the central question is whether it is fair for the mortgagee to enforce his strict legal rights following a default by the mortgagor. He cited the case of *Alfa Telecom v Cukurova* [2013] UKPC 2 as follows:

"87. CH and CFI contend that the mortgages in this case are a classic example of the type of transaction in which the courts of equity have jurisdiction to grant relief. They rely upon the classic statement of principle by Lord Wilberforce in Shiloh Spinners Ltd v Harding [1973] AC 691, 722:

"There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power. There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate and also costs (Peachy v. Duke of Somerset (1721) 1 Stra 447 and cases there cited). Yet even this head of relief has not been uncontested ..."

18. Mr. Scott submits that the above passage when combined with the Overriding Objective which compels efficiency and savings costs, especially in litigation involving persons of limited means, permits the Court to take into account the existence of the often overlooked equitable doctrine when invited to suspend a possession order on terms that any arrears will be repaid. He urged that the case states that a court should take a wide approach in

mortgage cases, the discretion applies to before or after the order for possession and that the general principles should not be regarded as inflexible. Mr. Scott cited extensively from *Alfa Telecom v Cukurova* to support his submissions as follows:

“90. The commonest cases in which equity has power to intervene were identified by Lord Wilberforce as mortgages, which give rise to the equity of redemption, and leases, which commonly contain re-entry clauses. The paradigm case for relief in such instances is where the primary object of the bargain is to secure a stated result which can be effectively attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result.

“91. That was precisely the position here. This is a case of a mortgage in which the primary object of the bargain was to secure the repayment of the loan together with contractual interest and the forfeiture provision, namely the power to appropriate, was added in order to secure that result.

92. It follows that, unless it can be said that the jurisdiction to give relief in the case of a mortgage is limited to mortgages of real property, no convincing reason has been identified why there should not be jurisdiction here. On the contrary it is a classic case for the exercise of the jurisdiction. The Board has reached the clear conclusion that there is no principled basis upon which the jurisdiction can be limited to real property. Nor is there any authority for such a distinction.

116. This leads the Board to consideration of whether it should grant CH and CFI such relief, and if so on what terms. These questions require further examination of the nature of the jurisdiction to grant relief. In the passages in Shiloh [1973] AC 691 quoted above, Lord Wilberforce noted that equity is willing, in cases of security for the payment of money, to relieve from forfeiture on terms that the payment is made with interest, if appropriate, and also costs. Factors bearing on the appropriateness of relief were said to include the

applicant's conduct, "in particular whether his default was wilful, the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach". Commenting on this form of relief, Snell's Equity (32nd Ed), para 13-015 observes that:

"Although this confers an apparently broad discretion, it is likely to be very difficult to establish a case for relief against forfeiture in a commercial context involving a freely negotiated contract. In such cases courts will place considerable emphasis upon the need for certainty.

122. In the Court of Appeal, Hyman v Rose [1911] 2 KB 234, 241-242, Cozens-Hardy MR had suggested general principles to the effect that, in the first place, "the applicant must, so far as possible, remedy the breaches alleged in the notice and pay reasonable compensation for the breaches which cannot be remedied" and must also undertake in future to observe any negative covenant broken, to make good any waste if possible and to comply in future with any other covenant. In the House, Earl Loreburn was therefore stressing that even these modest general principles should not be regarded as inflexible. His words have been cited and adopted in cases under section 146(2) of the 1925 Act. Southern Depot Co Ltd v. British Railways Board [1990] 2 EGLR 39 and Darlington BC v Denmark Chemists Ltd [1993] 1 EGLR 62 are examples. In the former case, Morritt J said, p.44, that

"to impose a requirement that relief under section 146(2) should be granted only in an exceptional case seems to me to be seeking to lay down a rule for the exercise of the court's discretion which the House of Lords in Hyman v Rose said should not be done. Certainly Lord Wilberforce in Shiloh Spinners Ltd v Harding did not purport to do so in cases under the statute."

19. Third, Mr. Scott submits that the factual matrix supports continuing to exercise the stay of execution in addition to the legal basis. He relies on RSC Order 47/1 as the authority for the Court to stay the possession until the determination of the HSBC Matter. Mr. Scott conceded that the Plaintiffs were entitled to prompt payment of the funds owed to them. Further, the Defendant intended to pay the funds due and owing to the Plaintiffs from the proceeds expected to be awarded as a result of a future successful trial in the HSBC Matter. The Defendant was in the Court's hands as far as timing was concerned because in the HSBC Matter, there was a current strike-out application being defended by Mrs. Trew, which if she was successful, would lead to an order for directions from discovery to trial. He submitted that the HSBC Matter could be expedited.
20. Mr. Scott listed several circumstances including that the Defendant is a 73 old Bermudian lady who has been prejudiced by other legal proceedings, which when she is successful will put her in a position to substantially meet and possibly extinguish the indebtedness to the Plaintiffs. He stressed that the HSBC Matter could possibly be settled once it survived the strike out application. Another circumstance of the HSBC Matter was that in the Will of Mr. Trew, Clause 6(a) and 6(b) provided for the trustees of Mr. Trew's estate to ensure that the Property remained available for his wife as her primary residence. He submitted that the estate had an estimated gross value according to the Certificate of Probate of \$4,048,326.73 and an estimated net value of \$1,927,355.53. He made various submissions about the breach of duties of the Trustees in the HSBC Matter. On that basis, Mr. Scott submitted that this matter should be stayed until after the determination of the HSBC Matter.
21. Fourth, Mr. Scott relied on RSC Order 4 to submit that this matter and the HSBC Matter should be consolidated to strengthen the application for a stay of execution and the Court could then manage them accordingly. He made reference to Trew 1 and Trew 2 as a basis for consolidating the two matters. The reason for consolidation was because in the HSBC Matter, Mrs. Trew as plaintiff was seeking an accounting of the \$4,000,000 estate of her deceased husband as well as an account of why various high priced offers to purchase the St. George's Property were not accepted, such proceeds which would have been used to satisfy the debt in the present case. Further, in the Will of Mr. Trew, he expressly set out

that his estate be used to meet any obligations including mortgages which may be owed by his wife, the Defendant in this matter. Mr. Scott submits that these issues raise common questions of mixed law and fact, the basis for consolidation of the matters.

22. Fifth, Mr. Scott submitted that RSC Order 18/19 gives standing at any stage to the Court which can make coercive orders to regularize any irregularity that are an abuse of the Court process. Mr. Scott submitted that the abuse he had in mind existed in the HSBC Matter in how various offers for the purchase of the St. George's Property were addressed by the Defendant in that matter. Mr. Scott submitted that in the interests of justice, this matter should be stayed pending until after the disposition of the HSBC Matter.

23. Sixth, Mr. Scott submitted that the Court should give consideration to the question of what is a reasonable period of stay that the Court can grant in its discretion. In this case, the Defendant seeks a period of time to allow the HSBC Matter to conclude at which point she can extinguish her indebtedness to the Plaintiffs if she is successful at trial. Mr. Scott referred to a *Queens University Belfast 2017 article "Giving the Borrower Time: an Evaluation of the fitness for Purpose of Section 36 of the Administration of Justice Act 1970"*¹ to support his contention that this Court is duty bound in law to find that it now has a very wide discretion in terms of what is a "reasonable period" of up to 4 years. The article cited the case of *Cheltenham and Gloucester Building Society v Norgan*:

"Although Evans LJ entirely agreed with Waite LJ and also agreed with the observation of Scarman LJ in First Middlesbrough Trading and Mortgage Co Ltd v Cunningham that "one begins with a powerful presumption of fact in favour of the period of the mortgage being the 'reasonable period'" it is suggested that his judgment, taken as a whole, did not endorse the remaining term as a "powerful presumption of fact" to be departed from only if there were good reason. This seems to follow from Evans LJ's practical summary of the Court of Appeal's conclusions in the last paragraph of his judgment:-

¹ In R. L. Weaver, A. Raynouard, D. Fairgrieve, & S. I. Friedland (Eds.), *Comparative Perspectives on Remedies: Visions from Four Continents* (pp. 73-123). (Global Papers Series; Vol.5). Carolina Academic Press.

“... the following considerations are likely to be relevant when a “reasonable period” has to be established for the purposes of section 36 of the Act of 1970. (a) How much can the borrower reasonably afford to pay, both now and in the future? (b) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last? (c) What was the reason for the arrears which have accumulated? (d) How much remains of the original term? (e) What are the relevant contractual terms, and what type of mortgage is it, i.e. when is the principal due to be repaid? (f) Is it a case where the court should exercise its power to disregard accelerated payment provisions (section 8 of the Act of 1973)? (g) Is it reasonable to expect the lender, in the circumstances of the particular case, to recoup the arrears of interest (1) over the whole of the original term, or (2) within a shorter period, or even (3) within a longer period, i.e. by extending the repayment period? Is it reasonable to expect the lender to capitalise the interest or not? (h) Are there reasons affecting the security which should influence the length of the period for payment? In the light of the answers to the above, the court can proceed to exercise its overall discretion, taking account also of any further factors which may arise in the particular case.” What this means is that all the relevant circumstances of the case must be taken into account in assessing the reasonable period. When due regard is paid to the previous practice of two to four year suspensions, full term mortgages with interest only to be paid until the end of the term, and a lender at no substantial risk of losing its security, Norgan simply says that the courts have the ‘remaining term’ to work with in setting a reasonable period. They are not stuck with two to four years or anything like that. To the extent that there is a starting point it clearly makes sense to specify where this should be. What the actual ‘reasonable period’ should be in any particular case will depend upon the facts and circumstances of that case. The previous approach had unhelpfully fettered the discretion of the court to take account of those particular circumstances.”

24. Mr. Scott submitted that notably, the Defendant was not asking for such a period of 4 years, but in light of the special circumstances of this case and the HSBC Matter, she was asking

for a stay until the HSBC Matter was determined, when she would be successful and could make full repayment.

25. Seventh, Mr. Scott submits that the Defendant should be allowed re-entry into the Property. This would be for the purpose of restoring her to her primary residence and to arrest the property becoming a wasting asset.

The Plaintiffs' Reply

26. The Plaintiffs oppose the application for several reasons. First, they oppose the Defendant's request made in submissions for a consolidation of this matter with the HSBC Matter as they are not involved in that matter, they have no knowledge of it and cannot comment on it. Further, the application for consolidation is not a proper application as it is not in the Defendant's Summons.
27. Second, Mr. White submits that in respect of Section 13 of the Bermuda Constitution, the Defendant correctly sets out that there is an exception to the enforcement of mortgage rights subject to the caveat. However, the Defendant in her submissions made no suggestion that the caveat was engaged in any way, but only offered commentary on irrelevant current and historical matters. More importantly, given the passage of time since the Possession Order, the Plaintiffs are concerned that the sum to be attained on the sale of the property will be exceeded by the sum owed by the Defendant to the Plaintiffs.
28. Third, Mr. White submits that the White Book RSC 1979 Order 88/2 8/5 deals with stays of an order. In the note it states that the 1970 UK Act overturned *London Permanent Benefit Building Society v De Baer* [1969] CH 1 321. However, he submits that the 1970 UK Act does not apply to Bermuda. Therefore, the case of *London Permanent Benefit Building Society v De Baer* has not been overruled by the 1970 UK Act in so far as its application in Bermuda is concerned. He referred to the case as follows:

“[headnote] That, on its true construction RSC Order 45 rule 11 did not confer any power to grant a stay of execution of an order for possession obtained by a legal mortgagee, that the power conferred by the rule referred to matters which would have prevented the order being made, or which would have led to a stay of execution if they had already occurred at the date of the order; and that nothing had occurred since the order of December 14, 1966, which, had it occurred before that date, could have prevented the order being made.

Per Curiam: There is no justification for the view that Order 45 rule 11 enables defaulting mortgagors to deprive legal mortgagees of their fundamental rights and remedies.”

29. Mr. White submitted that in that case *Plowman J* in his judgment reviewed the various authorities and practice directions as follows:

*“337G it is plain from that case that no matter which has occurred in this case since the order for possession was made could have prevented that order being made if it had not already occurred at that time. And it is, I think, equally plain that the principles that “a court of equity never interferes to prevent the mortgagee from assuming possession” (which is one way of stating the ratio decidendi of *Caunt’s* case) is just as applicable to the application for a stay of execution as it is to an application to adjourn a summons for possession.*

338F But, however, that may be, there is no justification for the view that Order 45 rule 11 enables defaulting mortgagors to drive a coach and horses through the decision in that case so as to deprive legal mortgagees of their fundamental rights and remedies.”

30. Fourth, Mr. White submitted that the case of *Alfa Telecom v Cukurova* did decide that relief against forfeiture was an available remedy to the Court. However, the Court also stated that there was a need for certainty as it identified several particular features as relevant to the exercise of the discretion, none of which are present in the present case.

31. Fifth, Mr. White submitted that as the UK 1970 Act does not apply to Bermuda, the Queen's University article about section 36 does not apply to Bermuda. Therefore, the article is not relevant to the present matter. Also, the case of *Cheltenham and Gloucester Building Society v Norgan* has no application in Bermuda being a case of the interpretation of the 1970 UK Act, in particular, what is meant by the statute wording "*a reasonable period*". In any event, in that case the Court held that a reasonable period would include the remainder of the term of the mortgage, in that case 13 years. Significantly, in this case, the term of the mortgage has long expired.
32. Seventh, Mr. White submitted that the Defendant's Summons applies for "Such other orders as the Court deems just". Mr. White submitted that there are no other Orders which are just in this matter. He submits that it is not clear that the Defendant is seeking to set aside the Judgment, but in any event, the RSC only provide the Court with the power to set aside in the following circumstances: (a) Order 13/1 Judgment in default of appearance to a Writ; (b) Order 14/11 Judgment given against a party who does not appear at a hearing; (c) Order 19/9 Judgment in default of pleadings; and (d) Order 35/2 judgment given against a party who does not appear at trial. Therefore, as none of these circumstances occurred then such an application must fail.
33. Eighth, Mr. White submits that if the Summons is dismissed then a number of issues arise that will require clarity from the Court as follows:
- a. On 8 August 2019 the Court ordered the Defendant to remove her contents from the Property within 7 days, which has not been done; and
 - b. The Plaintiffs face prospect of more expense on the Property in order to prepare it for sale in order to achieve the best price for it. As Mrs. White is not a person of great means, the Plaintiffs seek clarity that the expenses they are put to will be recoverable from the proceeds of sale of the Property.

The RSC on Consolidation, Mortgages and Stay of Execution

34. Under RSC Order 4/10 the Court has the power to order matters to be consolidated as well as well as order any of them to be stayed until the determination of any other of them.

Consolidation, etc. of causes or matters

Where two or more causes or matters are pending in the Court, then, if it appears to the Court—

- (a) that some common question of law or fact arises in both or all of them, or*
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or*
- (c) that for some other reason it is desirable to make an order under this rule,*

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.”

35. RSC Order 45/11 states as follows:

45/11 Matters occurring after judgment: stay of execution, etc.

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.

36. Under RSC Order 47/1 the Court is empowered to stay execution of judgment for the payment of money on either one or two grounds:

47/1 Power to stay execution by writs of fieri facias

1 (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment

or order, or at any time thereafter, by the judgment debtor or other party liable to execution—

(a) that there are special circumstances which render it in-expedient to enforce the judgment or order, or

(b) that the applicant is unable from any cause to pay the money.

then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.

(2) An application under this rule, if not made at the time the judgment is given or order made, must be made by summons and may be so made notwithstanding that the party liable to execution did not enter an appearance in the action.

(3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicants' inability to pay, disclosing his income, the nature and value of any property, whether real or personal, of his and the amount of any other liabilities of his.

(4) The summons and a copy of the supporting affidavit must, not less than four clear days before the return day, be served on the party entitled to enforce the judgment or order.

(5) An order staying execution under this rule may be varied or revoked by a subsequent order.

37. RSC Order 88 applies to mortgage actions.

88/1 Application and interpretation

This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely—

a) payment of moneys secured by the mortgage,

- b) sale of the mortgaged property,*
 - c) foreclosure,*
 - d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,*
 - e) redemption,*
 - f) reconveyance of the property or its release from the security,*
 - g) delivery of possession by the mortgagee.*
- (2) In this Order “mortgage” includes a legal and an equitable mortgage, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.*
- (3) An action to which this Order applies is referred to in this Order as a mortgage action.*
- (4) These rules apply to mortgage actions subject to the following provisions of this Order.*

Analysis of the Defendant’s Applications

38. In my view, the Defendant’s Applications should not be granted for several reasons.

Commission of Inquiry and 1970 UK Act

39. First, Mr. Scott highlights the position of the Bermuda Constitution in respect of mortgages whilst threading into his argument the effect of the 1970 UK Act as well as a Commission of Inquiry into Historic Loss of Land² presently underway in Bermuda. With respect to the Commission of Inquiry, I am satisfied that I should not give any weight to Mr. Scott’s reference to or about the Commission of Inquiry which is still under way and which has not produced a report. Further, the 1970 UK Act does not apply to Bermuda which accords certain rights to mortgagors in the UK that do not exist for mortgagors in Bermuda. As the 1970 UK Act does not apply to Bermuda, I am not persuaded by it or by the Queen’s

² Bermuda Commission of Inquiry into Historic Loss of Land established on 31 October 2019

University article about it to exercise the Court's discretion to stay this matter pending the determination of the HSBC Matter.

Request for Consolidation - RSC Order 4/10

40. Second, I do not agree that there should be consolidation of this matter with the HSBC Matter. The application was not set out in the Defendant's Summons and as such the Plaintiffs in this case and the Defendants in the HSBC matter were not on notice to address the Court. Also, I do not accept Mr. Scott's argument that there are common questions of law and fact. In this matter, the current state of play is that the Plaintiffs wish to move on with removing the Defendant's possessions, repairs and sale of the Property. In the HSBC Matter, the parties are at the start of the discovery process as they undertake the procedures to a trial of that matter which involves unrelated matters to the Plaintiffs. The legal issues and facts are vastly different. The only link between the two matters that is asserted is that the estate of Mr. Trew was for the benefit of his wife, the Defendant, in respect of any mortgage or other obligations she might have had.

41. Under the same RSC Order 4/10, I would decline to stay this matter pending the determination of the HSBC Matter. In respect of the Plaintiffs in this matter, the question begs, if any consolidation or stay was granted, what are the Plaintiffs to do for the duration of time, having obtained the Possession Order on 25 October 2018 and possession on 9 April 2019. Are they to be dragged into the HSBC Matter at further costs to them? Are they to watch the Property further diminish in value whilst they continue to pay the insurance on it? Are they to be mere bystanders to the HSBC Matter in which they play no part and can have no influence to expedite it? In my view, it would be vastly unfair for the Court to consolidate these matters preventing the Plaintiffs as mortgagees from continuing execution.

RSC Order 45/11

42. Third, I accept that RSC Order 45/11 does not confer any power to grant a stay of execution of the Possession Order obtained by the Plaintiffs on the basis that I am satisfied that the case of *London Permanent Benefit Building Society v De Baer* still applies in Bermuda.

Further, I accept that the power refers to matters which would have prevented the Possession Order being made, or which would have led to a stay of execution if the matter had already occurred at the date of the Possession Order. In my view, the HSBC Matter is not a matter that would have prevented the Possession Order being made for reasons set out below. It would be vastly unfair for the Court to prevent the Plaintiffs as mortgagees from assuming possession. In my view, applying *London Permanent Benefit Building Society v De Baer*, as the Defendant has defaulted on the mortgage, there is no justification that Order 45/11 can be engaged to deprive the Plaintiffs of their fundamental rights and remedies.

Doctrine of Equity to Stay the Possession Order

43. Fourth, I am satisfied that the case of *Alfa Telecom v Cukurova* did decide that the Court has jurisdiction to grant relief against forfeiture in equity with further reliance upon the classic statement of principle by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* as set out above in paragraph 87 of *Alfa Telecom v Cukurova*. This leads the Court to consideration of whether it should grant relief to the Defendant and if so on what terms. As set out above in paragraph 116 of *Alfa Telecom v Cukurova* Lord Wilberforce in *Shiloh Spinners Ltd v Harding* made reference to “*equity being willing to relieve from forfeiture on terms that the payment is made with interest, if appropriate and also costs*”, the “*appropriateness of relief*” on equity being based on factors including the applicant’s conduct, “*in particular whether his default was willful, the gravity of the breaches, and of disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach*”. Also, at paragraph 116 above of *Alfa Telecom v Cukurova*, *Snell’s Equity* made observations about the balance of the apparent broad discretion and the courts placing considerable emphasis upon the need for certainty.
44. In the present case, in respect of the loan and mortgage made in 2004 for a term of 3 years, the Defendant defaulted on repayment of any of the loan principal of \$450,000 as well as interest which continues to accrue. Demands were made by the Plaintiffs in 2017 and 2018 for repayment of the amounts owing with legal proceedings commencing in 2019 when the Possession Order was granted. The Defendant relies heavily on the HSBC Matter as a

circumstance supporting the Defendant's Applications. However, according to Trew 2, the writ in the HSBC matter was issued 18 September 2019.

45. On the evidence, it seems to me that the HSBC Matter is in its early stages with a strike-out application pending, followed by discovery and subsequent procedures to get to a trial of the matter. In reality, Mr. Scott asks this Court to stay this matter until the determination of the HSBC Matter which in the best of circumstances must be at least a year from now, and even longer if the HSBC Matter is appealed by any party. In my view, a defendant in a first set of proceedings could very well be a plaintiff in a second or further set of unrelated proceedings, with a confident hope of success and/or a favourable settlement, as perhaps all litigants possess. However, it must follow that such a set of circumstances does not automatically warrant a stay of possession granted in the first set of proceedings.
46. In the present case, I am not able to identify any reasons why relief should be granted in equity. In particular, according to the evidence, the Defendant has no ability to pay any money, any interest or any costs now. Further, there is no guarantee to pay of these amounts at a later date. The commitment is based purely on the Defendant's belief that she will be successful in the HSBC Matter. In respect of the factors to support the "*appropriateness of relief*", on the evidence, it appears that the default of payment was willful from 2004 to 2019 and the non-payment should be considered as a breach of the most serious kind going to the heart of the mortgage. In my view, I am satisfied that I should place considerable emphasis on the need for certainty in mortgage cases. Both mortgagors and mortgagees should be able to rely on the certainty of the Court's process to enforce the terms of a mortgage. In light of the above, I decline to exercise my discretion in equity to grant the Defendant's Applications.
47. Fifth, I am not satisfied to exercise my discretion under RSC Order 47/1 to stay the further execution of the Possession Order or to continue such stay pending determination of the HSBC Matter. RSC Order 47/1 expressly requires "*special circumstances which renders it in-expedient to enforce the judgment or order*" or "*that the applicant is unable from any cause to pay the money*". In *Island Construction Ltd and Zane DeSilva v Phillips and*

Phillips [2019] SC (Bda) 78 App, which was in relation to an application to stay execution of a judgment pending appeal, Subair Williams J stated as follows:

“23. Special circumstances simply means outside of ordinary circumstances. This means that the ordinary position, at which one starts, is that a stay will not be ordered. However, where there are special circumstances which give rise to a good reason for imposing a stay, as a matter of common sense, a stay of enforcement should be ordered. To state the obvious, this will vary and depend on the facts of each case. The Court must strike the right balance between the creditor’s rights to closure and collection of the judgment goods and debtor’s rights and realistic ability to be reimbursed for the payment wrongly awarded, if successful on appeal.

24. The following passage from the White Book offers valuable guidance on the exercise of judicial discretion in considering whether or not to grant or impose a stay:

“...Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled”, pending an appeal (The Annot Lyle (1886) 11 P. 114 at 116, CA; Monk v Bartram [1891] 1 Q.B. 346); and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from – for example... .. But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v. Church (No.2) (1879) 12 Ch.D.454 at 458,459, CA), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the court (Becker v Earl’s Court Ltd (1911) 56 S.J. 206; The Ratata [1897] P. 118, p. 132; Att-Gen. v. Emerson (1889) 24 Q.B.D. 56 at 58, 59) and the court will grant it where the special circumstances of the case so require. Execution might be stayed, for example, where the judgment is in favour of a person resident out of, or about to leave, the jurisdiction (see Wooton v. Sievier (1913) 30 T.L.R. 165, CA). And if, under an order of the court, money is to be paid out of a fund and

distributed among a large number of persons resident abroad, an injunction may even be granted, restraining dealings with the fund pending an appeal...”

48. I am of the view that the successful Plaintiffs should not be denied the fruits of their litigation and locking up the Property so that they cannot deal with it. Further, I do not support a stay where the consequential effect is that the Property diminishes further in value leading to additional costs to repair the same. Additionally, for the various reasons already stated above I am not satisfied that there are special reasons to grant the Defendant’s requests for a stay, particularly on the expectation of a successful outcome in the HSBC Matter which is not likely to be determined in the near future. I am cautious to accept the self-serving submissions by the Defendant on her anticipated success in the HSBC Matter in the absence of any contrary views.

49. Further, in respect of what is a reasonable time period for allowing a stay, if I were to take guidance from the Queen’s University article where it cited *Cheltenham and Gloucester Building Society v Norgan*, the time period for the duration of a stay fell within the duration of the term of the mortgage. In the present case, the mortgage duration was 14 December 2004 to 14 December 2007. Therefore, any time period for a stay has long past.

Application for Defendant to re-enter the Property for Residential Accommodation

50. Sixth, in light of the above reasons, it follows that I do not agree to grant the Defendant’s application to re-enter the Property for accommodation purposes. In my view, to grant such an application would be a retrograde step and an affront to the justice of this matter. The Plaintiffs have possession, are entitled to the fruits of their litigation, are paying for the insurance of the Property and anticipate further expense in repairing it in order to obtain the best possible sale price. Further, if the Defendant is not successful in the HSBC Matter, then the Plaintiffs would have to seek possession once again.

Conclusion

51. For the reasons above, I refuse the Defendant’s Applications.

52. Some consequential matters now arise as on 8 August 2019 the Court made an Order including that the Defendant remove all her contents from the Property. On review of that Order, it appears that for practical purpose, several paragraphs granting 7 days to perform an action may need to be varied, namely paragraphs 1(a), 1(d) and 1(f). I will need to hear from the parties in respect of an appropriate timeframe for the events set out in these paragraphs.
53. The Plaintiffs seek clarity that the expenses they are put to prepare the Property for sale will be recoverable from the proceeds of sale of the Property. In fairness to all parties, I agree to this request subject to hearing any submissions from the Defendant. However, the Plaintiffs should not be allowed a free rein on costs to perform repairs or unnecessary repairs. In order to protect both the Plaintiffs and the Defendant from further unnecessary contentious litigation, I will need to hear from the parties as to what is the most suitable method to determine the reasonable repairs required to return the house to a marketable condition, perhaps the condition it was in in April/May 2019 or to obtain the best sale price now, costs estimates and approval to proceed with repairs. I anticipate that the parties could agree these matters with liberty to apply to the Court to resolve any issues.
54. This matter will be set for a Thursday Chambers hearing before me at the earliest convenience to address the above two consequential matters.
55. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiffs against the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 23 July 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**